

Has the Supreme Judicial Council been able to Judge the Judges?

Zafar Iqbal Kalanauriⁱ

Historical Background of the Supreme Judicial Council

The Courts are acting for the people to administer justice who have reposed faith in them and the concept of the Supreme Judicial Council has come from the judicial system in where the people aggrieved ask for justice and be ensured rule of Law. To this regard Lord Denning said “*justice is rooted in confidence and if the confidence is destroyed right-minded go away thinking that the judge is biased.*” So in this situation an institution like Supreme Judicial Council is necessarily needed to maintain and control over the judges’ activities and their judicial accountability by enacting a certain code of Conduct for the judges. If the judges become biased somehow the confidence of the people is broken and the courts proceedings become meaningless. The second Constituent Assembly of Pakistan drafted and adopted Pakistan’s first Constitution, which came into force in 1956. A leading account of Pakistan’s constitutional history remarks: ‘Adequate provisions were made in the 1956 Constitution to ensure the independence of the judiciary so that “justice could be dispensed in Pakistan in a real and unpolluted form”’.¹ The life of the 1956 Constitution was rather short, being suspended and later abrogated by General Ayub Khan following a military coup. In the infamous *Dosso Case*² the Supreme Court declared the coup to have been lawful on the ground that because it had been successful, it had brought into existence an entirely new legal order. The legality of this new legal order could not be judged on the basis of 1956 Constitution, which had for all legal purposes disappeared as a result of the coup (which is referred to as a ‘revolution’ in the judgment). General Ayub Khan gave Pakistan its second Constitution in 1962. As far as the position of the higher judiciary was concerned, this Constitution followed the precedent set by the 1956 Constitution. There was, however, one important difference. The 1962 Constitution provided for the establishment of a Supreme Judicial Council, consisting of senior judges of the Supreme Court and the High Courts, which was given the jurisdiction to investigate complaints of misconduct against judges of the superior judiciary. An Interim Constitution came into force in 1972, replaced a year later by the Constitution of 1973. With respect to the judiciary, the Constitution of 1973 followed the pattern established by the constitutions of 1956 and 1962.

¹ Hamid Khan, *Constitutional and Political History of Pakistan* (Lahore: Oxford University Press, 2nd edn, 2009), p 285.

² PLD 1958 SC 533.

Basic Concept of Supreme Judicial Council in Pakistan

The accountability of Higher Judiciary is of prime importance because the judges of the constitutional courts have taken oath to defend, protect and preserve the Constitution of Pakistan. The Supreme Judicial Council which consists of the senior most judges themselves has a greater responsibility to see, that the judges of the superior courts remain committed for the Code of Conduct and thereby remain accountability to the Constitution.

The Constitution has envisaged certain basic and fundamental rights for the people and made the judiciary the guardian of those rights. In that context it has been rightly said the judges of the higher judiciary without public accountability may endanger democracy.

The Independence of judiciary does not mean that the absence of responsibility for the action of a judge. Judicial Independence without judicial accountability may generate both abuse and misuse and hence judicial independence involves the concept of judicial accountability of the judges. Basically, the Supreme Judicial Council is the governing authority of the Judiciary by which the judges of the Constitutional Courts can be controlled over in performing their activities. So, there is an inter-relation between judiciary and Supreme Judicial Council in Pakistan, such as the Supreme Judicial Council is formed with the Chief Justice and two other next most senior justice of the supreme court and two senior most chief Justices of provincial High Courts, they are the body who can look into the the conduct for the judges as per the code of conduct. The judges who fail to properly observe it and properly perform their duties, either for physical or mental incapacity, may be removed from their offices per inquiry conducted by the Supreme Judicial Council and recommendation of for their removal by the President. But the question is how far the council is independent in inquiring the incapacity of the judges? Is the council influenced or pressurized by the any other organ or not? Has the Supreme Judicial Council been able to play a vital role to uphold the dignity of Higher Judiciary in Pakistani Perspective? The aim of this research Article is to answer these questions.

Supreme Judicial Council of Pakistan

The Supreme Judicial Council of Pakistan is a body of judges empowered under

Article 209³ of the constitution of Pakistan to hear cases of misconduct against judges.

Composition

The composition of the Council is set out in the constitution as:

- The Chief Justice
- The two next most senior judges of the Supreme Court of Pakistan
- The two most senior Chief Justices of the provincial High Courts

Where the council is investigating a member of the council he is replaced by the next most senior judge.

³ ARTICLE- 209, Supreme Judicial Council

(1) There shall be a Supreme Judicial Council of Pakistan, in this Chapter referred to as the Council.

(2) The Council shall consist of,

(a) the Chief Justice of Pakistan;

(b) the two next most senior Judges of the Supreme Court; and

(c) the two most senior Chief Justices of High Courts.

Explanation: - For the purpose of this clause, the inter se seniority of the Chief Justices of the High Courts shall be determined with reference to their dates of appointment as Chief Justice [231] [otherwise than as acting Chief Justice], and in case the dates of such appointment are the same, with reference to their dates of appointment as Judges of any of the High Courts.

(3) If at any time the Council is inquiring into the capacity or conduct of a Judge who is a member of the Council, or a member of the Council is absent or is unable to act due to illness or any other cause, then

(a) if such member is a Judge of the Supreme Court, the Judge of the Supreme Court who is next in seniority below the Judges referred to in paragraph (b) of clause (2), and

(b) if such member is the Chief Justice of a High Court; the Chief Justice of another High Court who is next in seniority amongst the Chief Justices of the remaining High Courts, shall act as a member of the Council in his place.

(4) If, upon any matter inquired into by the Council, there is a difference of opinion amongst its members, the opinion of the majority shall prevail, and the report of the Council to the President shall be expressed in terms of the view of the majority.

(5) If, on information [231A] [from any source, the Council or] the President is of the opinion that a Judge of the Supreme Court or of a High Court,

(a) may be incapable of properly performing the duties of his office by reason of physical or mental incapacity; or

(b) may have been guilty of misconduct, the President shall direct the Council to [231B] [or the Council may, on its own motion,] inquire into the matter.

(6) If, after inquiring into the matter, the Council reports to the President that it is of the opinion,

(a) that the Judge is incapable of performing the duties of his office or has been guilty of misconduct, and

(b) that he should be removed from office, the President may remove the Judge from office.

(7) A Judge of the Supreme Court or of a High Court shall not be removed from office except as provided by this Article.

(8) The Council shall issue a code of conduct to be observed by Judges of the Supreme Court and of the High Courts.

Powers

No judge of any of the five High Courts, the Supreme Court of Pakistan and Federal Sharia Court or its Appellate Bench of Supreme Court may be dismissed except by the President on the report of the Supreme Judicial Council. The Council may start proceedings against a judge either by its own initiative or by reference from the President of Pakistan.

If the Council concludes that the judge is guilty of misconduct and should be removed from office they can recommend this to the President.

A judge of a court or tribunal subordinate to a High Court may be dismissed by the High Court concerned.

The Supreme Judicial Council Procedure of Inquiry

Article 209 to 211 of the constitution of the Islamic Republic of Pakistan are the relevant provisions regarding proceedings, procedure and inquiry by the Supreme Judicial Council, regarding Judges. The Constitutional Courts Judges are accountable in accordance with the aforesaid Articles.

Supreme Judicial Council can enquire the matters as under.

(i) The incapacity of a judge to perform the duties of his office properly arising out physical or mentally.

(ii) Misconduct of the judge.

The proceeding by the Supreme Judicial Council against the Judges are neither criminal nor civil, these is merely an administrative nature proceeding.

Supreme judicial court can take or initiate proceeding:

(i) By it self.

(ii) By the reference of the president of Pakistan.

The primary function of the by the Supreme Judicial Council is to make enquiry into the conduct of a judges. If, on the basis of information received from the council or from any other source, the president is of the opinion that a judge of the Supreme Court or High Court.

(a) May be incapable of properly performing his duties due to physical or mental incapacity.

(b) May have the guilty of misconduct.

The president shall direct the council to inquire into the matter. Supreme Judicial Council will undertake such an enquiry and submit a report on the matter, by majority of its members, declaring that the judge is incapable of performing his duties or has been guilty of misconduct, the president may remove the judge from his office.

Power to enforce attendance of person:

It is also the function of the council and its power of issuing directions or orders for securing the attendance of any person or for discovery or production of documents. The orders issued by the council in this connection are enforceable as though they

had been issued by the Supreme Court.

Contempt of court:

The law of contempt of court is also applicable to the council.

Bar of Jurisdiction:

The actions taken or reports made by the council shall not be questioned in any court of law.

The 17th Amendment to the Constitution brought a significant change in Article 209 of the Constitution. Prior to the Amendment, the Council could process only such matters as were referred to it by the President. Under the amended Article 209, the Council, besides a reference from the President, may, also on its own account, inquire into the conduct or capacity of a Judge of a Superior Court in Pakistan. To bring the forum more effective a Committee was constituted by the Chief Justice of Pakistan to prepare draft rules/procedures for initiating action and conducting investigation/inquire. The Committee prepared a draft of the Supreme Judicial Council Procedure of Enquiry 2005, which was approved by the Council. It was duly notified and gazette. Thus, the Council has become fully functional and is entertaining complaints as per the prescribed procedure. ⁴

⁴ THE GAZETTE OF PAKISTAN

Extraordinary, Karachi, November 29, 2005

PART III

SUPREME COURT OF PAKISTAN (SUPREME JUDICIAL COUNCIL)

NOTIFICATION

No.P.Reg.113/2005-SJC: - (SUPREME JUDICIAL COUNCIL PROCEDURE OF ENQUIRY 2005)
Pursuant to the decision taken by the Supreme Judicial Council, in its Meeting on 24th September 2005, the Supreme Judicial Council is pleased to lay down the following procedure for effective performance of functions vested in it under Article 209 of the Constitution of Islamic Republic of Pakistan.

1. Title and application:

(1) The procedure of enquiry shall be called "The Supreme Judicial Council Procedure of Enquiry 2005".

(2) It shall only apply to the Supreme Judicial Council and its proceedings.

2. Scope:

The Procedure shall provide for effective implementation of Article 209 of the Constitution and regulate all inquiries required to be undertaken and all other matters which need to be addressed there under.

3. Definitions:

In the present Procedure, unless the context provides otherwise, the following expressions used in the Procedure will have the meanings as assigned to them hereunder;

(a) "Any matter", includes all matters and facts associated with the enquiry that the Council may carry out.

(b) "Any other source", includes all sources through which information is received in respect of the conduct of a Judge.

(c) "Code of conduct", means the code of conduct issued by the Supreme Judicial Council in terms of Article 209(8) of the Constitution of Islamic Republic of Pakistan.

(d) "Chairman", means and includes the Chief Justice of Pakistan.

(e) "Incapacity", will include all forms of physical or mental incapacity howsoever described or

narrated, which render the Judge incapable of performing the duties of his office.

(f) "Conduct", will include series of facts associated with the matter being inquired into by the Council, including the facts which are attributed to the person of the Judge.

(g) "Guilty", will include arriving at an opinion by the Council that a Judge has been guilty of misconduct.

(h) "Opinion", will include arriving at a conclusion by the Council, that misconduct has or has not taken place.

(i) "Information", includes any material, facts, documentation, photographs, video or audio tapes, affidavits, letters or any other reasonable evidence that has come to the knowledge of any Member of the Council or the Council itself sufficient to initiate an enquiry.

(j) "Enquiry", means the consideration of any matter, in relation to conduct of a Judge, by the Council, or any Member of the Council.

(k) "Member", means Member of the Supreme Judicial Council.

(l) "Misconduct", includes,

(i) conduct unbecoming of a Judge,

(ii) is in disregard of the Code of Conduct issued under Article 209(8) of the Constitution of Islamic Republic of Pakistan,

(iii) is found to be inefficient or has ceased to be efficient.

(m) "Report of the Council", includes the findings of the enquiry proceedings carried out by the Council including recommendations for the President of Pakistan for removal of the Judge or otherwise.

(n) "Secretary", means the Registrar, Supreme Court or any person appointed by the Council.

(o) "Supreme Judicial Council", means the Supreme Judicial Council as constituted by Article 209 of the Constitution of Islamic Republic of Pakistan.

4. The Headquarters of the Council shall be at Islamabad, but the Council may hold its meeting or enquiry into reference or a complaint at any other place in Pakistan, as the Chairman may deem convenient.

5. Receiving of Information: --

(1) Any member of public may bring to the notice of the Council or any of its Members or the Secretary, information alleging incapacity or misconduct of a Judge.

(2) The allegation may be supported by material which is sufficient in the opinion of the Council to commence enquiry.

(3) The person providing the said information shall identify himself properly.

(4) The information may be received through any mode by the Council or any Member of the Council, without being restricted to any of the following sources such as;

(a) Print or electronic media;

(b) Written Complaint.

(5) Information received under sub-para (4) shall be entered in the Register maintained by the Secretary.

6. Cognizance by the Council: --

Without prejudice to the general requirement of receiving information in the manner provided for above, nothing in this Procedure shall be read to curtail or limit the jurisdiction of the Council to initiate an enquiry against a Judge.

7. Procedure for scrutinizing information: --

(1) Once any information in respect of enquiry into the conduct of a Judge is received by any Member or the Council, it shall be presented to the Chairman of the Council, who; shall

(a) refer the same to any Member of the Council to look into the said information; and to express his opinion in relation to sufficiency or otherwise of the information.

(b) if the Council is satisfied that the information prima facie discloses sufficient material for an enquiry, it shall proceed to consider the same.

(2) The Member, to whom the Chairman has referred the information, will examine the same and ascertain if the information so received discloses specific particulars of misconduct, and provides factual details necessary to form prima facie opinion in respect of the guilt of the Judge.

(3) If the Member forms an opinion that the information does reveal sufficient material to commence enquiry, he shall inform the Council accordingly and the information shall be placed before the Council.

(4) If the Member comes to a conclusion that the information is false, frivolous, concocted or untrue, he shall inform the Council accordingly and may recommend action against the person who initiated the information.

8. Enquiry by the Council: --(1) The Chairman may, call the meeting of the Council, for discussion and enquiry into the information received.

(2) The information in respect of the conduct of a Judge shall be placed before the Council for examination.

(3) If the Council is of the view that before forming an opinion, it should also hear the Judge under enquiry, it shall require the said Judge to present himself before the Council. The Council shall provide him the information and material received against him.

(4) If the Council is of the opinion that it requires more material or seeks additional information before it can form any opinion, it shall direct accordingly.

(5) The Council may, if necessary, secure the attendance of the person who has provided the information, for enquiry into any aspect of the information provided.

(6) The Council may summon any expert, where the enquiry is in respect of the incapacity of a Judge and may order any medical investigation by local or foreign expert.

(7) Without prejudice to the foregoing, the Council shall have inherent powers to adopt any procedure specific to the enquiry which is considered by the Council to be just and proper in the circumstances.

9. (1) If the Council decides to proceed against a Judge, a show cause notice shall be issued to him along with supporting material calling upon him to explain his conduct within 14 days.

(2) On receipt of reply from the Judge, Council shall convene its meeting to proceed further with the matter.

10.(1) The Attorney-General for Pakistan and in his absence a senior counsel of the Supreme Court, instructed by him, shall conduct a reference.

(2) The Council may require the Attorney-General for Pakistan or any other counsel to appear and assist the Council in relation to smooth and efficient conduct of its proceedings.

11. Procedure of Council: --(1) In the event of a difference of opinion amongst the members of the Council regarding, further enquiry, granting right of hearing to the Judge concerned, securing attendance of the person providing information and related matters, opinion of the majority shall prevail.

(2) In the event of a difference of opinion amongst the members of the Council whether the Judge concerned is guilty of misconduct, opinion of the majority shall prevail.

12. Report to the President of Pakistan: --

If the Council in its meeting, on conclusion of the proceedings forms an opinion, that the Judge concerned has been guilty of misconduct or incapacitated in the performance of his duties properly, it shall express its views accordingly and the same shall be communicated by the Chairman to the President as a Report of the Council for action under Article 209(6) of the Constitution of Islamic Republic of Pakistan.

13. Proceedings of the Council not to be reported: -- (1) Proceedings of the Council shall be conducted in camera and shall not be open to public.

(2) Only the findings of the proceedings shall be allowed to be reported.

(3) Proceedings of the meetings of the Council or any other steps that Council may take shall not be reported, unless directed otherwise.

14. Punishment for frivolous information: -- (1) Whenever the Council finds that the information or evidence provided to it was false in material particulars or with the sole intention to malign a Judge, or scandalizing the Court or to undermine it in any form whatsoever, it may direct action against all those who are found to have provided the said information, or evidence as the case may be.

(2) For this purpose, the Council may direct the Secretary of the Council to pursue the course of action against the offender.

15. Council Secretariat: -- (1) The Council shall have a permanent secretariat and in order to carry out the affairs and functions, the Council may appoint such officials and staff as deemed fit and proper.

(2) The Council shall have a perpetual seal which shall be retained in the custody of the Secretary.

(3) The Secretary of the Council shall be the custodian of the record and proceedings of the Council.

16. Powers to issue directions: --The Council shall have the power to issue any directive, pass any order and prescribe the procedure for achieving the objects of the Council.

17. This procedure shall, mutatis mutandis, apply to proceedings against other office holders, who can be removed from office in the manner prescribed by Article 209 of the Constitution.

By order of HCJ/Chairman,

(Dr. Faqir Hussain)

Secretary

CODE OF CONDUCT FOR JUDGES OF THE SUPREME COURT AND THE HIGH COURTS

Supreme Judicial Council has provided a code of conduct for the judges of the Supreme Court and High Court under Article 209(8) of the Constitution of Islamic Republic of Pakistan, 1973⁵.

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CODE OF CONDUCT TO BE OBSERVED BY JUDGES OF THE SUPREME COURT OF PAKISTAN AND OF THE HIGH COURTS OF PAKISTAN (Supreme Judicial Council)

NOTIFICATION

Islamabad, the 2nd September, 2009

No.F.SECRETARY-01/2009/SJC.-In exercise of powers conferred by Article 209(8) of the Constitution of Islamic Republic of Pakistan, 1973, the Supreme Judicial Council in its meeting on 8th August, 2009 approved the addition of a new Article No. XI in the Code of Conduct for Judges of the supreme Court and High Courts and in its meeting on 29th August, 2009 decided to publish the full text of amended Code of Conduct in the Gazette of Pakistan (Extraordinary) for information of all concerned as under:-

Code of Conduct for Judges of the Supreme Court and High Courts (Framed by the Supreme Judicial Council under Article 128 (4) of the 1962 Constitution as amended upto date under Article 209 (8) of the Constitution of Islamic Republic of Pakistan 1973).

The prime duty of a Judge as an individual is to present before the public an image of justice of the nation. As a member of his court, that duty is brought within the disciplines appropriate to a corporate body.

The Constitution, by declaring that all authority exercisable by the people is a sacred trust from Almighty Allah, makes it plain that the justice of this nation is of Divine origin. It connotes full implementation of the high principles, which are woven into the Constitution, as well as the universal requirements of natural justice. The oath of a Judge implies complete submission to the Constitution, and under the Constitution to the law. Subject to these governing obligations, his function of interpretation and application of the Constitution and the Law is to be discharged for the maintenance of the Rule of Law over the whole range of human activities within the nation.

To be a living embodiment of these powers, functions, and obligations calls for possession of the highest qualities of intellect and character. Equally, it imposes patterns of behavior, which are the hall-mark of distinction of a Judge among his fellow-men.

In this code, an attempt is made to indicate certain traditional requirements of behavior in the Judges of the Superior Courts, conducive to the achievement of a standard of justice worthy of the nation.

ARTICLE- I

On equiponderance stand the heavens and the earth. By equiponderance, oppression meaning unjust and unequal burdens is removed. The Judge's task is to ensure that such equality should prevail in all things.

ARTICLE- II

A Judge should be God-fearing, law-abiding, abstemious, truthful of tongue, wise in opinion, cautious and forbearing, blameless, and untouched by greed. While dispensing justice, he should be strong without being rough, polite without being weak, awe inspires in his warnings and faithful to his word, always preserving calmness, balance and complete detachment, for the formation of correct conclusions in all matters coming before him.

In the matter of taking his seat and of rising from his seat, he shall be punctilious in point of time, mindful of the courtesies, careful to preserve the dignity of the Court, while maintaining an equal aspect towards all litigants as well as lawyers appearing before him.

ARTICLE- III

To be above reproach, and for this purpose to keep his conduct in all things, 'official and private, free from impropriety is expected of a Judge.

ARTICLE- IV

A Judge must decline resolutely to act in a case involving his own interest, including those of persons whom he regards and treats as near relatives or close friend.

A Judge must rigidly refrain from entering into or continuing any business dealing, howsoever

Overview of History of Supreme Judicial Council

The judicial history of the country with regards to references filed against judges. The first reference in the judicial history of the country was filed against Justice Hasan Ali Agha in the Federal Court of Pakistan during 1951; the second reference was against Justice Ikhtlaq Hussain and the third against Justice Shaukat Ali while the fourth one was filed against Justice Safdar Ali Shah. All these references were filed during the martial law regimes except the one against Justice Hasan Ali Agha that was filed in a civilian regime and he was exonerated of all charges in 1951.

The reference against Justice Ikhtlaq was made out in Ayub's regime; Justice Shaikh Shaukat Ali faced reference in General Yahya's regime and Justice Safdar Ali Shah in General Zia's regime. All these cases were made out in peculiar circumstances and were settled on different grounds. In all the three references filed during

unimportant it may be, with any party to a case before him. Should the dealing be unavoidable, he must discontinue his connection with the case forthwith. A judge must refuse to deal with any case in which he has a connection with one party or its lawyer more than the other, or even with both parties and their lawyers.

To ensure that justice is not only done, but is also seen to be done, a Judge must avoid all possibility of his opinion or action in any case being swayed by any consideration of personal advantage, either direct or indirect.

ARTICLE- V

Functioning as he does in full view of the public, a Judge gets thereby all the publicity that is good for him. He should not seek more. In particular, he should not engage in any public controversy, least of all on a political question, notwithstanding that it involves a question of law.

ARTICLE- VI

A Judge should endeavor to avoid, as far as possible, being involved, either on his own behalf or on behalf of others, in litigation or in matters which are liable to lead to litigation such as industry, trade or speculative transactions.

To employ the influence of his position to gain undue advantage, whether immediate or future, is a grave fault.

A Judge must avoid incurring financial or other obligations to private institutions or persons such as may embarrass him in the performance of his functions.

ARTICLE- VII

Extra-Judicial duties or responsibilities, official or private, should be generally avoided. He should equally avoid being a candidate, for any elective office in any organization whatsoever.

ARTICLE- VIII

Gifts are to be received only from near relatives and close friends, and only such as are customary. Everything in the way of favours in consequence of the office must be refused. In accepting any entertainment offered, whether general or particular, care should be taken that its real purpose does not conflict with a Judge's duty to maintain detachment from likely litigants, and from partisan activity.

ARTICLE- IX

In his judicial work, and his relations with other Judges, a Judge should act always for the maintenance of harmony within his own Court, as well as among all Courts and for the integrity of the institution of justice. Disagreement with the opinion of any Judge, whether of equal or of inferior status, should invariably be expressed in terms of courtesy and restraint.

ARTICLE- X

In this judicial work a Judge shall take all steps to decide cases within the shortest time, controlling effectively efforts made to prevent early disposal of cases and make every endeavor to minimize suffering of litigants by deciding cases expeditiously through proper written judgments. A Judge who is unmindful or indifferent towards this aspect of his duty is not faithful to his work, which is a grave fault.

ARTICLE- XI

No Judge of the superior judiciary shall render support in any manner whatsoever, including taking or administering oath in violation of the oath, of office prescribed in the Third Schedule to the Constitution, to any authority that acquires power otherwise than through the modes envisaged by the Constitution of Pakistan.

respective military regimes, the judges were sent home. Justice Sh Shaukat Ali was removed on the basis of the reference but the decision of his removal remained controversial.

On March 9, 2007 the Chief Justice of Pakistan, Iftikhar Mohammad Chaudhry, was charged with "misconduct" and "misuse of authority" by President Musharraf and a reference was sent to the Supreme Judicial Council for a decision. Justice Javed Iqbal was sworn in as the acting chief justice presumably because Justice Bhagwandas, the senior-most judge after the chief justice, was out of the country. All these actions were justified under Article 209 of the Constitution. However, members of the bar, opposition leaders and many commentators, condemned the action on several grounds. Moreover, the public had its own perceptions of what became a landmark event, similar to the Maulvi Tamizuddin Khan case which laid the foundations for the erosion of democracy in Pakistan.

The charge against Justice Chaudhry was based primarily on a letter by TV personality and Supreme Court Advocate Naeem Bokhari. In his letter of February 16, 2007, Naeem Bokhari accused the chief justice of announcing decisions in court and then giving an opposite decision in the written judgment, insulting and intimidating lawyers, insisting on ostentatious protocol and using expensive cars and airplanes, and influencing decision-makers to help his son make his career in the bureaucracy without due merit.

Justice Iftikhar Chaudhry was the fifth judge to be proceeded against by the council. Justice Akhlaq Hussain was removed after such proceedings by Ayub Khan. Justice Safdar Shah, involved in the Bhutto case, was proceeded against by Ziaul Haq. In both cases the highest power in the land, both military rulers as it happened, were said to be annoyed with the judges. In two other cases, the charges were so flimsy that they were ridiculous. Justice Shaukat Ali was removed on the charge that he was doing business while being in the judiciary. Actually he was a co-partner in an arms firm of his family. Justice Fazal-e-Ghani was removed for having sold a gun he had brought from Britain for personal use. In a country as corrupt as ours, where cases of corruption and crime are condoned if people join the king's party, these kind of charges do not convince the public, whatever their legal validity.

Thus the people perceived the bringing of such charges against judges as attempts by the executive to keep the judiciary from interfering in the running of the state.

Another perception of the public was that the judiciary has been degraded. This was because the order by the government stated that the chief justice was "called" by the president. Moreover, the president chose to wear his uniform when he met the chief justice. At a symbolic level, as it appears in photographs, this implied that the army chief had summoned and confronted a chief justice.

This was obviously detrimental to the dignity of the highest judicial office in the land. As many members of the bar pointed out, chief justices are not summoned by presidents or prime ministers. Government spokesmen defended this action of the president on the grounds that he was only trying to find out what the chief justice said to the charges i.e. how he defended himself against them.

But then, the point is that the president was judging the chief justice whereas the only persons who can judge him are his brother judges. It is possible that the president was merely apprising the chief justice of the charges but if that was the case he could have done that through the mail or on the telephone. The summons was seen as detracting from the dignity of the judiciary.

In this context the public perception was that the chief justice was asked to resign and since he refused to do so he was proceeded against. This was seen as being

the chief justice's sense of his innocence though resignation is still not ruled out because most of the judges whose cases went to the SJC preferred to resign rather than be removed after a negative judgment by the President.

Despite all the negative rumours, the public did not see Justice Chaudhry as a bad judge. He may be all what Naeem Bokhari said he was but the public saw him as the man who gave an impeccably brave and patriotic judgment in the Steel Mills privatisation case.

The privatisation of steel mill was considered as being irregular and it would have cost the public dearly had it gone ahead. Similarly, the fact that he had brought down the cases in the Supreme Court from 38,000 to 10,000 during his tenure was seen as an achievement by the bar. The public did not know anything of this but it did know that he took notice of housing schemes which were environmentally disastrous.

Above all, he took suo moto action against the disappearances of citizens in violation of the habeas corpus act and the law of the land. The public thought this had annoyed the really powerful sections of the civil and military establishment which had moved in to reassert itself at the expense of the chief justice in particular and the judiciary in general.

The case brought Pakistan again to a judicial crisis. We are reminded of the Maulvi Tamizuddin Khan case. At that time, Governor-General Ghulam Muhammad had dismissed the government of Khwaja Nazimuddin. Tamizuddin Khan, the President of the Constituent Assembly, went to court against the judgment. The Sindh Chief Court ruled against the governor-general. However, the Federal Court, under Justice Munir, dismissed the case upholding the governor-general's action on purely technical grounds.

Since that day, everybody has accused Justice Munir of having opened the door to dictatorship in Pakistan. Justice Munir later hinted that he was under pressure and the courts would not have been obeyed if they had challenged the governor-general. It is possible that Munir thought the governor-general, who was supported by the army chief, would suspend the courts and declare emergency or martial law. However, if he had not given a wrong judgment he would have upheld the dignity of the judiciary. Martial law came anyhow but how much better it would have been if the judiciary had not sanctioned it.

When the case went to Supreme Judicial Council let us remember that there have been what Dr Inayatullah has termed "democracy-supporting judgments" in Pakistan's judicial history. Among these are: the Yousaf Patel case ⁶(1955), Asma Jilani case⁷ (1972), Benazir Bhutto case ⁸(1988), Haji Saifullah case ⁹(1988) and the Nawaz Sharif case ¹⁰(1993). Most did not make any real difference to the power structure, but in the Nawaz Sharif case President Ghulam Ishaq's decision to remove Nawaz Sharif was overturned and he returned to power.

Counsel for the non-functional chief justice of Pakistan Chaudhry Aitzaz Ahsan questioned the composition of the Supreme Judicial Council, and said he did not expect to get justice from the SJC in its present form. While addressing the Lahore

⁶ PLD 1955 FC 387

⁷ ASMA JILANI V. THE GOVERNMENT OF PUNJAB, PLD 1972 SC 139

⁸ Miss Benazir Bhutto Vs. Federation of Pakistan and others, PLD 1988 SC 416

⁹ Federation of Pakistan v Saifullah Khan case, PLD 1989 SC 75

¹⁰ Mian. Muhammad Nawaz Sharif v. President of. Pakistan , PLD 1993 SC 473

High Court Bar Association, Mr. Ahsan demanded open proceedings of the reference against Justice Chaudhry.

He argued that how come the council, whose one member was not even on speaking terms with the non-functional CJP, and the two others had references of misconduct pending against them, could dispense justice. He alleged the government's intentions in sending the reference to the SJC were mala fide, and this was the only reason it was avoiding open proceedings. He also demanded hearing in open court in the petition challenging the SJC's composition. Mr. Ahsan said there had been only two precedents when the council conducted in-camera proceedings in the past — one against Justice Shaukat Ali (retired) and the other against Justice Fazale Ghani (retired). In both cases, he said, the judges had requested for the in-camera proceedings, adding that in the present case the non-functional CJP had also requested for open proceedings.

He said though one of the charges against the suspended CJP pertained to use of special flights, the government itself provided a similar facility to the chief justices of the Lahore and Sindh high courts to reach Islamabad on March 9. If it was misuse of authority by the CJP, then how it was otherwise in the case of the two chief justices, he argued.

Aitzaz Ahsan believed that the government considered the suspended CJP a threat following some of his decisions like those in the Pakistan Steel Mill privatization and Muree project. He claimed the apex court judgment in the Steel Mill case was an indictment against Prime Minister Shaukat Aziz.

Criticising military generals, Mr. Ahsan said they always wanted to make political leaders their puppets. The military, he alleged, wanted to make Pakistan a national security state. He said welfare of the people and not the arms could ensure security of a state, adding that democracy was the only way to it.

The Lawyers' Movement, also known as the Movement for the Restoration of Judiciary or the Black Coat Protests, was the popular mass protest movement initiated by the lawyers of Pakistan in response to the former president and army chief Pervez Musharraf's actions of 9 March 2007 when he unconstitutionally suspended Iftikhar Muhammad Chaudhry as the chief justice of Pakistan's Supreme Court. Following the suspension of the chief justice, the Supreme Court Bar Association (SCBA) declared the judge's removal as an "assault on the independence of judiciary" and were backed by several political parties.

Four months into the movement, Musharraf caved under the "pressure of incessant nonviolent civil resistance" and reinstated Chaudhry as the chief justice on 20 July 2007. The Supreme Court cleared Chaudhry of all charges when restoring him to his earlier position. Nevertheless, the lawyers still continued their movement against Musharraf, declaring his actions and rule "illegal".

But by the decision of the Supreme Court the image of the state did suffer in some way or the other. The chief justice was acquitted the image of the presidency was tarnished.

Famous cases

The last case which was taken up by Supreme Judicial Council in was in 1971 against Mr. Justice Shoukat Ali and after detailed hearing it was held to remove him from his office on the ground of misconduct; he was represented by Mr. Manzoor

Qadir and M. Anwar Advocates while Sharif-ur-Din Pirzada appeared as Attorney General¹¹. Another case was taken up against Mr. Justice Akhlaque Hussain a Judge of the High Court of West Pakistan, in which SJC reported the President to remove the Respondent Judge on the ground of misbehaviour¹².

In 2007, President Pervez Musharraf suspended Chief Justice Iftikhar Muhammad Chaudhry and referred him to the Council on charges of corruption. However, Chaudhry contested the ability of the Council to form without the Chief Justice himself present, and the Council hearing was suspended by the Supreme Court. Later Council's Verdict was that Council was not valid without Chief Justice as according to Constitution of Pakistan Supreme Judicial Council can not be Completed, Validated, or Proceed without "de jure" Chief Justice, no matter whoever may be "de facto" or "acting Chief Justice" is and provided that Nobody can file "Petition" against "de jure" Chief Justice (In this scenario Chief Justice Iftikhar M. Chaudhary himself). So, Chief Justice, Mr. Chaudhary was restrained and found of No guilty.

It was held that recommendation of the chief justices of the high otherwise of a person to be appointed or confirmed as judge of high court would not fall within the scope of Article 209.¹³

Constitution of Pakistan 1973 Art. 209 (8)---Code of Conduct framed by Supreme Judicial Council for Judges of the Supreme Court and High Courts in Pakistan, Art, IX---Dissent or disagreement with the opinion of another Judge whether of equal or of inferior status has to be expressed in terms of courtesy and restraint---Principles elaborated.¹⁴

¹¹ Mr. President, (Referring Authority) v. Mr. Justice Shoukat Ali PLD 1971 SC 585

¹² The State v. Mr. Justice Akhlaque Hussain PLD 1960 SC 26

¹³ Asad Ali v/s Federation of Pakistan PLD 2000 SC 179.

¹⁴ 1995 SCMR 387 SUPREME-COURT, SIKANDAR A. KARIM Vs STATE

Constitution of Pakistan 1973 Arts. 203C & 209 --- Appointment of Judges of High Court as Judges of Federal Shariat Court --- Principles---Appointment of a sitting Chief Justice of a High Court or a Judge thereof in the Federal Shariat Court under Art.203C of the Constitution without his consent is violative of Art.209, Constitution of Pakistan which guarantees the tenure of office---Article 203C of the Constitution having been incorporated by the Chief Martial Law Administrator and Art. 209 of the Constitution having been enacted by the framers of the Constitution and also being beneficial and promoting independence of Judiciary, in case of conflict between the two, Art.209 of the Constitution shall prevail over Art.203C which detracts from dominant intent and spirit of the Constitution namely independence of Judiciary and such an appointment will be void--Supreme Court, therefore, directed that the cases of the appointees of the Federal Shariat Court be processed and be brought in line accordingly.¹⁵

Constitution of Pakistan 1973 Arts. 209(5), 199 & 184(3)---Supreme Judicial Council ---Reference--Procedure---Filing of a Constitutional petition for a direction to the Supreme judicial Council or to the President to initiate proceedings of a judicial misconduct against a Judge of a superior Court by a practicing lawyer or any other citizen of Pakistan is not admissible---Supreme Court or High Court cannot take upon itself the exercise to record even tentative finding that a particular Judge has committed misconduct warranting filing of a Reference against him under Art.209 of the Constitution.¹⁶

Arts. 209 & 199---Unconstitutional or invalid appointment of a Judge of superior Court---Supreme Judicial Council---Powers---Reference against a Judge of the superior Court to Supreme Judicial Council for holding an enquiry against him---Procedure---Invalidity and unconstitutionality of the appointment of a Judge of a superior Court are outside the purview of the enquiry under Art.209 of the Constitution but such appointment is open to be challenged before the High Court under Art. 199 of the Constitution---Remedy provided under Art.209 of the Constitution cannot be equated with the proceedings filed under Art. 199(1)(b)(ii) of the Constitution to challenge the unconstitutional appointment of a Judge of superior Court.¹⁷

Extra---constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Validity---Supreme Judicial Council---Judges of the Supreme Court and High Courts cannot be removed without resorting to the procedure prescribed in Art.209 of the Constitution---Cases of the Judges who ceased to be Judges of the Supreme. Court and High Courts by virtue of Oath of Office (Judges) Order, 2000,

¹⁵ 1996 PLD 324 SUPREME-COURT , AL-JEHAD TRUST Vs FEDERATION OF PAKISTAN

¹⁶ 1998 PLD 103 SUPREME-COURT, MUHAMMAD IKRAM CHAUDHRY Vs FEDERATION OF PAKISTAN

¹⁷ 1998 PLD 161 SUPREME-COURT, ASAD ALI Vs FEDERATION OF PAKISTAN

however, was hit by the doctrine of past and closed transaction and could not be re-opened¹⁸

Constitution of Pakistan 1973 Arts. 193 & 209---Appointment of High Court Judge---Recommendations of the Chief Justice of the High Court concerned and that of Chief Justice of Pakistan in respect of fitness or otherwise of a person to be appointed/confirmed as a Judge of the High Court, would not fall within the scope of Art.209 of the Constitution---Contention that a Judge once appointed in the High Court could not be removed, except in accordance with provisions of Art.209 of the Constitution was repelled.¹⁹

Arts. 209 & 184(3)---Provisional Constitution Order (1 of 1999), Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Oath of Office (Judges) Order (1 of 2000), Preamble--Constitution of Pakistan (1973), Preamble and Arts.184(3) & 209--Constitutional petition under Art.184(3) of the Constitution of Pakistan (1973), before Supreme Court calling in question the validity of Provisional Constitution Order, 1999 [as -amended], Oath of Office (Judges) Order, 2000 and Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Accountability, process of---Government shall accelerate the process of accountability in a coherent and transparent manner justly, fairly, equitably and in accordance with law---Judges of superior Courts were subject to accountability only in accordance with the methodology laid down in Art.209 of the Constitution of Pakistan (1973).²⁰

Constitution of Pakistan 1973 [As amended], Preamble---Constitution of Pakistan (1973), Arts.209 & 184(3)---Constitutional petition under Art.184(3) of the Constitution before Supreme Court---Vires of National Accountability Bureau Ordinance; 1999---Accountability of superior judiciary---Procedure---Judges of the superior Court's are not immune from accountability and it is for the President to make a reference under Art.209 of the Constitution if in a case such a course is desirable at his end.²¹

¹⁸ 2000 PLD 869 SUPREME-COURT, ZAFAR ALI SHAH Vs PERVEZ MUSHARRAF CHIEF EXECUTIVE OF PAKISTAN

¹⁹ 2000 PLD 179 SUPREME-COURT, GHULAM HYDER LAKHO HIGH COURT OF SINDH KARACHI Vs FEDERATION OF PAKISTAN

²⁰ 2000 SCMR 1137 SUPREME-COURT, ZAFAR ALI SHAH Vs PERVEZ MUSHARRAF

²¹ 2001 PLD 607 SUPREME-COURT, KHAN ASFANDYAR WLI Vs FEDERATION OF PAKISTAN

-Arts. 209(5), 184(3) & 187---Judges (Compulsory Leave) Order [President's Order 27 of 1970], Preamble---Constitutional petition under Art.184(3) of the Constitution before Supreme Court---Vires of Judges (Compulsory Leave) Order, 1970---Reference under Art.209(5) of the Constitution by the President of Pakistan dated 9-3-2007 against Chief Justice of Pakistan and order of the Supreme Judicial Council restraining the Chief Justice of Pakistan from acting as a Judge of the Supreme Court and/or Chief Justice of Pakistan and order dated 15-3-2007 passed by the President directing that the Chief Justice of Pakistan should be on leave and appointment of Acting Chief Justices of Pakistan (9-3-2007 and 22-3-2007)---Validity---Supreme Court, unanimously declared the petition under Art.184(3) of the Constitution to be maintainable, and by majority of 10 to 3 (Faqir Muhammad Khokhar, J, M. Javed Buttar, J and Saiyed Saeed Ashhad, J dissenting) set aside the Reference/direction by the President dated 9-3-2007---Judges (Compulsory Leave) Order, 1970 was unanimously declared as ultra vires of the Constitution and consequently the order of the President dated 15-3-2007 directing that Chief Justice of Pakistan shall be on leave was also unanimously declared to have been passed without lawful authority---Such invalidity, however, shall not affect the ordinary working of the Supreme Court or its discharging of any other Constitutional order/or legal obligations by the Acting Chief Justices of Pakistan during the period in question---Present declaration by the Supreme Court was so made by applying the de facto doctrine---Order of the President dated 9-3-2007 and order of the Supreme Judicial Council of the same date restraining the Chief Justice of Pakistan from acting as a Judge of the Supreme Court and/or the Chief Justice of Pakistan were also unanimously set aside as being illegal--However, since according to minority view on the question of validity of the direction (the Reference), in question, the said Reference had been competently filed by the President, therefore, the Supreme Court could pass a restraining order under Art. 184(3) read with Art.187 of the Constitution---Matter of accountability of the Chief Justice of Pakistan and issue that Chief Justice was not accountable, having not been raised before the Supreme Court, same did not require any adjudication---Held, Chief Justice of Pakistan (petitioner) shall be deemed to be holding the said office and shall always be deemed to have been so holding the same.²²

Provisional Constitution Order, 2007, Preamble---Oath of Office (Judges) Order, 2007, Preamble---Constitution (Amendment) Order (5 of 2007), Preamble---Provisional Constitution (Amendment) Order, (1 of 2007), Preamble---High Court Judges (Pensionary Benefits) Order (8 of 2007), Preamble---Supreme Court Judges (Pensionary Benefits) Order (9 of 2007), Preamble---Constitution of Pakistan (1973), Arts.188 & 209---Review of Supreme Court Judgment---Supreme Court, after reproducing some excerpts from the judgment under review, reaffirmed that all the acts and legislative measures including the amendment made in the Constitution and all other actions taken had been taken or done in the. interest of State necessity to

²² 2007 PLD 578 SUPREME-COURT, MR. JUSTICE IFTIKHAR MUHAMMAD CHAUDHRY, CHIEF JUSTICE OF PAKISTAN Vs THE PRESIDENT OF PAKISTAN through the Secretary

advance and promote the good of the people for the ordinary orderly running of the State---Chief Justice of Pakistan and the other Judges of the Superior Courts, after revival of the Constitution, having taken oath of office as provided by the Constitution and being holders of the constitutional office, all such Judges including the Chief Justices shall be governed by the Constitution---Rights, privileges or obligations so acquired, accrued or incurred, including their tenure of office were protected under the Constitution---Action in respect of the former Chief Justices and former Judges being a fait accompli and hit by the doctrine of past and closed transaction, could not be reopened and was irreversible and case of such Judges was fully covered by the law laid down in Zafar Ali Shah's case PLD 2000 SC 869---Said Judges had been retired and held entitled to draw pensionary benefits by virtue of High Court Judges (Pensionary Benefits), Order, 2007 and Supreme Court Judges (Pensionary Benefits) Order, 2007---No exception in circumstances, could be taken to the conclusion arrived at, the findings recorded and the directions given in the short order and the detailed judgment in the case under review---Petitioner could not be allowed to re-agitate the same points which had already been dealt with and determined by the Court---Review petition was dismissed.²³

Art. 209---Supreme Judicial Council---Reference to Supreme Judicial Council---Scope--Direction cannot be issued to the. Supreme Judicial Council to initiate proceedings of judicial misconduct against any Judge of a Superior Court at the instance of a lawyer or a citizen---Supreme Court as also a High Court is prohibited to take upon themselves the exercise to record even tentative finding that a particular Judge has committed misconduct warranting filing of a Reference against him under Art.209 of the Constitution---On the same analogy, no direction could be issued to the Supreme Judicial Council to stay its hands off the Reference filed against the (former) Chief Justice of Pakistan, what to speak of quashing the Reference altogether.²⁴

Art. 209---Appointment/removal of Judges of the Superior Courts---Held, in the scheme of Constitution neither a Judge of Superior Court can be appointed except in accordance with the method prescribed in the Constitution nor he can be removed from his office except in accordance with the provisions of Art.209 of the Constitution---Consultative process for appointment of Judges of Superior Courts as provided in the Constitution must not be interfered with and interrupted by the Executive by ignoring the opinion of the Chief Justice concerned and Chief Justice of Pakistan---Judges of Superior Courts, cannot be removed from their offices except in accordance with the provisions of Art.209 of the Constitution but since they are not immune from accountability, therefore, if situation arises and the President of Pakistan also considers necessary, the proceedings can be initiated against a Judge with respect to

²³ 2008 PLD 615 SUPREME-COURT, TIKA IQBAL MUHAMMAD KHAN Vs GENERAL PERVEZ MUSHARRAF, CHIEF OF ARMY STAFF, RAWALPINDI

²⁴ 2008 PLD 178 SUPREME-COURT, TIKA IQBAL MUHAMMAD KHAN Vs General PERVEZ MUSHARAF

his conduct in terms of Art.209 of the Constitution---Principles---Judicial history of Pakistan with regard to victimization of the Judges of the Superior Courts at the hands of executive traced.²⁵

Art. 209---Misconduct---Assumption of power by an authority not mentioned in the Constitution would be unconstitutional, illegal and void ab initio and not liable to be recognized by any Court, including the Supreme Court---Judge playing any role in the recognition of such assumption of power would be guilty of misconduct within the ambit of Art.209 of the Constitution.²⁶

Provisional Constitution Order [1 of 2007]---Oath of Office (Judges) Order, 2007---Provisional Constitution (Amendment) Order, 2007---Constitution (Amendment) Order [5 of 2007]---Constitution (Second Amendment) Order [6 of 2007]---Islamabad High Court (Establishment) Order [7 of 2007]---High Court Judges (Pensionary Benefits) Order [8 of 2007]---Supreme Court Judges (Pensionary Benefits) Order [9 of 2007]---Supreme Court (Number of Judges) Act (XXXIII of 1997)---Constitution of Pakistan (1973), Arts.176, 128, 89, 209(8), 177 & 184(3)---Constitutional petitions before Supreme Court under Art. 184(3) of the Constitution---Removal of Judges of Supreme Court and High Courts in violation of Art.209 of the Constitution; purported acts done by General Pervez Musharraf (Retd.) between 3-11-2007 and 16-12-2007 aimed at suspending and amending the Constitution of Pakistan through several instruments; appointment of Judges of superior judiciary on or' after 3-11-2007 uptill 23-3-2008 without consultation of de jure Chief Justice of Pakistan; opinion of Mr. Justice Abdul Hameed Dogar, as then he was called, that term of office of two Additional Judges of High Court of Sindh had not expired and two judgments of the Supreme Court, dated 23-11-2007 and 15-2-2008 on Constitutional Petitions Nos.87 and 88 of 2007 filed by Tika Iqbal Muhammad Khan and Watan Party reported in (PLD 2008 SC 6 and PLD 2008 SC 178), and Review Petition No.7 of 2008 reported in (PLD 2008 SC 615)---Validity---Held, General Pervez Musharraf (Rtd.) in the garb of Emergency Plus and the Provisional Constitution Order made amendments in the Constitution by self-acquired powers which were all unconstitutional, unauthorized, without any legal basis, hence, without any legal consequences---Mr. Justice Abdul Hameed Dogar, took oath as CJP in violation of the order dated 3-11-2007 passed by a 7 member Bench headed by de jure Chief Justice of Pakistan and in pursuance of unconstitutional instruments introduced by General Pervez Musharraf (Rtd.), additionally knowing well that the office of Chief Justice of Pakistan was not lying vacant---Judges who were either retired or were not holding any judicial office, besides those in High Courts took fresh oath on their appointment on and after 3-11-2007 till 15-12-2007 in Supreme Court where the

²⁵ 2008 PLD 522 SUPREME-COURT, ACCOUNTANT-GENERAL, SINDH Vs AHMED ALI U. QURESHI

²⁶ 2009 PLD 408 KARACHI-HIGH-COURT-SINDH, SINDH HIGH COURT BAR ASSOCIATION, through Honorary Secretary Vs FEDERATION OF PAKISTAN through Ministry of Law and Justice, Islamabad

full strength of Judges along with an Ad hoc Judge appointed under the Constitution were already working and thus there was no vacancy---Similarly, many Judges took oath in Provincial High Courts; all of them did so in violation of order dated 3-11-2007 passed by 7 member Bench headed by de' jure Chief Justice of Pakistan---Four incumbent Judges already functioning in the Supreme Court took fresh oath under the influence of and in pursuance of unconstitutional steps of General Pervez Musharraf (Rtd.)---Petition No.73 of 2007 filed by Mr. Justice (Rtd.) Wajihuddin Ahmad (PLD 2008 SC 25) challenging the eligibility of General Pervez Musharraf (Rtd.) to contest for the office of President in Uniform was dismissed purportedly on merits although the record maintained in the Supreme Court revealed otherwise---Decisions in the cases of Tikka Iqbal Muhammad Khan granting validity to the actions of General Pervez Musharraf (Rtd.) were per incurium, coram non iudice, without any legal basis hence, of no legal consequences---Amendments in the Supreme Court (Number of Judges) Act, 1997 by way of Finance Act, 2008 raising the strength of Judges in Supreme Court from 17 (1+16) to 30 (1+29) seemingly aimed at providing allocation of funds for increasing the strength of Judges was unconstitutional because the strength of Judges of Supreme Court was to be increased by Parliament as defined in Article 50 to be read with Article 260 of the Constitution which defined the acts of Parliament---In the past the Courts of the time used to extend favours empowering the adventurers to amend the Constitution in actual effect were to achieve their overt and covert agenda but this time, such powers were acquired by General Pervez Musharraf (Rtd.) himself through the Provisional Constitution Order and brought a host of unconstitutional amendments for his own benefits--Present representatives of people firmly believe in strong and independent judiciary and the democratic system which was evident from the fact that the deposed Judges of Supreme Court, High Courts and the de jure Chief Justice of Pakistan were restored with effect from 3rd of November, 2007 implying that the present representatives of people denied the validity of the actions of General Pervez Musharraf (Rtd.) taken from 3-11-2007 to 15-12-2007 during which the Constitution remained suspended---Judgments purported to have been delivered in Constitutional Petitions bearing Nos.87 and 88 of 2007 in the case titled as Tika Iqbal Muhammad Khan v. General Pervez Musharraf and others (PLD 2008 SC 6 and PLD 2008 SC 178) and the judgment dated 15-2-2008, purported to have been passed in C.R.P.No.7 of 2008 titled as Tika Iqbal Muhammad Khan v. General Pervez Musharraf and others (PLD 2008 SC 615) and any other judgment/judgments passed on the strength of the said two judgments were declared to be void ab initio---Proclamation of Emergency issued by General Pervez Musharraf as the Chief of Army Staff (as he then was) on November 3, 2007; the Provisional Constitution Order No.1 of 2007 issued by him on the same date in his said capacity; the Oath of Office (Judges) Order of 2007 issued by him also on the same date though as the President of Pakistan but in exercise of powers under the Proclamation of Emergency and the Provisional Constitution Order No.1 of 2007; Provisional Constitution (Amendment) Order, 2007 issued by him likewise on 15-11-2007; the Constitution (Amendment) Order, 2007 being President's Order No.5 of 2007 issued on November 20, 2007; the Constitution (Second

Amendment) Order, 2007 being the President's Order No.6 of 2007 issued on 14th December, 2007; the Islamabad High Court (Establishment) Order, 2007 dated 14th December, 2007 being the President's Order No.7 of 2007; the High Court Judges (Pensionary Benefits) Order, 2007 being President's Order No.8 of 2007; the Supreme Court Judges (Pensionary Benefits) Order, 2007 being President's Order No.9 of 2007 dated 14th December, 2007 were declared to be unconstitutional, ultra vires of the Constitution and consequently being illegal and of no legal effect---Legal consequences elaborated.²⁷

Arts. 209, 199(5) & 184(3)---Supreme Judicial Council---Constitutional jurisdiction of High Court under Art.199(5) of the Constitution---Scope---Article 199(5) of the Constitution allowed issuance of writ, inter alia, to all courts and to tribunals of all kinds, it kept certain courts and tribunals outside the said purview and commanded that no writ could issue to the Supreme Court of Pakistan, to a High Court and to a court or a tribunal established under any law relating to the Armed Forces---Significant omission of the Supreme Judicial Council from such protected arena is more than revealing in the matter of determining the vulnerability of the Supreme Judicial Council to writ jurisdiction---Principles.

Preamble---Validation of Laws Act (LXIII of 1975), Preamble---Constitution of Pakistan (1973), Arts.184(3) & 209---Vires of Judges (Compulsory Leave) Order, 1970---Mere reading the provisions of Judges (Compulsory Leave) Order, 1970 with the provisions of the Constitution clearly shows that it is not a valid piece of legislation as the same is in derogation of the mandatory provisions of the Constitution and clearly hit by the independent character of the organ of judiciary---Judges (Compulsory Leave) Order, 1970 is ultra vires the Art.209 of the Constitution---If provisions of both Art.209 of the Constitution and provisions of Judges (Compulsory Leave) Order, 1970 be read together then both are conflicting with each other---Judges (Compulsory Leave) Order, 1970 validated under the Validation of Laws Act, 1975 was violative of the provisions of the Constitution and fundamental rights and therefore, liable to be struck down---Principles.

Art. 209---Supreme Judicial Council---Status---Scope---Proceedings of Supreme Judicial Council---Nature---Held, Supreme Judicial Council is a forum created by the Constitution but the Constitution itself has refused to grant it the status of court---Findings of the Supreme Judicial Council and its report to the President are only "recommendatory in nature".

Arts. 209, 187 & 184(3)---Order of Supreme Judicial Council to the Chief Justice of Pakistan not to perform any functions as a Judge of the Supreme Court and/or as the Chief Justice of Pakistan---Validity---Held, Supreme Judicial Council was not possessed of any power to order a Judge, leave alone the Chief Justice of Pakistan,

²⁷ 2009 PLD 789 SUPREME-COURT, SINDH HIGH COURT BAR ASSOCIATION through Secretary Vs FEDERATION OF PAKSITAN through Secretary, Ministry of Law and Justice, Islamabad

not to perform functions of his office---Such order of the Supreme Judicial Council being not a valid and a bona fide exercise of powers, could not be sustained and was set aside by the Supreme Court being illegal, without jurisdiction and of no legal effect--
-Principles. Arts. 209(5) & 260---Only forum to inquire into the conduct of Judges of Superior Courts including the Chief Justice of Pakistan in terms of Art.209(5) of the Constitution is Supreme Judicial Council---Procedure and principles. Arts. 209(5)(6), 210, 211 & 184(3)--- Constitutional petition under Art.184(3) of the Constitution filed by the Chief Justice of Pakistan impugning amongst others, the validity of the direction (generally known as a "Reference") made by the President under Art.209(5) of the Constitution calling upon Supreme Judicial Council to inquire into the allegations of misconduct committed by the Chief Justice of Pakistan; the composition of the Supreme Judicial Council and its competence to inquire into the conduct of the Chief Justice of Pakistan; validity of the order denuding the Chief Justice of Pakistan of the powers conferred on him by the Constitution and the vires of the manner in which the Supreme Judicial Council was proceeding with the same---Jurisdiction of Supreme Court to deal with the matter in question despite the ouster clause contained in Art.211 of the Constitution---Scope and extent---Expression "proceedings" used in Art.211 of the Constitution---Connotation.²⁸

Arts. 178, 209(8) & Third Sched. ---Code of Conduct for Judges of the Supreme Court and High Court, Art.4.²⁹

Arts. 178, 209(8) & Third Sched.---Code of Conduct for Judges of the Supreme Court and High Courts, Art.4---Impartiality of a Bench---"Near relative" of a Judge---Scope--- Judge related to one of the litigants---Judge refusing to recuse himself from hearing such a case---Scope---Sister of litigant in question was married to the Judge's brother--- Concerned Judge stated that he could not recall the last time he met said litigant, it may have been 20 years ago or 16 years ago or perhaps at some occasion, which he could not recall, and that he had no basis for regarding or treating said litigant as a "near relative"---Judge himself had to make a determination as to whether or not his relationship with any other person was such that he should not hear a particular case in which such person was a party---Concerned Judge did not find any reasons whatsoever not to sit on the Bench of the present case--- Objection regarding constitution/impartiality of the present Bench was repelled accordingly.

Arts. 178, 209(8) & Third Sched.---Code of Conduct for Judges of the Supreme Court and High Courts, Art.4---Impartiality of a Bench---"Near relative" of a Judge---Judge related to one of the litigants---Recusal of a judge from hearing such a case---Scope--- Judge himself had to make a determination as to whether or not his relationship with any

²⁸ 2010 PLD 61 SUPREME-COURT, CHIEF JUSTICE OF PAKISTAN IFTIKHAR MUHAMMAD CHAUDHRY Vs PRESIDENT OF PAKISTAN through Secretary

²⁹ 2014 PLD 657 SUPREME-COURT, INDEPENDENT MEDIA CORPORATION Vs FEDERATION OF PAKISTAN

other person was such that he should not hear a particular case in which such person was a party---Only such persons could trigger recusal of a Judge who were considered to be close by a Judge---Holy Qur'an directed Judges to act fairly, justly and impartially even if they were hearing cases involving their own relatives---Article 4 of the Code of Conduct for Judges of the Supreme Court and High Courts or Oath of Office of Judges of the Supreme Court (Art.178 of the Constitution) or the verses from the Holy Qur'an did not impose a bar on a Judge from hearing cases unless there was cause under Art.4 of the said Code of Conduct--- Conscience of the Judge himself must determine his decision whether to sit on a Bench or not.³⁰

Art. 209 & Part VII [Arts. 175 to 212] ---Independence of judiciary---Judicial restraint, exercise of---Reasons for superior judiciary in Pakistan to exercise its powers with restraint and wisdom stated.³¹

Arts. 177 & 193 --- Appointment of Supreme Court and High Court Judges-- Appointment of a Judge has to be transparent so that the litigant public and people at large have faith in the independence of Judiciary --- Appointment of a Judge and the mode and manner in which he is appointed has close nexus with the independence of Judiciary and cannot be separated from each other --- Words "after consultation" employed in Arts. 177 & 193 of the Constitution of Pakistan connote that the consultation should be effective, meaningful, purposive, consensus oriented, leaving no room for complaint of arbitrariness or unfair play and involving participatory consultative process between the consultees and also with the executive --- Constitutional conventions can be pressed into service while construing a provision of the Constitution --- Acting Chief Justice, however, is not a consultee as envisaged by Arts. 177 & 193 of the Constitution and, therefore, mandatory Constitutional requirement of consultation is not fulfilled by consulting an Acting Chief Justice except in cases where the permanent Chief Justice concerned is unable to resume his functions within 90 days from the date of commencement of his sick leave because of his continuous sickness --- Opinion of the Chief Justice of Pakistan and the Chief Justice of High Court as to the fitness and suitability of a candidate for judgeship is 'entitled to be accepted in -the absence of very sound reasons to be recorded by the President/Executive --- Consultation for the appointment/ confirmation of a Judge of a Superior Court by the President/Executive with the consultees mentioned in Arts. 177 and 193 of the Constitution being mandatory, any appointment/confirmation made without consulting any of the consultees as interpreted herein, would be violative of the Constitution and, therefore, would be invalid --- If the President/Executive appoints a candidate found to be unfit and unsuitable for judgeship by the Chief Justice of Pakistan and the Chief Justice of the High Court concerned, that will not be a proper exercise of power under the relevant Article of the Constitution --- Supreme Court, therefore, directed that upon the appointment of the permanent Chief Justices in the High Courts where

³⁰ 2014 PLD 650 SUPREME-COURT, INDEPENDENT MEDIA CORPORATION Vs FEDERATION OF PAKISTAN

³¹ 2015 PLD 401 SUPREME-COURT, DISTRICT BAR ASSOCIATION, RAWALPINDI Vs FEDERATION OF PAKISTAN

there is no permanent incumbent or where there are permanent incumbents already, they shall process the cases of the High Courts' Judges accordingly within one month from 20th March, 1996 (date of the order of Supreme Court) or within one month from the date of assumption of office by a permanent incumbent, whichever is later in time and to take action for regularizing the appointments/confirmations of Judges recently appointed confirmed accordingly --- Chief Justice of Pakistan will take appropriate action for recalling permanent Judges of the Supreme Court from the High Court's where they are performing functions as Acting 'Chief Justices and also shall consider desirability of continuation or not of appointment in the Supreme Court of Ad hoc/Acting Judges³².

Recent History

The Supreme Judicial Council (SJC) formally indicted Auditor General Pakistan (AGP) Mohammad Akhtar Buland Rana on charges of financial impropriety and abuse of power for personal benefit. AGP Buland Rana, facing two references for his removal from the high office. The National Assembly Secretariat's reference, endorsed the charge of "misconduct" framed by the Public Accounts Committee (PAC), saying the AGP Rana pocketed around Rs4.7 million of the exchequer in excess salary and privileges, and suggested the SJC remove Rana from his office. Under Article 168(2) of the Constitution, the auditor general, who is administered oath by the chief justice for being a constitutional office, can only be removed by invoking SJC under Article 209 of the constitution. On September 26, 2014 the SJC had issued a show-cause notice to AGP Rana with the direction to controvert the allegations leveled in the reference against him. Former chief justice Iftikhar Mohammad Chaudhry had sworn in Mr. Rana as 17th AGP on August 27, 2011, even though the CJ had questioned his candidature in a tussle with the then PPP government by seeking a clarification from the presidency over the choice. The PML-N, then the main opposition, also had opposed Rana's appointment, alleging he had dual nationality. And Chaudhry Nisar Ali Khan, then leader of the opposition in the National Assembly, had resigned as the chairman PAC after Mr. Rana got the appointment. Mr. Rana again came under spotlight when as AGP he questioned the sitting Prime Minister Nawaz Sharif's decision to retire the Rs480 billion circular debt without a pre-audit³³.

Pakistan Bar Council requested the chief justice of Pakistan to activate the Supreme Judicial Council under Article 204 of the constitution. In an emergent meeting of members of the Pakistan Bar Council held under the chairmanship of Senator Barrister Farogh Naseem, Vice Chairman PBC, the chief justice of Pakistan has been requested to activate the forum of the Supreme Judicial Council under article 209 of the constitution. It was resolved that the Pakistan Bar Council is committed to strive for merit in the matters of administration of justice. Vice Chairman made it clear that under his captaincy merit

³² Al-Jihad Trust--- Vs--- Federation of Pakistan, P L D 1996 Supreme Court 324

³³ Published in Dawn, December 12th, 2014

alone will be the criteria and, therefore, the CJP was requested to activate the Supreme Judicial Council. He further stated not only the Supreme Judicial Council will have to be activated, but the disciplinary committees of the Pakistan and provincial bar councils are required to dispense unmitigated justice so that any black sheep in the legal profession is struck off from the advocates' rolls³⁴.

In the wave of accountability in the country, it seems timely action by the Honorable Chief Justice of Pakistan (CJP) to make the judiciary accountable as the CJP earmarked the New Judicial Year 2015-2016 as "a year of judicial accountability". The outgoing chief justice also pointed out significant flaws in our judicial system. The Pakistan Bar Council (PBC) has recently asked the Supreme Court (SC) to restrain all those judges of the superior judiciary against whom complaints are pending before the Supreme Judicial Council (SJC) from performing their duties. Supreme Judicial Council (SJC) which was not functioning for the last about two decades and representatives of legal fraternity were demanding of its restoration. It is the first time that a voice for judicial accountability has echoed in the SC and PBC. So, this opportunity should be availed to reform and strengthen our justice system. The chief justice said around 90% of the complaints filed against the judges of superior judiciary had become outdated as the council had been inactive for the past many years. The vast majority of references had become infructuous since most of those judges had retired after completing their terms. The CJP also said the remaining 10% complaints were "in the pipeline" and the SJC would contemplate invoking Article 209 over these complaints. Likewise, SC's senior-most judge Justice Saqib Nisar in his judgment on the 21st Constitutional Amendment case had observed no judge of a superior court in Pakistan had ever been prosecuted in a criminal court³⁵.

Judicial independence has long been a flashpoint in Pakistan, as illustrated by the movement nearly a decade ago to reinstate the unlawfully deposed former chief justice Iftikhar Chaudhry. However, accountability has largely been absent from this discourse. Without accountability, independence has the potential to act as a shield behind which judges have the opportunity to conceal possible unethical behaviour. Indeed, judicial accountability is part and parcel of judicial independence, since a judge whose conduct and decisions are influenced by extra-legal elements cannot be independent. Under international standards, including UN basic principles on the independence of the judiciary, therefore, the independence and accountability of the judiciary are inextricably linked.

Chief Justice Jamali's focus on accountability within the judiciary is welcome, as corruption in the judiciary is a long-standing and chronic issue in Pakistan. Transparency International's corruption perception surveys, for example, frequently

³⁴ Published in The Nation newspaper on 14-Feb-2016

³⁵ Published in The Express Tribune, April 12th, 2016.

place the judiciary as one of the most corrupt institutions in the country (along with the police).

Chief Justice Jamali's focus on accountability in all tiers of the judiciary, including the high courts and the Supreme Court, is an important aspect of the accountability drive. In the past, where judges have acknowledged corruption in the judicial institution, the focus has been limited only to judges in the subordinate judiciary. The National Judicial Policy adopted by the SC in 2009, for example, recommended that strict action be taken against district and sessions judges who carry a "persistent reputation of being corrupt". However, while judges of the superior courts were encouraged to decide cases expeditiously, there was no recognition of corruption or other misuse of authority by judges of the supreme and high courts in the policy. Corruption in the judiciary has been a long-standing and chronic issue in the country. The chief justice's vision on accountability rests on 'activating' the Supreme Judicial Council (SJC), which under Article 209 of the Constitution is tasked with carrying out inquiries into the capacity and conduct of SC and high court judges.

The Supreme Judicial Council comprises the chief justice of Pakistan, the two most senior judges of the SC, and the two most senior chief justices of the high courts. Disciplinary proceedings are initiated before the Council if there is information from 'any source', or it is the opinion of the president of Pakistan, that a judge from the superior judiciary is either incapable of performing his or her duties due to mental or physical incapacity, or that he or she may have engaged in misconduct. A finding of guilt by the SJC is the only method by which a judge of the SC or of a high court can be removed. The chief justice has acknowledged that the SJC has been rendered ineffective because of prolonged delays in deciding complaints: according to the chief justice, 90pc of cases before the SJC have become moot, as the accused judges retired while their cases were still pending. In addition, especially in the recent past, military governments and judges of the SC have also undermined the authority and the constitutional role of the SJC.

The most glaring (and damaging) recent example occurred after Gen Musharraf's proclamation of emergency in 2007, when the unlawful sacking of then chief justice Iftikhar Chaudhry and other judges of the SC and high courts and was justified in the name of 'judicial accountability'. These judges were dismissed without the involvement of the SJC. Ironically, under the leadership of chief justice Chaudhry, the process of circumventing the SJC continued. Following restoration in 2009, the SC gave at least 72 judges who were accused of taking oath under Musharraf's provisional constitution the option of resigning or facing contempt of court charges. Their plea to appear before the Supreme Judicial Council for hearing was dismissed by the SC. In this context, therefore, Chief Justice Jamali's focus on rejuvenating the SJC to perform its constitutional role is a welcome move. The process of judicial accountability, however, will require much more:

First, measures must be taken to ensure that disciplinary proceedings are not used as a means of intimidation, harassment, or retaliation against judges for exercising their judicial functions independently and diligently. At the minimum, this would mean that disciplinary proceedings against judges are strictly according to the provisions of the

Constitution and international standards, and must meet all fair trial and due process guarantees. Second, transparency should be a key aspect of disciplinary proceedings against judges. The number of cases referred to the SJC; the legal and evidentiary bases for the complaints; the time taken for adjudication; and the outcomes of the proceedings must be made public — both to maintain the public's confidence in the administration of justice and also to protect the interests of the parties involved. Third, what amounts to judicial misconduct must be clearly defined and must be appropriate under the rule of law. While the current understanding of misconduct seems limited to financial corruption, nepotism and misuse of authority, perhaps what is also needed is the recognition of the role of judges in undermining human rights protections or facilitating violations or impunity for such violations. One of the ways this can be done is to revise the judicial code of conduct to bring it in line with international standards, including reflecting the duty of judges to guarantee and protect human rights. Fourth, the judges cannot be held accountable like the manager of a football team or an employee of a corporate body. The very nature of the judicial function requires the independence of the judiciary so that judges can decide cases without fear and favour. If a judge could be removed just because a politician or a senior judge does not like his decision, that will undermine the possibility of a fair trial. It may also lead judges to make decisions pleasing those who could remove or promote them. Therefore, judges should be accountable in different ways: accountability to senior judges through the system of a writ, appeal, and revision; accountability to the public through the publication of judicial decisions and annual judicial statistics; accountability through the SJC. These means to ensure a considerable degree of accountability in the judiciary. The judiciary may also promote accountability in its own ranks making the appointment process more transparent. It will lend institutional credibility and independence to the judiciary.

The 18th amendment attempted to make the appointment process of judges more inclusive by allocating some role to a Parliamentary Committee (Art.175-A) which was diluted through the 19th amendment. In the SC judgment on the 18th and the 21st amendment, due attention has not been brought to the matter of judicial appointments suggesting a double-ended constitutional mechanism for the nomination of judges. It may be argued that nomination of judges by the concerned Chief Justice of High Court alone amounts to a sort of discrimination in the selection process. Under this process, only those are considered for appointment who are nominated at the sole discretion of chief justice of High Court. So, a nomination at the first instance should be made by a constitutionally composed body of judges and lawyers to make the first nomination an objective process.

In the United States, the Senate Judiciary Committee consisting of eighteen members has a significant role in the process of appointing Supreme Court justices. In Canada, the lawyers submit a written application to a screening committee consisting of judges, lawyers, government officials and other public members before their appointment as judges. In Pakistan, the recommendation of the Judicial Commission and the Parliamentary Committee may also be made public. The people should know why a particular lawyer has been preferred for nomination and appointment on others. The judicial appointments may not be treated as a 'state secret' as doing justice begins with

an objective and open procedure of appointments of judges. Mystique, if any, in the judicial appointments may not foster judicial accountability. The process of accountability should begin from the bench and bar both. In keeping with the promise of our Constitution (Article 37) to provide 'inexpensive and expeditious justice', the bar should hold lawyers accountable for their professional negligence in the conduct of cases and behaviour towards litigants and courts, and the bench should hold fellow judges accountable for violating the judicial code of conduct. Bar councils should constitute effective disciplinary committees to decide pending applications against lawyers quickly and the SJC should decide pending complaints as per mandated by the Constitution.

Finally, And finally, judicial immunity under Article 77 of the Penal Code and other provisions of the law which protect judges from liability resulting from their 'good faith' judicial actions, should never insulate judges from prosecution for serious crimes and crimes under international law. If carried out fairly, expeditiously and transparently, the judicial accountability drive initiated by the chief justice can be a step towards restoring public confidence and trust in the judiciary, which has long suffered because of neglect of the problems plaguing the institution. It will also bring Pakistan closer to an independent judiciary, in a truer sense of the term. Our justice system can be reformed only if members of the legal profession implement their farewell sermons and speeches in letter and in spirit. Thus, we can hope that the declared Judicial Year 2015-2016 ushers an era of institutional accountability in Pakistan. If the bench and bar succeed to initiate the process of accountability in our legal institutions, it will go a long way to uplift the legal professions and make other institutions accountable to an independent judiciary.

In September last year, CJP Jamali in his first speech after taking oath of his office had vowed to make the SJC effective. On October 30, 2015, during the tenure of the current chief justice, the council has already held a couple of meetings to listen to grievances against judges. In some cases, further proceedings have also been initiated by the council. However, the media has been restrained from publishing or airing news items about the council's proceedings without verification and confirmation from the SJC Secretariat. It has been learnt that more than three dozen complaints are pending with the council. In the recent past, lack of self-accountability within the judiciary has been questioned.

According to press reports the Supreme Judicial Council (SJC) has initiated proceedings against six superior courts judges for their alleged misconduct and use of authority including Justice Mazaher Ali Akbar Naqvi, Justice Mazhar Iqbal Sidhu and Justice Shahid Hameed Dar of the Lahore High Court, Chief Justice Anwar Khan Kasi of Islamabad High Court for alleged illegal appointments and misuse of authority and Justice Shoukat Aziz Siddiqui of Islamabad High Court for alleged misuse of authority and Justice Daud Khan of Peshawar high Court of alleged land grabbing. The SJC has taken action against these based on complaints reported by different newspapers. The council is invoking its jurisdiction under Article 209 of the Constitution against superior court judges after eight years. Last time the SJC had proceeded against former chief justice Iftikhar Muhammad Chaudhry in 2007, though the action was later suspended by

the Supreme Court. According to Article 209 of the Constitution, the SJC comprises the chief justice of Pakistan, two senior most judges of the Supreme Court and as many senior-most chief justices of high courts. The council is also empowered to hear complaints against top government functionaries such as NAB chairman, ECP members, AGP, etc. SJC's proceedings are always in-camera and the Supreme Court registrar serves as secretary to the council.

A judge of the Lahore High Court Justice Mazahar Ali Akbar Naqvi has approached the Supreme Court by filing a petition under the enforcement of fundamental rights clause of the constitution, challenging a show-cause notice issued to him by the Supreme Judicial Council (SJC) over alleged misconduct. Headed by Chief Justice Anwar Zaheer Jamali, the SJC had issued the show-cause notice to the judge on April 19, 2016 under Paragraph 9(1) of the Supreme Judicial Council Procedure of Enquiry (SJCPE), 2005. The show-cause had required the judge to submit his explanation within a period of 14 days and in case no reply was made, it will be deemed that the judge had nothing to offer in reply. The filing of the petition under Article 184(3) of the Constitution is reminiscent of the April 18, 2007, episode when former chief justice of Pakistan Iftikhar Muhammad Chaudhry filed a similar petition before the apex court, challenging the move of then president retired Gen Pervez Musharraf to file a reference against him on misconduct and abuse of powers. The then suspended chief justice, Iftikhar Chaudhry, had filed the petition through his counsel the day his fate as the highest adjudicator of the country was being discussed by the SJC. Later on July 20, 2007, a 13-judge Supreme Court bench headed by Justice Khalilur Rehman Ramday reinstated Justice Chaudhry to his position as chief justice of Pakistan.

Now the fresh petition by the sitting high court judge pleaded before the Supreme Court to declare the show-cause notice, as well as all acts leading up to the issuance of the notice, as unlawful, unconstitutional, without jurisdiction and contrary to public interest and in violation of Articles 209(5) (SJC), 9 (security of person), 10A (fair trial), 19 (freedom of speech) and 25 (equality of citizens). The petition also asked the apex court to declare the SJCPE unconstitutional as being violative of Articles 10A and 25, read with Article 8 of the Constitution and, therefore, liable to be struck down. The petition has also pleaded for the grant of the status quo in the action proposed to be taken against the petitioner pending decision of the matter³⁶.

Conclusion

The Supreme Judicial Council is an important institution under the constitution and it consists of the Judges so the Supreme Judicial Council has a direct relationship with the judiciary. Its functions include making a Code of Conduct and control over the

³⁶ Published in Dawn, April 30th, 2016

Judges activates and their conduct for ensuring justice. The judges are required to abide by the rules and principles formed by the Council.

Supreme Judicial Council in Pakistan has become an illusion. Unless activated in the real sense, it may well become a delusion. Urgent steps have to be immediately taken to make this constitutional body functional and effective. Otherwise, self-accountability in judicial system of Pakistan is likely to become an inane myth. Tout-Mafias are operating in all High Courts of Pakistan. Members of these groups are practicing Lawyers who have become affluent through corruption and corrupt practices. They sponsor Judges who carry out open corruption with the active support of black-sheep amongst elected Representatives of Lawyers. A Large number of References on the subject noted above have been filed. However, for all practical purposes, the constitutional forum of Supreme Judicial Council has remained dormant since decades. It had not been convened for a long time. This is tending to damage the public confidence in Superior Judiciary. The Media talk shows are adding fuel to the fire by openly discussing the conduct of judges including the members of the Supreme Judicial Council. This situation must not continue. Judges are not sacred cows. They should use the privilege made available to them to conduct their own accountability. Delaying the decision of pending references on merits shall cause further irreparable damage and loss to the already eroded image of the judiciary. Let's see, what are the results of present move by the Chief Justice of Pakistan to make Supreme Judicial Council a vibrant and effective institution. By holding a fair and expeditious proceedings on references pending before Supreme Judicial Council it can set an example for all the superior court judges to abide by their code of conduct. This is the last hope of restoring the confidence and trust of the Nation in Judiciary which is at its lowest ebb.

ⁱ Zafar Iqbal Kalanauri, Mediator & Advocate Supreme Court of Pakistan, Adjunct Faculty of Law at SACHOL, Lahore University of Management Sciences (LUMS), SAF Center, #3 3rd Floor, 8-Fane Road Lahore 54000, Pakistan, Cell: (92) 300-4511823 & 314-4224411
E-mail: kalanauri@gmail.com ; Web: <http://www.zklawassociates.com>