

JUDICIAL POLITICS IN PAKISTAN SINCE 2009: A CRITICAL APPRAISAL

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Abstract

The political and constitutional history of Pakistan has witnessed the murder of political rights by other institutions. The Pakistan's political history is full of judicial interference. Since 2009, the judiciary of Pakistan has emerged as a dominant force in Pakistani politics through use of judicial review, or the power to overrule Parliament's laws and the Prime Minister's acts. This politics was on display during the Supreme Court's unilateral disqualification of Prime Minister Yousef Raza Gilani in 2012 under the leadership of Chief Justice Iftikhar Chaudhry. Despite the Supreme Court's practical adoption of restraint subsequent to the retirement of Chief Justice Chaudhry in 2013, the Court has once again disqualified a prime minister, Nawaz Sharif, due to allegations of corruption in 2017. The main objective of this paper is to revisit and reappraise the role of Pakistani judiciary in the politics of Pakistan since 2009. This paper presents that how this era in Pakistan's judicial history was marked by great controversy as the court faced charges that it had engaged in "judicial activism," acted politically, and violated the constitutionally mandated separation of powers between institutions of the state.

Key Words: Judicial Politics, Superior Judiciary, Judicial Activism, Judicial Review, NRO Judgment, Memo Gate Case, Panama Gate Case,

Historical Background of Judicial Politics in Pakistan

The role of Judiciary in political affairs started from Maulvi Tamizuddin case and continues till today. The constitutional and political history of Pakistan experienced judicial politics on the grounds of doctrine of necessity which further proved to be a legal black hole. The constitutional development and democratic process of Pakistan faced many hurdles also due to the constitutional imbalance. Week representative institutions helped judiciary to become empowered. The doctrine of necessity was adopted by superior Courts in 1955 in Tamizuddin case and hence became responsible for democratic and political instability of Pakistan (Steyn, 2004). Governor General Ghulam Mohammad dissolved the constituent assembly of Pakistan on October 24, 1954. The unconstitutional act of governor general was challenged by writ petition filed by Moulvi Tamizuddin khan, the then speaker of constituent assembly of Pakistan, in Sindh High Court under section 223. Sindh High Court declared the act of dissolution of assembly unconstitutional. The decision of Sindh High Court was challenged in Federal Court declared the act of dissolution of constituent assembly validated. The judgment of Sindh High Court was set aside by majority of Federal Court judges however only Mr. Justice Cornelius wrote a dissenting judgment (Dawood, 1994). The judgment of federal court was widely criticized because it did not only affect the politics of country but also put deep scars on democratic development of Pakistan.

Judiciary and military nexus was also exhibited in the Nusrat Bhutto case in which SC of Pakistan declared martial law of 1977 constitutional and valid. After the imposition of martial law and



abrogation of constitution by the chief of army staff General Zia ul Haq, the then PM Zulfiqar Ali Bhutto was imprisoned and threatened with military tribunal trials. Begum Nusrat Bhutto challenged the legality and validity of martial law by filing a petition in SC of Pakistan (Rizvi, 1986). The leading judgment was written by Mr. Justice Anwar ul Haq and the constitutional petition was dismissed unanimously. This verdict gave free hand to Zia ul Haq government to retain the power and also provided a foundation to a deep-rooted long military rule in civil society (Newberg, 2002). The eighth amendment gave sufficient powers to president of Pakistan to dissolve the National assembly. In May 1988 Gen. Zia ul Haq dismissed the elected prime minister of Pakistan Muhammad Khan Junejo on the charges of corruption. A writ petition filed in 1989 challenged the order of dissolving the national assembly. But the writ petition was dismissed. Hence the constituent assembly could not be restored though the act of dissolution of assembly was illegal (Bazmi, 2022). This decision was though a delayed decision but it showed that judiciary can play an effective role in politics and opened new doors for elections which were being delayed for almost 11 years.

On 6th August 1990 President dissolved the national assembly and dismissed the Prime Minister Benazir Bhutto under the article 58(2B). Khawaja Tariq Raheem challenged the order of President in Lahore High Court; hence a full bench upheld the order of dissolution of assembly. Mr. Tariq Raheem challenged the decision of Lahore high court in the superior court. The petition was however dismissed because a new National Assembly had taken the oath (Khalid, 2012). It was another setback for the democratic and constitutional development of country.

The series of dissolving the national assembly continued and on April 18, 1993 President Ghulam Ishaq Khan dissolved the national assembly dismissing the then prime minister. The dissolution of assembly was challenged directly in SC. The CJ reinstated the national assembly on May 26, 1993. It was a different decision from the previous ones which further invited diverse comments from political circles. The elected assembly of Mohtarma Benazir Bhutto faced the same fate and the National assembly was dissolved again in 1996 by the then President Mr. Farooq Laghari. The act of president was challenged in SCP. The decision also created unrest and democratic instability in the state (Gul, 2016).

The general elections were held on February 3, 1997 resulting in the victory of PML (N), Nawaz Sharif was elected as the prime minister of Pakistan. Confrontation with judiciary arose soon after when a list of five judges of SC was sent to prime minister for elevation by CJ. Nawaz Sharif showed his resistance over two names. After the intervention of president, the issue was resolved and the government notified the appointments of judges. Later another issue arose when Prime Minister Nawaz Sharif criticized the suspension of 14th amendment by the Supreme Court in a press conference. This resulted in contempt of court and Prime Minister Nawaz Sharif had to appear twice before the Court and submit his written regret. The controversies continued when the seniority of CJ Sajjad Ali Shah was challenged and later resolved with Justice Sajjad Ali Shah vacating the office (Ziring, 1997). The Chief of Army Staff Gen. Jahangir Karamat was also forced to leave his office and replaced by Gen. Musharraf. The constitution was also amended by the 13th and the 14th amendments by force the president Farooq Laghari has to resign. The then Prime Minister of Pakistan Mr. Nawaz Sharif turned out to be the most powerful prime minister as a result of all these replacements (Khan, 2017). On Oct 12, 1999 General Pervez Musharraf was coming back from an official tour of Sri Lanka. His plane was not allowed to land at Karachi airport and in the meantime prime minister appointed General Ziauddin Butt as new Chief of Army Staff. The army took over the control of Karachi airport and allowed the plane to land. After landing on Oct 12, 1999, General Pervez Musharraf suspended the 1973 constitution dissolved the National Assembly, and dismissed Nawaz Sharif. This imposition of martial law was challenged by Syed Zafar Ali Shah challenged in a writ petition in the SC. A full Court bench comprising of twelve judges including Iftekhhar Muhammad heard the case. CJ Irshad Hassan Khan declared that the act of General Pervez Musharraf as lawful. Nawaz Sharif was found guilty of plane high jacking, sentenced to 14 years of imprisonment. He was later extended presidential pardon, later left for Saudi Arab. Once again, the democratic process of state was sacrificed in the guise of doctrine of necessity (Hussain & Khan, 2012).

On 30 June 2005, General Pervez Musharraf appointed Iftekhar Muhammad Choudhry as CJP. SC started taking Suo Motto notices in cases of fundamental rights especially in the case of missing persons. General Pervez Musharraf response was decisive with this independent performance of judiciary. And on March 9 General Musharraf called the CJ Iftekhar Chaudhry in his army house asking him to resign. The CJ flatly refused to do so; he was kept in army house for five hours (Bazmi, 2022). During these five hours Justice Javed Iqbal took oath as the new CJ of Pakistan. A massive protest sparked included not only lawyers but also politicians, students, traders and religious scholars participated. The protests lasted for months, finally ended when Supreme Court set aside the allegations of misconduct and restored the CJ Iftekhar Muhammad Chaudhry (Bazmi, 2022). Nevertheless, this restoration remained for a short span as General Pervez Musharraf declared emergency and imposed PCO on 3rd November 2007. On the same day, Mr. Justice Hameed Dogar took the oath necessary to become Pakistan's CJ. Nearly 63 judges of the Apex Court were placed under house arrest after they refused to take the oath required by PCO. General Pervez Musharraf ended the state of emergency on December 15 after resigning as Chief of Army Staff on November 28. Later, fresh elections were held in February 2008, and Pakistan People's Party won. The General Pervez Musharraf also stepped back from the office of president (Gul, 2016). The CJ Iftekhar Muhammad Chaudhry was reinstated in March 2009. Hence Judiciary became independent and powerful after winning a long battle of its survival. On the other hand, this movement resulted in the division of judiciary in two categories, the PCO judges and the judges who did not take oath under PCO (Khan, & Muhammad, 2020).

Judgment of Reconciliation Ordinance and its Political Impact

The National Reconciliation Ordinance (NRO), which General Pervez Musharraf issued in October 2007, was declared unconstitutional by the SCP in a landmark decision on December 16, 2009. This has once again thrown Pakistan into another state of constitutional crisis as the judgment removes the immunity from prosecution enjoyed by a slew of senior political and senior administrative officials (Jetly, 2009). The NRO was a component of a deal that Musharraf and the late Benazir Bhutto made, under which Musharraf would continue in office and Benazir Bhutto would be free to return to Pakistan and take part in politics without being prosecuted. Nearly 8,000 people, including ministers, government employees, and politicians, including President Asif Ali Zardari, were the targets of corruption investigations and prosecutions that were put to a halt by the NRO (Khan, 2017).

The NRO was highly controversial and severely criticized by civil libertarians, who argued that the NRO condoned corruption and protected powerful elites by allowing them to avoid accountability for their actions. In issuing its ruling, the SC considered the NRO as an unconstitutional edict against Pakistan's national interests rather than as a tool for promoting national harmony. It would not be an understatement to say that this judgment of the SC could have far-reaching implications on the course of Pakistani politics. The SC judgment has clearly dropped a bombshell in Pakistani politics, but its implications went beyond the mess of party politics. The four-year conflict between the SC and the PPP-led government continued. In the NRO case, the SC filed a contempt complaint against both PPP prime ministers, who were ordered to appear in court six times (Jetly, 2009).

Politics of Memogate Case

An unidentified, top-secret memo was made public in November 2011. The PPP-led government reportedly feared a military coup after the death of bin Laden, according to a paper purportedly given to the US administration by Hussain Haqqani, a former Pakistani ambassador to the country. To avoid such a result, it made a plea for American support. Despite maintaining that he was the author of the document, Haqqani was removed from his position and called back. The government insisted that it was unaware of the document. To the chagrin of the Government, the army submitted documents to a judicial commission that had been appointed by the SC to investigate the memorandum's accuracy and if government authorities had authorized its writing (Munir, & Khalid, 2020). The government and army lost the public's trust when they publicly threatened one another. The political fervor was heightened by a unilateral US raid on a Pakistani army border station in late November, which cost at least 24 Pakistani soldiers their lives (Kanwal, 2017). By January

2012, a rising political crisis had been brought on by Memogate as well as the ongoing legal dispute between the Government and the Court regarding the 2007 amnesty. The SC ordered Prime Minister Yousuf Raza Gilani to appear before it on contempt of court charges in order to comply with its ruling that the Government should write to the Swiss authorities requesting the reopening of a protracted corruption case against President Zardari that the Musharraf amnesty had quashed (Khan, 2017). Gilani asserted that no action could be taken because a president had immunity while in office. Supporters of the government expressed worry about Pakistan seeing another coup, this time a "judicial" one. Gilani was found guilty in April 2012 but only received a symbolic sentence that ended before he even left the SC complex. Supporters of the government celebrated the decision as a success, and for a while it appeared that the crisis had passed. The lengthy probe carried out by the "memogate" commission also temporarily lessened the fervour around that debate (Munir, & Khalid, 2020). In November, the SC's Chief Justice presided over the bench as it heard arguments in the "memogate" case. Haqqani has been asked to personally appear before the Court but has yet to do so due to security reasons. The SC made a shocking announcement on June 19 when it said that the Prime Minister was no longer eligible to hold office or serve in parliament as of April 26 since he had not filed an appeal against its April ruling (Bazmi, 2022). Unexpectedly, the PPP's response was subdued. It acknowledged the decision and made an effort to appoint a replacement. However, the selection process swiftly turned into a farce when the first candidate, Makhdoom Shahabuddin, was forced to resign after another judge ordered his detention for allegedly importing illegal drugs while serving as the federal health minister. Raja Pervez Ashraf, a substitute candidate, was proposed and accepted by parliament on June 22 (Gul, 2016).

A new Contempt of Court Act was enacted by the National Assembly in July 2012, providing Prime Ministers and other public office holders with protection from contempt cases. The SC swiftly overturned it, though. Like Gilani, Ashraf quickly found himself under fear of legal action for contempt of court. At the end of August, after his final personal hearing before the SC, he was granted until September 18 to submit the letter. After the letter was finally sent to the Swiss authorities in November, the contempt lawsuit against PM Ashraf was dropped on November 14, 2012 (Munir, & Khalid, 2020).

Judicial Overreach Judgments

The resolution of the amnesty controversy greatly improved the political climate's stability and raised the probability that the government would serve out its term. However, this did not indicate that the Court stopped being operational. A new front has been opened with the decision in September 2012 that 11 serving national or provincial MPs with dual citizenship were disqualified with immediate effect. The Court later issued a decision in October claiming that the 1990 general election, in which the PML (N) was declared the victor, had been rigged and directing an investigation into the roles played by three retired generals (Gul, 2016).

General Kayani, the head of the army, verbally warned the Court not to overstep its bounds and suggested that the generals should only be subject to military investigations. The decision caused the PML (N) political difficulty for the obvious reasons. In response to Kayani, the CJ stated that by making decisions in the matters that were presented before it; the SC was merely carrying out its duties (Bazmi, 2022). The court also issued an interim decision in October 2012 stating that the provincial administration of Balochistan had violated its constitutional commitments and was consequently without power. In November, the SC came to the conclusion that, under the current Constitution, which supports a parliamentary system, the position of the president should be "above politics." Most individuals do not believe that President Zardari fulfilled this duty while in government. Some claim that CJ Chaudhry's desire for vengeance against the PPP for initially opposing his reinstatement after gaining office in 2008 contributed to his decision to issue an injunction against the 2007 amnesty (Munir, & Khalid, 2020).

Politics of Political Leadership and Superior Judiciary

Political parties' leaders frequently attempted to use the superior judiciary as a weapon against one another. Nawaz asked the SC to launch an investigation into the aforementioned Memogate affair, in which the then-president Zardari was reportedly engaged, when the PPP was in office.

Khawaja Asif of the PML (N) complained to the SC over energy agreements the PPP government had made, while Chaudhry Nisar contested the nomination of two NAB chairmen. PTI reciprocated by doing the same to that party when the PML (N) was in power. Nevertheless, a group of attorneys feels that the SC, led by CJP Iftikhar, revealed PPP corruption and bad governance by examining topics including as CNG rates, rental power projects, inconsistencies in PIA, and Pakistan Steel Mills, among other things (Khan, 2017) (Interestingly, despite their regular court appearances, no PPP leader was found guilty in any of the big scams.).

Role of Superior Judiciary in Election Processes

Election procedures, like as compiling voter lists, were also handled by the SC while CJP Iftikhar was Chief Justice. It suspended 28 legislators who were chosen in by-elections after the 18th Amendment in February 2012. They would be put on hold until the 20th Amendment was passed. By rejecting Dr. Tahirul Qadri's petition against the foundation of the ECP, the SC will also hasten the 2013 general election (Munir, & Khalid, 2020). Prior to the 2013 general elections, CJP Iftikhar spoke to returning officials. It is no secret that the Supreme Court proceedings seriously damaged PPP's credibility, allowing PML (N) to fill the void and gain an advantage. Imran Khan of the PTI also accused CJP Iftikhar of taking part in purported election tampering in 2013 (Gul, 2016).

Judicial Self Control Policy

Following the departure of CJP Iftikhar in December 2013, his successors implemented a policy of moderation. Throughout their terms, there was no excessive meddling in the business of other institutions. The SC even issued a ban on initiating any additional legal action during the PTI and Pakistan Awami Tehreek sit-in in 2014 under CJP Nasirul Mulk. The claims of election tampering made by PTI were also denied by a commission of judges headed by CJP Mulk (Sultan, & Jabeen, 2020).

The majority of SC judges likewise rejected constitutional challenges to the 18th and 21st amendments, but eight of them made history by noting for the first time that there are implied restrictions on parliament's ability to change the constitution. The "judicial restraint" strategy was mostly maintained throughout CJP Anwar Zaheer Jamali's 15-month term. In his final days, he took on Imran Khan, the leader of the Pakistan Tehreek-e-Insaf's petition, to remove Nawaz Sharif as prime minister in response to the Panamagate controversy (Bazmi, 2022). He was unable to resolve the issue during his employment. Justice Saqib Nisar's appointment altered this strategy. He started a unique form of judicial activism in the final year of his term that was entirely unrelated to his work as a superior court judge. Justice Nisar had supported the administration throughout his tenure, but in his final year he started to have doubts about its authority. Although he had reservations about using the suo motu powers provided for in Article 184(3) of the Constitution, he eventually came to support them. Even though he did not participate in the wider bench hearing for Panamagate, it was said that when he was appointed CJP, he was pro-PML (N) (Sultan, & Jabeen, 2020).

Politics of Panama Gate Case

On April 20, 2017, a majority decision mandated the creation of a strong Joint Investigation Team (JIT) to look into the sources of the money the Sharif family used to buy the assets. In the JIT's final report, the issue surrounding Sharif's employment in his son's Capital FZE, domiciled in the UAE, was raised for the first time. Senior attorneys contend that the JIT would not have been able to bring the documents pertaining to Capital FZE from the UAE without the help of a few significant parties (Bazmi, 2022). On July 28 of that year, based on the same papers, the former prime minister was declared permanently ineligible, and NAB was instructed to file four references against the Sharifs (Gohar, Khan, & Noareen, 2022). The court also decided that when the NAB filed references, a SC judge would oversee the accountability courts' proceedings. The monitoring judge that oversaw the PML (N) leaders' trial was Justice Ijazul Ahsan, but the specifics of the supervision's guidelines are unknown. In the review appeal, the attorney for the Sharifs, Khawaja Haris, argued that the supervision would interfere with a fair trial because the SC had taken on the roles of complainant, prosecutor, and judge. The Islamabad Accountability Court-I judge rejected Nawaz's request to combine all three references against him for a single trial in November 2017

(Bazmi, 2022). However, when the accountability court requested a reasonable four-week extension in June of the following year, the SC granted it. Just two weeks before the election, the extension came to an end, and when the verdict was handed down, Nawaz, his daughter Maryam, and Maryam's husband Capt Safdar were found guilty and imprisoned. This increases the likelihood that the Sharif would be successful in establishing bias against CJP Nisar in order to stop the Panamagate proceedings (Gohar, Khan, & Noareen, 2022). Imran Khan was also recognized as Sadiq and Ameen by a three-judge panel chaired by CJP Nisar. Jahangir Khan Tareen, the PTI leader, was however disqualified by the same bench (Bazmi, 2022). In light of the Panamagate ruling, a court chaired by CJP Nisar also declared Nawaz ineligible to lead the PML (N), forcing PML (N) candidates to run for the Senate on independent party tickets. For using harsh language against the current CJP, three PML (N) employees were disqualified in contempt cases, and cases were filed against others under the Anti-Terrorism Act. Additionally, the SC under CJP Nisar declared that the lawmakers' disqualification under Article 62 (1) (f) would be permanent. Due to their claimed dual nationality, it also prevented the ECP from informing four freshly elected senators of their victories (Shah, 2019).

Divergent Judgment to the Election Act 2017 and its Political Impact

On June 5, 2018, the SC reinstated nearly all of the information that the Parliament had left out of the nomination forms, in violation of the Election Act of 2017. The superior courts designated specific benches to hear election-related cases. The PML (N) leader Hanif Abbasi was also found guilty in the ephedrine case as the election process progressed. Ex-CJP Nisar took immediate notice of allegations that money was laundered through fictitious accounts in Sindh. The SC ruled that the trial of those involved in the bogus account scheme, including Murad Ali Shah, Faryal Talpur, and Asif Ali Zardari, will take place in Islamabad. In the most recent general elections in 2018, PML (N) lawyers complained that they were not provided a level playing field (Shah, 2019). Later, the Islamabad High Court provided respite by postponing Nawaz Sharif and Maryam Nawaz's Avenfield case sentences. Senior judges in the SC, however, questioned the IHC decision that allowed them to be released on bail. High courts were given instructions for granting bail by even a larger bench presided over by the former CJP Nisar. Nawaz Sharif was subsequently disqualified in the Al Azizia reference (Rasheed, & Mukhtar, 2020).

Asif Saeed Khosa became CJP in January 2019 when CJP Nisar retired. Ex-CJP Khosa did not pursue political issues, but he also did not offer defence to the leaders of the opposing parties in graft trials. Leaders of opposing parties received harsh treatment from NAB throughout his administration, and they were imprisoned. In NAB instances, the superior courts have established stringent post-bail requirements. Even the former Chief Justice of Pakistan, Khosa, stated in his speech that the perception of unfair accountability must end. He also voiced alarm about the terrible state of speech freedom. A video of accountability court judge Arshed Malik surfaced during his tenure, but he left the matter up to the high court to decide on the outcome of the Sharif family trial in the Alazizia reference, in which Nawaz Sharif was found guilty (Akhtar, & Ashraf, 2022). Since December 2019, the CJP in place, Gulzar Ahmed, has refrained from rendering decisions that could have an impact on domestic politics. He started civil cases in the public interest, notably when it came to presidential actions to control pandemic. The CJP has very strong views on corruption and poor governance. However, he did not start suo motu proceedings in cases involving political personnel, unlike former CJPs Iftikhar and Saqib (Rasheed, & Mukhtar, 2020).

CONCLUSION

Although the superior judiciary existed since 2009 as a result of a mass movement, it has been difficult to overcome the perception that it is controlled by the security establishment. PTI has benefited in some ways from judicial overreach, but PPP and PML (N), two other significant parties, have been the victims. Ironically, this invigorated judiciary would eventually erode Pakistan's democracy. Top judges have criticized the political leadership on various topics rather than allowing them room. The Supreme Court dismissed two prime ministers, Gilani of the PPP and Nawaz of the PML (N) as well as thirty MNAs for using false credentials, holding dual citizenship,

and failing to disclose assets in their nomination papers. A number of them were found guilty of contempt. Judges might possibly consider whether their decisions over the last ten years have strengthened democracy. They must also assess their record of effectiveness in defending free speech and civic liberties. How to alter the perception that court proceedings are controlled by the establishment in high-profile cases is an issue to consider. At least, the dismissal of elected premiers has not been welcomed. It is past due for the judiciary to take action to organize its own affairs. The CJP's discretionary powers should also be immediately restricted. It is advisable to exercise public interest jurisdiction under Article 184 (3) infrequently. It shouldn't be used to situations where one political party stands to gain or lose. Those whose rights are being infringed upon by strong governmental institutions should be provided with recourse under this jurisdiction.

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