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Pakistan's Judicial Renaissance: A New Phase?

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Abstract

This paper considers the relationship between the judiciary and government of Pakistan in light of the recent developments involving the Supreme Court and the Prime Minister, which culminated in a historic conviction of the Prime Minister for contempt of court. Pakistan's judiciary, historically seen as relatively passive in political matters, has witnessed a new phase. A strong judiciary is clearly vital in any democracy, and it will be important for the key institutions and players to find the right balance to ensure the success of Pakistan's return to democracy.

Evolution of the Judiciary in Pakistan

Pakistan's political history has been characterised by ongoing tussles between the military and democratic establishments. The judiciary has a significant role to play in checking the executive and the legislature, and in protecting the constitution. For a long time, the judiciary in Pakistan was seen as playing a pliant role to military dictatorships, leading to this harsh observation by one commentator: 'In short, Pakistan's Supreme Court has followed the path of least resistance and least fidelity to constitutional principles...the courts have been the military's handmaiden in extra-constitutional assaults on the democratic order.'²

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² Tasneem Kausar, 'Judicialisation of Politics and Governance in Pakistan, Constitutional and Political Challenges and the Role of the Chaudhry Court' in Ashutosh Misra & Michael E Clarke, *Pakistan's Stability Paradox, Domestic, Regional and International Dimensions* (Oxon: Routledge, 2012), p.30.

The years from 2005 however, saw a turning point in Pakistan's judicial history with the Supreme Court coming out on its own and questioning many government policies.³ The change was brought about by the newly-appointed Chief Justice, Iftikhar Chaudhry, who as Chief Justice implemented reforms to improve the efficiency of the judiciary and gave new impetus to public interest litigation through a Human Right Cell established in the Supreme Court. Consequently, the Supreme Court dealt with several matters of public interest and human rights violations, including issues that directly affected the ordinary person. This made the Supreme Court popular among the masses and the liberal intelligentsia, and gradually the court began to take on more complicated issues pertaining to rights and liberties that began to threaten the Musharraf government, culminating in the dismissal of the Chief Justice by President Pervez Musharraf. Not surprisingly, the dismissal proved a catalyst in galvanising lawyers, civil activists and people at large into a broad-based social and political movement for the ouster of Musharraf and restoration of democratic governance.

This was a defining moment for Pakistan's judiciary as it was a stark reminder to the public at large of the connection between the independence of the judiciary and the restoration of democracy in Pakistan. Untoward delay by the newly-elected PPP-led government in reinstating Chief Justice Chaudhry, who was seen as a champion of justice and rule of law, created tensions between the executive and judiciary. Sympathy for the Chief Justice and popular satisfaction with the Supreme Court, which continued to be active in hearing public interest issues such as the privatisation of steel mills and sugar price hikes, further enhanced the power of the Court. Notwithstanding some disquiet about the independence of the judiciary being 'crystallised in a personal rather than institutional framework, symbolised by Iftikhar Choudhry,'⁴ the widespread support from the media and civil society further emboldened the court.

The growing popularity of the Supreme Court, seen widely as reflecting the general will of the people, has come at the expense of the government, which is seen as inefficient and failing to deliver on economic, political and security issues.⁵ The judiciary is clearly asserting its independence. The judiciary, historically the weakest of the three institutions of government – the other two being the legislature and the executive – paradoxically is today in a position of considerable strength given the popular support that it has gained. This could be a potential tipping point, where the judiciary risks going beyond its role as defender of the constitution to become a political player, but one that is not democratically accountable, unlike the other two arms of government.

³ *Ibid.*, p.28.

⁴ Mohammad Waseem, 'Judging Democracy in Pakistan: Conflict between the Executive and Judiciary', *Contemporary South Asia* Vol. 20, no.1, 2012, p.21.

⁵ Tasneem Kausar, 'Judicialisation of Politics and Governance in Pakistan', *op.cit.*, p.34.

Conviction of the Prime Minister for Contempt of Court

This near-brinksmanship between the executive and judiciary reached a head on 26 April 2012, when a seven-judge Supreme Court bench headed by Justice Nasir-ul- Mulk, issued a historic verdict convicting a sitting Prime Minister for contempt of court. To recall briefly, in December 2009 the Supreme Court overturned the National Reconciliation Ordinance (NRO), declaring it unconstitutional and against the national interests of Pakistan. The NRO had been promulgated by President Musharraf in October 2007, and was part of a deal between President Musharraf and the late Benazir Bhutto, which allowed the latter to return to Pakistan and participate in politics without facing criminal charges. The NRO put an end to corruption investigations and prosecutions against almost 8,000 individuals – ministers, bureaucrats and politicians, including President Asif Ali Zardari.

Having declared the NRO unconstitutional, the Supreme Court held that none of the actions and orders taken pursuant to the NRO was valid, and it ordered Prime Minister Yousaf Raza Gilani to reopen the cases of graft against President Zardari. Gilani refused to comply with the order on the ground that the Government could not initiate any criminal action against the President, who was protected by Presidential immunity. This immunity was guaranteed under the constitution and remained for as long as the President held office. On 13 February 2012, Gilani was formally charged with contempt of court for wilfully disregarding and disobeying orders from the Supreme Court to re-open corruption cases against the President. Having convicted the Prime Minister, the Supreme Court imposed a symbolic sentence by ‘imprisoning’ him until the court rose – a duration that lasted less than a minute. This unusually short sentence was explained in the full judgment of 8 May 2012 where the court seemed to suggest that it did not intend for the Prime Minister to be disqualified from holding office as a result of a criminal conviction – a possibility under Art 63(1) (g) and (h) of the Constitution – preferring to leave the Prime Minister’s fate to the political process. The court’s short order of 26 April 2012 is reproduced here:

For reasons to be recorded later, the accused Syed Yousaf Raza Gilani, Prime Minister of Pakistan/Chief Executive of the Federation, is found guilty of and convicted for contempt of court under Article 204(2) of the Constitution of Islamic Republic of Pakistan, 1973 read with section 3 of the Contempt of Court Ordinance (Ordinance V of 2003) for willful [sic] flouting, disregard and disobedience of this Court’s direction contained in paragraph No. 178 of the judgment delivered in the case of Dr. Mobashir Hassan v. Federation of Pakistan (PLD 2010 SC 265) after our satisfaction that the contempt committed by him is substantially detrimental to the administration of justice and tends to bring this Court and the judiciary of this country into ridicule.

2. As regards the sentence to be passed against the convict we note that the findings and the conviction for contempt of court recorded above are likely to entail some serious consequences in terms of article 63(1) (g) of the Constitution which may be treated as mitigating factors towards the sentence to be passed against him. He is, therefore, punished under section 5 of the Contempt of Court Ordinance (Ordinance V of 2003) with imprisonment till the rising of the Court today.

Legal and Political Consequences of the Judgment

Since the issuing of the order and publication of the May judgment, there has been some confusion as to the actual legal consequences of the conviction. While it appears from the judgment that the court had not intended the disqualification of the Prime Minister, a literal reading of Art 63(1) (g) suggests that the conditions for disqualification have been met. Art 63(1) (g) is reproduced below:

63 Disqualifications for membership of Majlis-e-Shoora (Parliament):

(1) A person shall be disqualified from being elected or chosen as, and from being, a member of the Majlis-e-Shoora (Parliament), if:-

g. he has been convicted by a court of competent jurisdiction for propagating any opinion, or acting in any manner, prejudicial to the ideology of Pakistan, or the sovereignty, integrity or security of Pakistan, or morality, or the maintenance of public order, or the integrity or independence of the judiciary of Pakistan, or which defames or brings into ridicule the judiciary or the Armed Forces of Pakistan, unless a period of five years has elapsed since his release.

If contempt of court is an offence that is captured by Art 63(1) (g), all that is required is a conviction for the Prime Minister to be disqualified. The sentence is immaterial as the offences in Art 63(1) g) are sufficiently serious, unlike a conviction under Art 63(1) (h), where disqualification only occurs when the accused is sentenced to a minimum of two years' imprisonment. The effect of the Supreme Court's conviction on the legality of Gilani's continued holding of office and all actions taken in that capacity will have to be tested in court. A petition has already been submitted in the Supreme Court seeking the disqualification of the Prime Minister on grounds that the application of Art 63 (1) (g) is a 'self-executor provision and does not need implementation through any subordinate legislation or through Article 63 (2) or Article 63(3) of the Constitution.'⁶

⁶ 'Petition moved in SC seeks PM's disqualification', Dawn (11 May 2012) <http://dawn.com/2012/05/11/petition-moved-in-sc-seeks-pms-disqualification/> Accessed 11 May 2012.

The political consequences are also significant. The judgment raised questions about the powers of the executive, the sovereignty of Parliament and the role of the judiciary – the long-term implications of which are yet to unfold. Predictably, the judgment created immediate political ripples for the beleaguered government. Opposition parties lost no time in asking the Prime Minister to step down in view of the Supreme Court judgment. Pakistan Muslim League-N PML (N) has said that Gilani does not have any moral or legal authority to continue and should step down. Tehreek-e-Insaaf chief Imran Khan has said that, in principle, his party did not accept Gilani as Prime Minister after the conviction, but conceded that he had the right to appeal the conviction.⁷ Even as the dust settles on the judgment, it is clear that Gilani is in a vulnerable position and the confrontation between the Pakistan People's Party (PPP) and the opposition, particularly the PML (N) is likely to gather steam in the days to come.

Once the detailed judgment was out, the government had 30 days to file an appeal against the order. The matter, as per the parliamentary procedures, went to the Speaker of the National Assembly for referral to the Election Commission of Pakistan to decide whether the Prime Minister remained qualified to be in Parliament. However, on 24 May 2012, the Speaker of the National Assembly, Dr Fehmida Mirza, rejected the order on grounds that there was 'no specific charge regarding the propagation of any opinion or acting in any manner against the independence of the judiciary or ridiculing the judiciary as stipulated under Article 63 (1) (g).'⁸ Therefore there was no question of disqualification of the Prime Minister. In light of this development, the government has reversed its earlier decision to file an appeal against the Supreme Court's decision.⁹ This has irked the opposition parties and it is likely that the matter could be taken to court again.¹⁰

Implications for Democratic Governance

The judgment has stirred a fierce debate on the role of the judiciary in Pakistan. According to one view, it is argued that judicial activism, including the recent actions resulting in the conviction of the Prime Minister, could weaken democratic institutions, which would be tragic in a country where a civilian democratic government is for the first time heading towards the completion of a full term of office. Najam Sethi, a respected Pakistani analyst, has cautioned that a continued standoff between the judiciary and the executive carries the

⁷ 'All parties stick to earlier positions', Dawn (9 May 2012) <http://dawn.com/2012/05/09/all-parties-stick-to-earlier-positions/> Accessed 12 May 2012.

⁸ 'Complete text of Dr Fehmida Mirza's ruling' http://www.geo.tv/important_events/2012/PM_indicted/pages/DrFahmidaMirzaRuling.asp Accessed 27 May 2012.

⁹ 'No appeal to be filed against PM conviction, says Aitzaz', Dawn (26 May 2012) <http://dawn.com/2012/05/26/no-appeal-to-be-filed-against-pm-conviction-says-aitzaz/> Accessed 27 May 2012.

¹⁰ Qamar Zaman 'PM Contempt Case: Case will go to Court again, says confident opposition', International Herald Tribune (27 May 2012) <http://tribune.com.pk/story/384818/pm-contempt-case-case-will-go-to-court-again-says-confident-opposition/> Accessed 27 May 2012.

risk of infighting within the political parties, and that ‘at one level this serves the Army’s purposes’.¹¹ There is also concern that the judiciary ‘may have implicitly played politics by trying to determine not just the legal issues but to influence the preferred political outcome in Pakistan’.¹² Asma Jehangir, a noted human rights activist and former Supreme Court Bar Association President, echoed this sentiment when she said that the Apex court ‘should have pondered over how they had damaged the image of Pakistan by the judgment’.¹³ Stating that the PM had appeared before the court and remained submissive to the court, she added that it was ‘not a good tradition to disqualify the prime minister under Article 63,’ and that no Prime Minister would survive in future if that same tradition continued.¹⁴

On the other hand, there is continued support particularly from civil society and the media for a strong and independent judiciary. The empowerment of the judiciary is seen as a critical ingredient of the democratic process. An independent judiciary upholding constitutionalism and the rule of law is a positive development at a time when Pakistan is engaged in building its democratic institutions and processes.

The judiciary in Pakistan is trying to tread cautiously to keep within its constitutional mandate. It bears pointing out that the Supreme Court had exhibited restraint in sentencing the Prime Minister for conviction, conscious of the risks that would follow if the conviction resulted in the Prime Minister’s disqualification from office. This is reassuring at a time when judicial activism or the ‘judicialisation of politics’ has become an integral part of Pakistan’s political scene.

Pakistan stands today at a critical juncture in its political history as it seeks to put in place durable political processes and structures within the framework of democratic governance. The present political scene is characterised by a quest for a new equilibrium between the key political institutions—the executive, judiciary and legislature which are seeking to find their space in a dynamic democratic milieu. Three factors deserve attention in this regard. First, if democracy is to survive and thrive in Pakistan, the balance of powers between the legislature, executive and judiciary has to be carefully maintained, with none encroaching upon or threatening the other’s mandate. Second, the ruling political elite needs to show both the will and capability to provide effective, transparent and clean governance in line with popular will and aspirations. Third, the judiciary has to be strong and independent, but should exercise caution in walking the fine line between constitutionality and political populism. Any upset in

¹¹ ‘Pakistan PM charged with contempt in case that could drag on’, (13 February 2012) <http://www.themalaysianinsider.com/world/article/pakistan-pm-charged-with-contempt-in-case-that-could-drag-on/> Accessed 12 May 2012.

¹² See Rajshree Jetly, ‘Pakistan’s Supreme Court and the National Reconciliation Ordinance: What now for Pakistan?’ ISAS Brief no. 147, 22 December 2009, p.3.

¹³ Jamaluddin Jamali, ‘PPP lawyers, Asma Jahangir rant against SC verdict’, Pakistan Today (27 April 2012) <http://www.pakistantoday.com.pk/2012/04/27/news/national/ppp-lawyers-asma-jahangir-rant-against-sc-verdict/?printType=article> Accessed 12 May 2012.

¹⁴ *Ibid.*

this delicate political balance at this juncture would only prove counter-productive and imperil the future of democracy in Pakistan.

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