**Judicial Accountability (Part-I)**

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While addressing the beginning of the new judicial year a little while back, the Supreme Court’s Chief Justice of Pakistan (CJP) recognized the perception that the accountability drive being pursued is considered part of the ‘political engineering’ and it makes the accountability process lose it credibility. He also referred to the ‘loss of political space in governance’ that does not bode well for Pakistan being a constitutional democracy. The CJP also remarked that the court under his leadership is pursing ‘active judicialism’ instead of ‘judicial activism’.

While it is encouraging to note the candid remarks by the CJP regarding the ongoing accountability process (despite towards the end of his career in judiciary and stint as CJP), the larger question is where does the judiciary drive its legitimacy from and how is the judiciary held accountable for its performance and actions? This article refers to some literature (mainly Kalhan 2013; Pérez-Perdomo and Azziman contributions to global conference proceedings “In Comprehensive Legal and Judicial Development”, World Bank 2001) to illustrate the discussion.

The overall sense in the literature is that the hallmark of functioning of judiciary is not only some sorts of absolute ‘independence’; it is also closely tied in with ‘accountability’ or ‘constraint’. There is also the realization that the independence of judiciary is not guaranteed through laws and decrees only, it is the result of development of a historical process of institutional development. This historical process evolves as the result of turbulence and conflict and slowly judicial ethos based on collective memory and social conscience are formed. Evolution of judicial ethos is linked with the ‘long process of democratization’ that needs to win over authoritarianism to ensure impartiality of the justice system. Values of judicial independence and its accountability need to coexist to ensure institutional equilibrium.

Yet, there are situations when there is institutional disequilibrium in countries like Pakistan and Egypt. In Pakistan, judicial independence might be ensured via-a-vis the civilian political leadership and institutions but not from the non-representative state institutions. Chile is another example from the recent past. Chilean judiciary might have removed procedural obstacles to enable the trial of former President Pinochet, yet years earlier the same Chilean judiciary upheld the coup, and did not act to stop massive human rights violations by the Pinochet regime.

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In Pakistan, the judiciary has not been fully able to exert its independence since the country has historically altered between non-representative and ‘weak civilian rule’; and the judiciary has always legitimized the non-representative regime, despite the fact gradually putting more conditional clauses to exercise some constraint on the unbridled power of non-representative institutions. The overall judicial legitimization of takeover of power has led to ‘institutional imbalance’ to the detriment of Pakistan’s weak civil/political institutions. Constitutional development trajectory is often non-linear and protracted instead of being a straight line of progression from authoritarianism to the rule of law. Many countries exist in the hybrid ‘grey zone’ between authoritarianism and full-fledged democracy. Pakistan is one such state with its ‘checkered’ history and judicial developments over here like other developing countries need reassessment on the ongoing basis.

Judicial independence need not be equated with ‘maximal autonomy’ as an end in itself; rather it is ‘dynamic web of relationships and interdependencies’ and its needs to be contextualized while moving on the continuum between ‘autonomy’ and ‘constraint’ across multiple axis of exercise of power. The end purpose of the functioning of judiciary should be to strengthen constitutionalism and democracy. However, the non-representative institutions in Pakistan have consolidated their hold on other organs of the state including the judiciary in a ‘recurring, iterative process of transformative preservation’ even in the periods when civilians are in power at the de jure level.

As a result, there has been continuing ‘institutional disequilibrium’ in Pakistan and the judiciary has been politicized. It has been able to exert its independence from the weak civil/political institutions but has largely been functioning under the constraints imposed by the non-representative state institutions. The lawyers’ movement that apparently overthrew the Musharraf government; yet it has not made any dent in the entrenched power of the non-representative institutions, and did not address the institutional imbalance between the judiciary, Parliament, and the non-representative institutions.

In the second part of this article, we will discuss how the judiciary exerted its control to bring the process of judicial appointments under its sphere in the post 18th amendment phase by weakening the political control. We would also discuss in the next article recommendations to strengthen procedures for judicial accountability.

***To be Concluded.***

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