

An Evaluation of Separation of Powers: A Case Study of Pakistan (2007-2013)

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ABSTRACT

The principle, 'separation of powers' has the purpose to protect the citizens of the state from rash, tyrannical and unrestrained powers of the rulers. Democracies all over the world consider that tyranny and arbitrary rule of the Government can be minimized by implementing the separation of powers in its proper context. In Pakistan, the concept 'Separation of Powers' could not find its place accurately. Since the establishment of Pakistan (1947), the executive branch managed to possess judicial and legislative powers with themselves. This practice fashioned the fragile political system and instable democracy in Pakistan. Resultantly, civilian governments had been removed from power by the Military on several times. Courts were ready to justify the military takeover on the grounds, such as 'law of necessity'. It was only after the restoration of Chief Justice Chaudhry in 2009 that the judicial branch started functioning on the line of a real independent institution in the country. This was considered the commencement of the separation of powers for the first time in the political history of Pakistan. This article examines four cases during the above-mentioned era to understand whether or not separation of powers practically exists in Pakistan.

Key Words: Separation of powers, independence of judiciary, the executive, the legislature, constitution

Introduction

The liberal democracies in the world have the tradition of power sharing among the state institutions. People's liberty is ensured when powers of the government are divided between executive, judicial and legislative branches. It is a hard fact that political managers of Pakistan could not decide to establish and implement any of the government systems. Theoretically, they announced to run the state under Islamic democracy but, practically, they adopted neither democracy nor Islam. They shaped their own system to manage the affairs of the state. Powers remained personality centered instead of functioning through separate institutions. The constitutions, adopted in Pakistan, provide the separate role and function of the three institutions, but in reality, the judiciary remained passive to the executive.

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Leading to this callous observation, it can be concluded that "... Pakistan's Supreme Court has followed the path of least resistance and least fidelity to constitutional principles...the courts has been the military's handmaiden in extra - constitutional assaults on the democratic order". (Rajshree, 2012, p.1-7)

Practically, the ruling elites, somehow or the others, managed to make executive branch more powerful than the legislature and judiciary. According to Niaz (2012), since partition of India in 1947, the rulers in Pakistan have been treating the state with support of civil bureaucracy as their personal estate. He further argued that the manners, in which the executive exercised power and authority in Pakistan, have undermined the institutional norms and principles left by the British in the sub-continent. (Niaz, 2012, p.1)

There are few cases when judiciary asserted its role as an independent institution. During the period of 2007-2013 the relationships between judiciary and executive became very tense. President suspended the Chief Justice on his suo motu actions. As a reaction, a powerful mass movement started to restore the chief justice. Resultantly, chief justice was restored and judiciary became so powerful institution that it convicted one Prime Minister. This paper highlights four cases to understand the position of separation of powers in Pakistan since the judicial independence. The factors supported the independence of judiciary are also discussed. The first part of this paper deals with the philosophical foundation of the concept, separation of powers. The second part consists on the historical overview of the separation of powers in Pakistan, while the third one is related to the most relevant cases of the separation of powers after the restoration of judiciary.

The Concept 'Separation of Powers'

Generally, Governments have three broader powers: the judicial, the executive and the legislature. These powers are performed by three different branches of government: Executive, Legislature and Judiciary. When power of the government is broadly divided into three spheres, and activities of the government are performed by these three branches separately, it is called separation of powers. According to Axford and other (1997), "It is the concept that maintains that three powers/elements of government (executive, legislature, and judiciary) should be separated in role and responsibility and that such a separation will ensure good and just government". (Axford, Browning and Turner, 1997, p. 290) This concept rests on democratic values that all branches of government are bound by the rule of law and defined powers with competencies. (Resende, 2011, p.5)

Philosophical Foundation of Separation of Powers

Since ancient times, Greek philosopher Aristotle (350 B.C) mentioned that the powers of the government rest with three branches. He discussed in his work 'Politics' "that there are three elements in each constitution in respect of which

every serious lawgiver must look for what is advantageous to it, if these are well arranged, the constitution is bound to be well arranged, and the differences in constitutions are bound to correspond to the differences between each of these three elements. These three are, first the deliberative, who discuss everything of common importance, second the officials...and the third is judicial element.” (Parpworth, 2012, P.19)

Locke (1632-1704), the modern English political theorist, also categorized the power of government into three branches: Legislative, executive and federative. He stressed that “...it may be too great a temptation to human frailty; apt to grasp at power for the same persons who have the powers of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they made, and suit the law, both in its making and execution to their own private advantages.” (Waldron, 2013, pp.433-468)

In 1748, Montesquieu formulated the modern version of this theory. He explained that in every government there are three kinds of powers: the legislative, the executive and the judicial. Laws are made under the legislature branch of the government; policies, both internal and external are executed by the executive power. The third is judicial power, which is exercised by the separate body to interpret the laws and check the authority of the executive. Montesquieu relates the liberty of the people with separation of powers. He stated the importance of this theory in these words:

“When the legislative and executive powers are united in the same person, or in the same body or Magistrate, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner...there would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise these three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.” (Harmon, 2000, p.281-282)

The following table shows the role and function of the three powers of the government.

Table: Three branches of the government

The state	Three branches	Powers
All institutions	legislature	Makes laws
	Executive	Administers laws
	Judiciary	Interprets laws

Source: (Ryan, Parker, and Hutchings, 1999, p.89)

Contemporary world and the concept of separation of powers

In the modern perspective, this doctrine is at the top of the seven ‘essential elements’ of democracy laid down by the UN General Assembly in 2004. Those are:

1. Separation of powers
2. Independence of judiciary
3. A pluralistic system of political parties and organizations
4. Respect for the rule of law
5. Accountability and transparency
6. Free, independence and pluralistic media
7. Respect for human and political rights

This resolution was endorsed by 172 states. It therefore both represents and consolidates an international consensus on what democracy means and how it should function. (Resende, 2011, p.5) The general perception about the applicability of the doctrine is the presidential system. This is not necessary. It is the theory of government, so it can be adopted by any systems of government with varying degree of changes and alterations. There is no restriction of only presidential system. Like representative government, it is adjustable in the prevailing legal conventions, principles or practices of the different constitutional systems. (Carney, 1993)

Model of separation of powers in the world

Complete separation of powers is no where found in the constitutional systems of the world. Some overlaps are inevitable in the strict application of this doctrine. A system of checks and balances is prominent characteristic of this doctrine. States in the World like, USA tried to adopt this doctrine in strict manners but could not succeed. (Carney, 1993, p.3) Similarly, there is no pure and absolute universal model of separation of powers in the universe. The court of South Africa in 1996 while clarifying the objection on the constitution, explained that, “Under the democratic systems of government it is general practice that checks and balances result in the imposition of restraints by one branch of government upon another, thus, there is no absolute separation.” It further maintained that, “Mostly the presidential systems in the world are based on the division of powers... Some constitutional democracies, like Argentina, Brazil, Panama, the Philippines, and the United States of America have adopted the Separation of powers model. It exists in different forms in different countries, like in USA, Netherlands and the France, members of the executive may not continue to be members of the legislature, while in German separation of powers this is not a requirement. Moreover, because of the different systems of checks and balances that exist in these countries, the relationship between the different branches of government and

the power to influence one branch of government over the other differs from one country to another". (Regan, 2005 p.120)

Separation of powers in Pakistan

Historically, Indian subcontinent was ruled by Muslim from (712 AD) till war of independence (1857) from the British. During this period, several dynasties of Muslims like, Turks, Afghans, Lodhi etc, ruled over the India. The first foundation of Sultanate was laid down by the Qutubuddin Aibak in 1206 AD at Delhi. The Sultan of this Sultanate issued Farman (decrees) to rule the country. According to Symonds (1966), Sultan was the chief executive, chief judge and the sole legislator of the land. He concentrated all powers of the state, whether, judiciary, executive or legislature by himself. (Symonds, 1966, p.20)

Thus Sultans of Delhi were unrestrained powerful in their personalities. Their whims and wishes were the laws of the land. Territory of the Sultan was divided into subas (provinces). Provincial governors/subedars were appointed to govern the provinces. It was the responsibilities of the governors to create lavish and glorious courts, give rewards to the obedient, and suppress the rebels and above all maintaining the environment of fright and fears in the minds and hearts of the subjects. Seeking the consent of the people in the decision making process was not the tradition under the powerful Sultans. (Maluka, 1995, p.83)

Mughal Empire succeeded these Turko-Afghan dynasties in 1526, when Zahiruddin Babur defeated the last ruler of Lodhi dynasty. The Period (1526-1707) is known as the power and glory of the Mughal emperors. They introduced the modern system of administration and agricultural revenue, which still exists in both India and Pakistan. To run the affairs of the state, empire was divided into provinces and various departments. Although there were heads of departments like, Khan-e-Saman (imperial household), Dewans (imperial exchequer), Mir Bakhshi (the military pay department), Chief Qazi (judiciary), Sadrus Sudur (Religious Endowment) , but the empire was ruled by the decrees from the emperor who concentrated all the executive, judicial and legislative powers in himself. There were no concepts of written constitutions during the entire Muslim rule right from 1206 to 1857. Affairs of the Government were run on the principles of monarchy. (Maluka, 1995, p.83)

The British came to India as merchants. They gradually held sway of the whole subcontinent. In 1858, the British formally broke up the Muslim rule. For governing the sub-continent, the British parliament passed the Government of India Acts. The famous acts were: The Government of India Council Act 1861, the Minto-Morley Reforms of 1909, the Government of India Act 1919 and finally the Government of India Act 1935. The 1935 Act drew from previous Acts with some innovations. In this Act, the position of the Governor General (Viceroy) was unique. As the representative of the British crown in India, he enjoyed final political authority and the widest discretionary powers and special responsibilities. The supreme command of the army, navy and air force was vested in him. The

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Governor General had extraordinary powers of legislation. He could however, seek the advice of a council in all matters except defense, external affairs and the affairs which involved his special responsibilities. Though he could seek ministerial advice, he was not bound to act thereupon. (Khan, 2004, p.21)

During freedom movement, the major political parties of the Indian politics included the slogan of separation of judiciary from the executive. Later on, both countries (India and Pakistan) recognized the separation of judiciary from the executive control. The constitution of India incorporated in it the provisions related to the separation of powers. The article 50 reads as, “The state shall take steps to separate the judiciary from the executive in the public service of the state.” Same sentiments were manifested in the 1956 constitution of Pakistan. The state policy had its directive principles that, “the state shall separates the judiciary from the executive as soon as possible and practicable.” (Khan, 2005, p.113-114)

In Pakistan, the concept separation of powers was signified and suggested right from the independence (1947). Abdul Rashid, the then chief justice of federal court of Pakistan expressed on 1949, that the independence of judiciary can only be achieved if it is separate and independent from the executive and legislature. (Mirza, 2015, p.41)

There have been three constitutions enacted in Pakistan: the 1956, 1962 and the 1973. The first two abrogated while, the constitution of 1973 is functioning in Pakistan with various amendments. The constitution of 1973 is based on Westminster model. Under this model of government, Prime Minister is the head of Executive branch, which necessarily comes from the parliament and is answerable to it unlike the US President in the World. In this way, the elected parliament runs the executive organ of the state. (Mirza, 2015, p.41)

Table: Separation of powers under 1973 constitution

Branches	Provisions	Statements
Executive	Article 41(1)	“There shall be a president of Pakistan who shall be the head of state and shall represent the unity of the republic”.
	Article 90(1)	“Subject to the constitution, the executive authority of the federation shall be exercised in the name of the president by the federal government, consisting of the prime minister and the federal ministers who shall act through the prime minister, who shall be the chief executive of the federation.”
	Article 48(1)	“In the exercise of his functions, the president shall act in accordance with the advice of the cabinet or the prime minister. Provided that (within fifteen days) the president may require the cabinet or, as the case may be, the prime minister to reconsider such advice, either generally or otherwise, and the president shall (within ten days) act in accordance with the advice tendered after such reconsideration.”
	Article	“The president shall dissolve the national assembly if so

	58(1)	advised by the prime minister; and the national assembly shall, unless sooner dissolved, stand dissolved at the expiration of forty eight hours after the prime minister has so advised.”
	Article 58(2) (a)	president can also dissolve the national assembly by using his discretion powers as “a vote of no confidence having been passed against the prime minister, no other member of the national assembly is likely to command the confidence of the majority of the members of the national assembly in accordance with the provisions of the constitution as ascertained in a session of the national assembly summoned for the purpose...”
	Article 58(2) (b)	“a situation has arisen in which the government of the federation cannot be carried on in accordance with the provisions of the constitution and an appeal to the electorate is necessary
	Article 91 (5)	“the prime minister shall hold office during the pleasure of the president, but the president shall not exercise his powers under this clause unless he is satisfied that the prime minister does not command the confidence of the majority of the member of the national assembly, in which case he shall summon the national assembly and require the prime minister to obtain a vote of confidence from the assembly.”
Legislature	Article 50	“There shall be a Majlis- e- Shoora (parliament) of Pakistan consisting of the president and the two houses to be known as national assembly and the senate.”
Judiciary	Article 175	“There shall be a supreme court of Pakistan, a high court for each province and a High Court for the Islamabad Capital Territory and such other courts as may be established by law.”

Source: (Mahmood, 1997, p. 855-923)

From the very beginning, executive tried to dominate the judiciary. Under the Indian Independence Act 1947, Governor General had vast powers. He misused this power by dissolving the Constituent Assembly when it was working on amending those provisions in the constitution under which Governor General had the power to dissolve the assembly and order the judges of high courts to conduct an enquiry against the ministers. This 1st amendment intended to repeal the PRODA (Public and Representative Offices Disqualification Act) of 1949 against the abuses of maladministration and corruption in public life. On several occasions, governor general misused this authority against the ministers. The dissolution of the Cabinet of Khawaja Nazimuddin in 1953 was the result of this misuse of powers. (PLD 1954, Central Acts 173)

Constituent assembly planned to dissociate and prevent the governor general from repeating such acts of dismissing the cabinet. It could be a milestone for the

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propagation of parliamentary democracy but, it proved to be a ‘constitutional coup’ in Pakistan, because governor general did not want to lose his grip on the legislature at any cost. (PLD 1954, Central Acts and notifications 172) This struggle led to the dissolution of constituent assembly on 24 October 1954, and governor general proclaimed an end to what he described as parliamentary wrangling. The dissolving of the constituent assembly at the final stage of first constitution making clearly indicates the real intentions of the executive. The action of governor general was personal and not based on any democratic norms. (Wilcox, 1963, p.79)

The role of the courts at this important moment further dismayed the nation. It validated the Governor General’s act on the base of Law of Necessity. This novel concept was introduced first time in Pakistan to oblige Governor General Ghulam Muhammad. Justice Munir pleaded the maxims *salus populi suprema lex* (the welfare of the people is the supreme law) and *salus republicae suprema lex* (the safety of the state is the supreme law). He was much impressed by the statement of Cromwell who stated that, “If nothing should be done but what is according to law, the throat of the nation might be cut while we send for someone to make a law.” This was the basic source of Law of necessity before Justice Munir. Thus the crown was placed on the head of Ghulam Muhammad. Consequently thereupon, he was allowed to assume all powers just like the Kings in the Middle Ages used to exercise. (Ahmad, 2012, P.47)

Resultantly, the newly born country was thrown into confusion and turmoil. Governor General intended to give the country a constitution through decrees rather than by proper legislative body. He also established the supremacy of military power over civilian government when he instructed the Prime Minister Bogra to include two army generals in the cabinet. Those were: Major General Iskandar Mirza (later on became the first president of Pakistan) and General Muhammad Ayub Khan (who was the commander in-chief of Pakistan army at that time) as the minister for defense. (Khan, 2009, p.79)

Relation between Executive and Judiciary from 2007 to 2009

Iftikhar Muhammad Chaudhry became the Chief Justice of Pakistan on 2005 after Irshad Hassan Khan. He tried to handle the high profile cases with transparent and impartial manners. He constantly used *suo motu* powers to provide justice in the issues related to human rights as well as cases of political and public interests. The most notable cases of political and public interests were missing persons, privatization of Pakistan Steel Mills (PSML), presidential elections, postponement of the general elections and the legality of the Musharraf holding dual position at a time (as Chief of Army staff and President). (PLD 2006 S.C. 697)

In the missing persons case, chief justice summoned the high profile police officials and took sever actions against them. While in PSML case, Chaudhry (Chief Justice) highlighted many irregularities in the privatization process. The

massive corruption in the case was a financial loss to the national exchequer. (Ahmad, 2012, p.310-311)

These independent initiatives by chief justice contradicted the wishes of Musharraf (President of Pakistan). He had only option to permanently get rid of the Chief Justice from the scene. To fulfill his desires, he summoned Chief Justice to army house. Musharraf was accompanied by Prime Minister along with other senior military officers in the army house. Throughout conversation with Chief Justice, Musharraf continuously charged him with gross misconduct and on this base stressed him to either resign from the post of chief justice or face the trial. Chief Justice was even forced to resign by other senior military officers along with Musharraf. In this compulsory retirement stage show, chief justice was assured to be accommodated in some lucrative posts on his resignation. But, contrary to the expectations of the Musharraf, he showed courage and refused to resign. This reaction on the part of chief justice infuriated Musharraf who ordered that ‘the President does hereby restrain Mr. justice Iftikhar Muhammad Chaudhry to act as Chief Justice of Pakistan and a judge of supreme court, and he is unable to perform the functions of his office...’ (President’s press Release, 9 March 2007)

To give legal cover, he prepared a Reference against the chief justice. President alleged in the Reference that chief justice of Pakistan supported his son (Arslan Iftikhar) in the advancement of his profession. Arslan Iftikhar started his career as medical doctor with the support of his father (chief justice). Later on he joined the police service of Pakistan again with his father’s influence. It was also alleged in the Reference that chief justice used to demand illegal protocol and insisted on police squads along with senior bureaucrats to meet him at airports. (Khan, 2009, p.511)

After suspending the chief justice, Musharraf in his capacity as COAS imposed emergency on 3 November 2007 throughout Pakistan. Constitution of 1973 was put in abeyance and Provisional Constitutional Order (PCO) No.1 of 2007 was issued. (Dawn, 4 November 2007, p.4)

Despite the fact, that the reference filed by the Musharraf against Chief Justice was dismissed by the majority of the judges under the article of 209, but former did not bother to change his intentions against the later. It was evident from the despotic steps by the Musharraf that he intended to crush the voice of the judiciary; therefore, the legal community came out to defend the rule of law in the country. The slogans like ‘Go Musharraf Go’ were raised by the lawyers throughout Pakistan. Gradually, on 16 March 2009, the lawyers along with the segments of Pakistani urban civil society started a movement to restore the judges removed in the result of emergency. (Ahmad, 2012, p.340)

The lawyer’s community, political leaders as well as members of civil society gathered at Lahore under the leadership of Nawaz Sharif PML (N). The PPP government formed in the result of general election 2008 was expected to restore the chief justice along with other deposed judges, but it was proved otherwise. This civilian government ordered the police to seal the capital city (Lahore) as long March was moving towards Islamabad from Lahore. But the protesters came

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on the street somehow or the other and succeeded to break the siege of the law enforcement agencies. Initially the procession was led by Nawaz Sharif alone but later on Aitzaz Ahsan (President of the Supreme Court Bar Association) also joined the procession. This was the historic long procession. Nearly all TV channels were giving a wide live coverage. It seemed as whole Pakistan was shaking because thousands of people were marching towards Islamabad to restore the judges. The procession hardly covered a few miles distance when it was communicated to Nawaz Sharif in his vehicle that Chief justice Iftikhar Chaudhry along with other deposed judges were going to be restored. With this news, the whole procession was dispersed. Thus on 17 March 2009, all the deposed judges of the Supreme Court and high courts were restored to the position they were holding before 03 November 2007. Subsequently, Mr. Justice Iftikhar Muhammad Chaudhry assumed the office of the chief justice of Pakistan on 22 March 2009, after the retirement of Mr. Justice Abdul Hameed Dogar. That is how the hard earned victory for the emancipation of the judiciary was achieved. The historic moment was in fact a D-day for the members of the Bar. It was a victory for the rule of law. It was a victory for what was right. (Ahmad, 2012, p.343-345)

Restored and Empowered judiciary

This struggle between the judiciary and the executive branch of the government shaped the new dimension in the political history of Pakistan. Judiciary in its restored position started asserting as an empowered and independent institution. Prime Minister Gilani was convicted on 26 April 2012 by the Justice Nasir-ul-Mulk who headed the seven members' bench. The apparent reason behind the conviction of the prime minister is linked with the controversial National Reconciliation Ordinance (NRO).

National Reconciliation Ordinance (NRO) 2007 and the Enigma of Disqualification of PM

National Reconciliation Ordinance (NRO) was promulgated in 5 October 2007 by the then president Musharraf. It became controversial ordinance as all the cases of corruption, money laundering and terrorism, from 1st January 1986 to 12th October 1999 against high profile politicians and bureaucrats were pardoned off. More or less 8000 individuals were beneficiary of this ordinance. (Rajshree, 2012, p.1-7)

Dr. Mubashir Hassan filed a petition in which he challenged the legality of the NRO. The petition contained that ordinance was imposed in colorable exercise of legislative powers. It highlighted that most of the provisions in the Ordinance were based on discrimination between common and classified accused. About 3000 cases relating to murder, corruption, and rape were withdrawn to oblige nearly 8000 accused individuals. The high profile beneficiary of the controversial NRO was Asif Ali Zardari (husband of ex-prime minister Benazir Bhutto). There was

money laundering cases pending against him in Switzerland. It was alleged that Benazir Bhutto and Zardari (later on he became president after Musharraf) had been using Swiss banks accounts since 1990s to launder 12 million dollar.

Supreme Court bench on December 16th 2009, headed by Iftikhar Chaudhry, gave its verdict that NRO was unconstitutional act and against the national interest. Consequently it was declared by the Court that “all cases in which the accused were either discharged or acquitted under section (2) of the NRO or where proceedings pending against the holders of public office had got terminated in view of section 7 thereof... shall stand revived and relegated to the status of pre 5th of October 2007 position”. (Rajshree, 2012, p.1-7)

It seems as if the NRO was deal, whereby Musharraf would be elected as a president, while, Benazir would return from exile to participate in the general election without facing the corruption cases. NRO had allowed Zardari to request the Swiss authority to close all the cases against him. According to the constitution of Switzerland, a person is immune from the prosecution as long as he remains the head of state. Thus Swiss authorities stopped pursuing the cases against Zardari on his becoming the head of state. On the other hand, Syed Yousaf Raza Gilani was the Prime Minister of Pakistan at that time. Constitutionally he was duty bound to write a letter to the Swiss authorities for the reopening of cases but, he refused to comply with the order of the court. (Zaidi, 2015, p.23)

Impact of this judgment- Cause of rift between executive and judiciary

This refusal on the part of PM led the judiciary to charge contempt of court against him. It was the findings of the Court that PM intentionally disregarded the orders of Supreme Court. Therefore, on 13 February 2012, symbolic sentence was imposed on PM by the court. The symbolic punishment was “imprisoning him until the court rose”- nearly thirty second duration. Court explained the order as, “...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”. It was further stated that “the accused PM Syed Yousaf Raza Gilani, is found guilty of and convicted for contempt of court under Article 204 (2) of the constitution of Pakistan, read with section (3) of the contempt of court ordinance for willful disregard and disobedience of this court’s direction contained in paragraph no. 178 of the judgment delivered in the case of Dr. Mubashir Hassan v. Federation of Pakistan.” (Rajshree, 2012, p.1-7)

Disqualification of PM

It is pertinent to mention here that in this case, Supreme Court did not disqualify the PM. It just caused the removal of the head of the state as he disobeyed the court for not writing a letter to the Swiss Authorities. Parliament was constitutionally bound to remove PM and appoint choose his replacement. Under the article 63(1) (g) of the constitution , ‘a person shall be disqualified from being

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elected or chosen as, and from being a member of the Majlis-e- shoora (parliament), if 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.’ (Rajshree, 2012, p.1-7)

Within thirty days, the government could appeal against the verdict of the court. According to the constitution, it was the will of the speaker of the national assembly to refer the matter to election commission of Pakistan for the final removal of the PM and any member of the assembly. Speaker of national assembly, Dr. Fehmida Mirza had no intentions of sending the matter to the election commission. But the opposition parties were pressurizing the Gilani to resign. (Rajshree, 2012, p.1-7) Ultimately, court ordered on 19 June 2012, the disqualification of Gilani as a member of the parliament and hence he was also disqualified from the head of executive branch.

Cases related to the separation of powers during 2009-2013

There are few cases that are related to the separation of powers in Pakistan. These are (1) SHCBA, (2) Memo gate, (3) Tahirul Qadri, (4) 19th Amendment

Sindh High Court Bar Association (SHCBA) v Federation of Pakistan

As already discussed, that President Musharraf imposed emergency on 3rd November 2007. At the same time he issued ‘Provisional Constitutional Order (PCO) 2007’ and ‘oath of judges order 2007’. It meant that only those judges were allowed to continue who would take oath under the aforementioned orders. Meanwhile, Chief justice Chaudhry headed the seven member bench and issued restraint order that no judge would take oath under the PCO or any other extra constitutional order. In contrary to the order of the Supreme Court, Justice Abdul Hameed Dogar along with four judges took oath under the PCO and oath of office order 2007. On the other hand, judges including chief justice who refused to take oath under the Musharraf extra constitutional steps were prevented from performing their duties. Most of the judges were sent to house arrest. Thus Abdul Hameed Dogar became the chief justice of Pakistan. This new court under the new chief justice validated the proclamation of emergency on the doctrine of law of necessity. In this way, Musharraf got the legal protection for his 3rd November 2007 actions. He was also legally empowered to amend the constitution. Court declared him qualified for next term president. General elections were held on February, 2008 and as a result, new civilian government was formed both at federal and provincial level. Later on Musharraf resigned from the seat of president. Civilian leader –the co chairman of PPP, Asif Ali Zardari became the president and the matter of restoring the judges switched over to the civilian

government. Ultimately judges were restored in March 2009 to the same status prior to the 3rd November 2007 emergency.

When Iftikhar Chaudhry resumed the office of chief justice of Pakistan, the first major decision he took was the reversal of Musharraf unconstitutional measures, especially during the emergency period. In the case of Sind High Court Bar Association (SHCBA), Court announced on 31 July 2009 that Musharraf was usurper and all his actions of post 3rd November 2007 were invalid and illegal. He had apprehension that he might be disqualified as a candidate of presidential election from the ruling of eleven member bench of Supreme Court. It was also held by the court that since the judges could not be appointed without the consultation of the chief justice, therefore all the appointment of the judges with consultation of de facto chief justice (Abdul Hameed Dogar) were unconstitutional. Sixty one judges were restored. In this judgment, it was ordered that new clause be included in the 'code of conduct' so that judges might be prohibited from taking oath under any unconstitutional method. The court further held that those judges, who took oath under PCO, violating the orders of the Supreme Court, would be trialed under article 209 of the constitution. (Mirza, 2015, p.62)

However, those ordinances which were implemented during 03-11-2007 (proclamation of emergency) to 15-12-2007 (lifting of emergency) placed before the parliament to decide their validity. Thus, Supreme Court demonstrated the balance of powers by putting the ball in the court of parliament and set the precedent of separation of powers.

Nineteenth Constitutional Amendment and resistance of Supreme Court

Another case relevant to the separation of powers is the reaction of the judiciary on the enactment of the eighteenth constitutional amendment. The passing of 18th amendment in April 19th. 2010 and then 19th amendment on the reaction of Supreme Court is viewed in the perspective of separation of powers case in Pakistan.

In the eighteenth amendment, ninety eight articles were amended with the insertion of some new articles also. Among other applaudable achievements; the prime achievement was the empowering of the provinces by abolishing the concurrent list (which had given the overlapping powers to the federal legislature). But, it had curtailed the absolute power of chief justice in the appointment of the judges. Before the enactment of 18th amendment it was the exclusive power of the chief justice to appoint the judges of the courts. Article 175 (A), introduced by this amendment, deprived of the chief justice from the right of appointment. The powers of the chief justice were shared with the executive and legislature also. Many judicial experts apprehended these changes as an assault on the independence of the judiciary. Considering this amendment as a threat to independence of judiciary, thus the court sent the matter back to the parliament for

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reconsideration of the said article along with proposed suggestions. These recommendations of the court were not contrary to the basic scheme of the article 175. The major demands of the court were to gain effective control over appointment process by increasing the strength and power of the judicial members. Parliament accepted this judicial review and resultantly, passed 19th amendment in the constitution on 1st January, 2011. (Mirza, 2015, p.48)

Before this, it was not the jurisdiction of the court to intervene in the parliament constitutional right of amendment, but by showing the relaxation in this case, reflected the positive interaction between the judiciary and the executive. Although many critics see this development as the overstepping in the jurisdiction of the parliament by the court, but it also set the precedent of balance of powers and institutional co existence in Pakistan.

Dr. Tahirul Qadri's case

The issue was that, Dr. Muhammad Tahirul Qadri, the chairman of Pakistan Awami Tehreek (political party), filed a petition under article 184(3) of the constitution on 7th February, 2013 in which he sought the reformation of the Election Commission of Pakistan (ECP). He challenged that “the appointment of the Chief Election Commissioner (CEC) and selection of four members of the ECP was not according to the article 213 and 218 of the constitution. And that's why these appointments are void ab-initio.” Therefore, he claimed in the petition that the appointment of the CEC along with the members of the election commission be made according to the article 213(2) (a) and 218(2) (a) and (b) of the 1973 constitution. (15 March, 2013, the News International)

Judgment of the court

Chief Justice Iftikhar Chaudhary headed the three member bench and dismissed the petition on the ground that “Qadri could neither demonstrate any violation of his fundamental rights nor establish his *locus standi* to contest the elections given that he was a dual national.” Court found in the concise statement filed by the Qadri that he holds the nationality of Canada also. According to the Canadian citizen's act 1985, a person has to show loyalty to the Canada. He has to take oath before the Canadian constitution, “From this day, I pledge my loyalty to Canada and her majesty Elizabeth the second, queen of Canada. I promise to respect our country's rights and freedoms, to uphold our democratic values, to faithfully observe our laws and fulfill my duties and obligations as a Canadian citizen.” On the other hand the citizenship act of Pakistan 1951, section 14(1) reads, “ if any person is citizen of Pakistan, and is at the same time a citizen or a national of any other country renouncing his status as citizen or national thereof, cease to be a citizen of Pakistan.” This disqualifies a person from the membership of the parliament. The article 63(1) reads as, “A person shall be disqualified from being

elected or chosen as...a member of Majlis-e-Shoora (parliament), if, under the section(c) of the same article, “he ceases to be a citizen of Pakistan, or acquires the citizenship of a foreign state” (15 March, 2013, the News International)

As for as the article 184(3) of the public interest litigation case is concerned, it is pertinent to see whether or not the instant case decided by the court falls under the public interest category. In this regards, the interpretation of the Indian Supreme Court is relevant to quote. It was held in the *Ashok Kumar Pandey v state of West Bengal* that, “public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest...” It was further held that, ‘it is to be used as an effective weapon in the armory of law for delivering social justice to the citizens...it should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta.” (15 March, 2013, the News International)

The appointment of the CEC and other members of the ECP were constitutionally made with the notification on 16th July, 2012 and 16th June, 2011 respectively. These appointments were not criticized by the other population of nearly 189 to 120 million and the people’s representatives in the parliament, including the members of the opposition party. Surprisingly, it was highlighted by the person, who showed his loyalty to the foreign country.

Tahirul Qadri claimed the restructuring the entire electoral process when the next general elections were scheduled to be held after the completion of five years terms of the assembly. People of Pakistan were ready to elect their representative through election. Under such critical circumstances, duty lies on the court to realize the facts about the person approaching the court, as a bona fide and without his personal or political motives or any other indirect concerns in the guise of public interest. It was widely believed that Qadri was supported and backed by the non political entity to affect the democratic process by obtaining the legal cover from the court. However, court dismissed the petition on the ground that under the instant case, there was no matter of fundamental rights violation. Thus court proved its impartiality and augmented its role against the political elite and the military. (15 March, 2013, the News International)

Memo gate scandal

Memo gate scandal was one of the most critical issues that shook the very edifice of the government. It was the direct tussle between the government and the armed forces of Pakistan. It was alleged that on 10 May 2011, Hussain Haqqani, the then ambassador to America, wrote a memorandum to the chairman of the joint chiefs of staff of the US Armed Forces, Admiral Mike Mullen. This caused tense relation between army and the government. The intervention of the court cleared the situation and proved the balance of powers among the state institution.

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The instant issue was the memorandum in which Mansoor Ijaz, a Pakistani businessman settled in America, wrote an article in *financial Times*. It was exposed in the article that he was asked by Hussain Haqqani (Pakistani ambassador in America) to convey the message of President Asif Ali Zardari. The message was a request from president Zardari to Admiral Mike Mullen. Zardari requested the Mullen to convince General Kayani (commander of Pakistan armed forces) not to topple down the PPP government in Pakistan.

Judgment of the Supreme Court

Petitions were filed before the Supreme Court under article 184(3). It accepted a petition filed by Nawaz Sharif, the leader of Pakistan Muslim League (N) and recommended to appoint a three member judicial commission to probe into the memo gate scandal. According to the findings of the commission released on 12th June, 2012, “it has been incontrovertibly established that the Memorandum was authentic and Mr. Haqqani was the originator and architect of the Memorandum.” (www.supremecourt.gov.pk/...const.p.77-78-79%20 Memogate detailed. Watan party and others v Federation of Pakistan and others)

Thus the long term political deadlock between army and government was averted by the mediation of the court. The complete blames was put on Mr. Haqqani and thus the military and the civil government were safely rescued from the case. Once again the precedent was set by the court as institutional balance in the democratic system of Pakistan. (Mirza, 2015, p.67)

Conclusion

Constitution provides the separate role and functions of the three institutions. Unfortunately, judicial branch of the government could not perform its role as an independent institution. To attain the status of practically independent institution, judiciary has to face stern actions from the executive in the form of suspension of the chief justice. The struggle of the legal community along with civil society led the judiciary to the powerful institution.

Complete separation of powers is difficult to exist in the political system of Pakistan, as under the Westminster model of government, executive is the part of the parliament. The partial separation of powers depends on the independence of judiciary. In Pakistan, the independence of judiciary, which is essential component for separation of powers, is seen at the time of first reinstatement of the chief justice on 20th July 2007 under the military president. The full bench of Supreme Court restored the chief justice by striking down the ‘reference’ filed by the president against him. Another example of its independence is imagined when the parliament had to pass 19th amendment considering some reservations of the judiciary on certain clauses under the 18th amendment. Likewise the SHCBA declared the military president as usurper and hence affirmed the 3rd November, 2007 emergency illegal. There were few decisions on the part of judiciary that

proved the separation of powers in the parliamentary system of Pakistan. The conviction of PM, Memo gate Scandal and the passing of the 19th amendment are the examples that the three institutions performed their role within their constitutional jurisdictions

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