

The Ultimate Arbiter of the Institution of Executive: Parliament or Supreme Court?

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ABSTRACT

The paper brings in view the functions of the judiciary where it challenged the sovereignty of the Parliament with focus on the government affairs from 2008-2013. It happened twice when the judiciary stepped out of its bounds; first, the conviction of Prime Minister Yousaf Raza Gillani in the contempt of court case, and the other is Memogate scandal. Both, constitutionally and legally, fall in the domain of Parliament. In the post-18th Amendment scenario, it is only the prerogative of Parliament in power to de-seat a sitting prime minister. However, in the absence of 58-2 (b) and despite the fact the prime minister enjoyed majority in Parliament, the apex court's decision to dethrone prime minister was an interference in the core of parliament's powers. Secondly, the Memogate scandal was to be resolved on the floor of Parliament. These two important aspects are discussed in the following pages.

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Introduction

The judiciary in Pakistan has an advantage over the executive as the former interprets the constitution and judicial review. This privilege has often been used against the political executives during successive civilian regimes. In the past, it was witnessed that there has been contradictions in different court decisions. In Mehmud Khan Achakzai's case in which 58-2 (b) was challenged on the ground of its alleged misuse by the President, the court put responsibility on the legislature for not amending the concerned article and declared it valid and practical part of the Constitution, while in 2009, the highest court of the country itself asked the Parliament to pass the National Reconciliation Ordinance (NRO) so to make it a law.¹ Importantly, the Ordinance had been issued in 2007 but the apex court in 2007 and 2008 did not ask the Parliament to pass it when the President Pervez Musharraf was at the helm of affairs.² The analysts who favoured the apex court's decisions argued that the executive heavily depended on the Supreme Court to give legal cover to its actions. At the same time, the decision of the court to refer the case regarding the NRO to the Parliament indicated its policy and intention to enter in the political arena to evaluate the actions of the executive on any judicial scale. It was considered to be the right decision of Iftikhar Muhammad Chaudhry's Supreme Court that it took stand against the dictation of executive and the power of executive was checked through the judicial review.³

The verdict brought the PPP government on fragile position as its coalition partners were not ready to support it in the Parliament due to too much politicized and controversial character of the NRO. As a result, the government could not

1 Dr. Mubashir Hassan VS Federation of Pakistan, *PLD 2010 SC*.

2 Mohammad Waseem, "Judging Democracy in Pakistan: Conflict between the Executive and Judiciary," *Contemporary South Asia* 20, no. 1 (March 2012): 19-31.

3 Syed M. Ghazenfur, "Politics, Power and the Crisis of Jurisprudence", In *The Politics and Jurisprudence of the Chaudhary Court*, eds., Moeen H. Cheema and Ijaz Shafi Gilani (Karachi: Oxford University Press, 2015), 237.

pass it from the Parliament and the Court got an opportunity to open corruption cases against President Asif Ali Zardari and asked the government to pursue it.⁴ Ironically, almost 8034 persons in different capacities had taken benefit from the NRO but only politicians in general and the President Asif Ali Zardari in particular were focused and targeted.⁵

The implementation of NRO had become a bone of contention between the civilian government and the Supreme Court. The order had been issued by the President in the shape of Ordinance in October 2007 after the military establishment had reached an agreement with Benazir Bhutto. It enabled Benazir Bhutto to come back to Pakistan. Moreover, the Ordinance gave indemnity to almost 8000 people including Asif Ali Zardari.

The Ordinance was challenged in the Supreme Court which set November 28, 2009 as a deadline for the Parliamentary approval of the NRO. Consequently, the Supreme Court annulled it on December 16, 2009 and asked the government to reopen the cases of corruption against the President of Pakistan, Asif Ali Zardari.

Consequently, in 2012 it asked the sitting Prime Minister Yousaf Raza Gillani to write a letter to the Swiss Government to reopen their investigation into President Asif Ali Zardari's bank accounts in Swiss Bank.⁶

The Prime Minister Yousaf Raza Gillani was of the view that since the President of Pakistan enjoyed immunity under 1973 Constitution, therefore, any type of case could not be initiated against him. The Prime Minister further argued that if he used his authority and office to initiate cases against the sitting President, it would be unconstitutional.⁷

4 Dr. Mubashir Hassan Vs Federation of Pakistan.

5 Ian Talbot, *Pakistan: A New History* (London: Oxford University Press, 2015), 216.

6 Christophe Jafferlot, *The Pakistan Paradox: Instability and Resilience*, (Haryana: Random House Publication, 2015), 398.

7 Talbot, *Pakistan: A New History*, 216.

However, the Chief Justice of Pakistan was of the opinion that the President of Pakistan did not enjoy absolute immunity. The Constitution of Pakistan has protected the functions of the President in official capacity and not in personal domain.

In pursuance of the cases against Asif Ali Zardari, the legal and political community was divided. To pro-government parliamentarians-cum-legal community, the President enjoyed Constitutional immunity and that Constitution clearly stipulates that the sitting head of the state could not be prosecuted. They further said that how the court could order prosecution of the country's president in another country.⁸ While to pro-judiciary group, the President did not enjoy absolute immunity. Therefore, the government was constitutionally bound to write letter to the Swiss Government to reopen the cases.⁹

However, "the PPP did not implement the Court's judgment in the NRO case, and it prompted the Court to convict Prime Minister Yousaf Raza Gillani under Contempt of Court Act;"¹⁰ dismissing all arguments of the government. Furthermore, the Court forwarded the disqualification proceedings against Prime Minister Yousaf Raza Gillani to the Office of the Speaker National Assembly, which will send it to the Election Commission (EC).

However, the Speaker National Assembly issued a ruling that the prime minister's conviction did not require the referral to the Election Commission for disqualification from holding office under Article 63 (l) (g). To substantiate this decision, she gave references from the past. She referred to the case of Kanwar Intezar Muhammad Khan Vs Federation of Pakistan in which it was established that while examining a reference under Article 63 (2), the speaker is not supposed to act merely as post office and is not bound to forward it to the EC. A reference was also given from the proceedings of the

8 Aitzaz Ahsan Interview with BBC News, August 7, 2012.

9 Interview with Akram Shaikh, an Islamabad based lawyer, June 16, 2015.

10 Suo Motu Case No. 4 of 2010, *PLD 2012 SC*.

assembly in which the Speaker National Assembly had rejected the government's objection against the opposition's nomination of Javed Hashmi to contest for the seat of the Leader of the House. To government, Hashmi was convicted by the lower courts on charges of defaming armed forces but speaker rejected the plea and let him contest the elections.¹¹

The legal experts, however, had divergent views about speaker's ruling. Some were of the opinion that since the decision had come from the highest court, therefore, the speaker had no option but to forward it to the ECP.¹² However, the pro-government legal experts were of the opinion that after the 18th Amendment, the positions of the Speaker of National Assembly and the Chairman Senate were strong and, therefore, they were not bound to refer the court's ruling to the ECP but now had the power to apply his or her mind to a question of disqualification.

The Speaker's ruling was challenged in the Supreme Court by the opposition on the ground that it had defied the principle of independence of judiciary and, therefore, requested to overrule it. The court accepted this plea and, "overruled prime minister's disqualification and removal from office under the principle of independence of judiciary that prime minister defied principle of independence of judiciary and thus convicted him of contempt that he had brought the Supreme Court and judiciary into ridicule".¹³

However, the opposition welcomed the apex court's decision. Mian Muhammad Nawaz Sharif was of the view that Gillani was rightly convicted. He said that the government's tussle with the judiciary was an unwise decision. Gillani's conviction upheld the rule of law for which judiciary must be praised.¹⁴ Similarly, Imran Khan warmly welcomed the decision,

11 *National Assembly Debates*, May 20, 2012.

12 *Dawn*, June 20, 2012.

13 Muhammad Azhar Siddique Vs Federation of Pakistan, *PLD 2012 SC*.

14 *Dawn*, June 20, 2012.

criticized the government and the Parliament and praised the judiciary.

Similarly, those academics who favoured the decision of the Court, were of the view that removal of the prime minister was not a judicial *coup*. To them it was rather exaggeration and over-simplification of the case. The Supreme Court only removed the head of the executive branch while leaving the Parliament with all its powers to appoint a new prime minister. Moreover, the policies and performance of the government were also not affected by the change of the chief executive.¹⁵

One school of analysts was of the view that it was the strategy of the PPP government to politicize actions of judiciary and then create an impression of victimization. Certain ministers had been given the task to paint judiciary as a vindictive institution and prove it as a politically bias institution towards the PPP leadership.¹⁶

However, the PPP and its coalition parties criticized judiciary's decision for grossly interfering in the internal affairs of the Parliament. Senator Aitezaz Ahsan, a leading counsel of the party, expressed reservations over the court's judgment. He argued that:

Disqualifying Prime Minister Gillani was a wrong decision of the court. The case in which he was disqualified was not about disqualification but about court's jurisdiction. Constitution has clearly stipulated that the head of state could not be prosecuted. Then how could the court order prosecution of the country's president in another country?¹⁷

The impartial critics though did not endorse the point of view of Itezaz Ahsan and recognized that the Supreme Court enjoyed power of judicial review under Article 184 (3) of the constitution. They were, rather, of the view that it did not give primacy to the norms of judicial restraint. The disqualification of the sitting prime minister was considered by them as violation of the norm.

15 Muhammad Azhar Siddique Vs Federation of Pakistan, *PLD 2012 SC*.

16 *National Assembly Debates*, June 14, 2012.

17 *Aaj*, June 21, 2012.

The ousted Prime Minister Yousaf Raza Gillani was of the view that:

Parliament is supreme because it consisted of people's elected representatives. The judiciary should also respect the will of the people because I was elected Prime Minister of the people. Nowhere in the Constitution has it been mentioned that Prime Minister could be sent home if he did not write a letter... I did not accept the unconstitutional order of judiciary as constitutionally I could not write for reopening of cases against the sitting President because he enjoyed constitutional immunity under Article 248 of the Constitution. I appeared twice before the judiciary and thus respected the institution but they could not respect elected institution, the Parliament. Historically, they had justified the unconstitutional acts of dictators under law of necessity and in future they would do the same because they had no respect for representative institutions and democracy.¹⁸

However, critics argued that the prime minister continuously delayed the directives of the court. It was the policy of the government to politicize the actions of Supreme Court and to prove the hypothesis that the courts are traditionally biased to the PPP governments and favour military establishment. The government had tasked its spokesmen to publicly defame the Supreme Court.¹⁹

However, the coalition partners also supported the PPP stand point regarding the court verdicts. According to Asfandiyar Wali Khan, the head of Awami National Party (ANP), "it was the most unfortunate step of judiciary rather was an effort to derail democratic system."²⁰ He was of the same opinion that the Parliament is supreme and prime minister enjoyed confidence of the Parliament. He argued that the speaker had also issued ruling in favour of him and had not referred the matter to the ECP. It would be better if the Supreme Court did not interfere in the domain of the Parliament.

18 Yousaf Raza Gillani's Press Conference, August 9, 2013 reported in *Mashriq*, August 10, 2013.

19 Moeen H Cheema, "The Choudhry Court: Rule of Law or Judicialization of Politics", In *The Politics and Jurisprudence of Choudhry Court*, eds., Ijaz Shafi Gillani and Moeen H. Cheema (Oxford University Press, 2015), 94.

20 Interview with Asfandiyar Wali Khan, October 14, 2014.

The then Attorney General Irfan Qadir was of the view that, "Prime Minister is not answerable to the court in exercising of his functions and any direction issued by the court becomes meaningless because the constitution wants the courts to extend sanctity to the office of Prime Minister."²¹ Therefore, the court could not issue any direction to prime minister in matters which fell within the domain of his functions in view of the provision of Article 248 (1) of the constitution... writing of the letter was one such action that fell within his domain.²²

Maulana Fazl-U-Rehman, the President of Jamiat Ulema-e-Islam (JUI- F) remarked that the prime minister enjoyed absolute majority in the Parliament and to oust it through extra-parliamentary mechanism would lead towards the tussle between the (two) institutions and it would collapse the system. He was of the view that situation had gone beyond an issue of law and justice and it might endanger the political order and elected institutions. The judiciary should play a neutral role. Instead of becoming part of the crisis, it should amicably resolve the crisis. He gave credit to the political forces for showing maturity; did not confront judiciary and safeguarded the system from possible derailment.

The PPP Senator Faisal Raza Aabdi criticized the vindictive action of the Chief Justice Iftikhar Muhammad Choudhry. He argued that "nullifying the recently passed Contempt of Court Act is a part of plan to pitch two state institutions against each other."²³ Furthermore, he was of the view that, "the contempt cases against other PPP leaders were pending, but the Prime Minister's case was hurriedly picked and then he was sent home. The judiciary failed to provide attention to its own inefficiency. There were 2.1 million cases pending in the courts but when the present judges were restored the numbers had increased to over 2.3 million. The verdict (PLD 2000) of a Supreme Court Bench that included the Chief Justice Choudhry which had validated the 1999 *coup* of

21 *Dawn*, August 16, 2012.

22 *Dawn*, August 16, 2012.

23 *National Assembly Debates* July 14, 2012.

General Musharraf on the basis of allegations that former Prime Minister Nawaz Sharif was involved in Rs. 6 billion money-laundering. Ironically, the Supreme Court was interested in Rs. 1.5 million of Asif Ali Zardari allegedly lying in Swiss Courts but on the other hand, Nawaz Sharif was given favour.”²⁴

In 2013, when the Parliament completed its five-year constitutional term, certain academics openly criticized the politicized decision of the court. The Supreme Court and High Court Bar Associations also joined them. They were of the view that the interference of judiciary in the domain of legislative and executive organs of the government had weakened the political institutions.

After the retirement of Iftikhar Muhammad Choudhry as Chief Justice of the Supreme Court, the critical question before the apex court was whether it would follow the same policy or would reconsider it. The dominant answer of the academics was that it would retreat from the policy of judicial activism.²⁵ Therefore, the PPP criticism that the Apex Court had historically been biased to it, was not without logic and reason.

The provincial legislatures also showed concern and reservations over the removal of prime minister through extra-parliamentary mechanism. The Khyber Pakhtunkhwa Assembly session was suspended in protest. Mufti Kifayatullah, a senior politician of JUI-F, remarked that:

The verdict has shocked democratic forces and such decision might result in clash among institutions. Though, free and independent judiciary is good omen for the country but some forces do not want democracy and strengthening of democratic institutions in the country and those forces do not miss any opportunity to derail the system.

The judiciary continued its partial justice when it issued the arrest order of Makhdoom Shahabuddin, a MNA from the PPP, in the alleged case that he imported chemicals used in the production of narcotics when he was Health Minister.

24 *Dawn*, August 6, 2012.

25 Cheema, “The Choudhry Court: Rule of Law or Judicialization of Politics”, 199-200.

Before the arrest orders, the party had announced his name for the premiership.²⁶

Surprisingly, the apex court did not question the nomination of Raja Pervaiz Ashraf who was also facing similar type of corruption charges which had been levelled against Makhdoom Shahabuddin. Issuing arrest order of one, and ignoring the other shows contradiction in the decision of Supreme Court.²⁷

Sindh and Balochistan provincial assemblies showed concern over the disqualification of prime minister. Provincial Information Minister of Sindh, Sharjeel Memon questioned:

Why it is that PPP governments have always been targeted by Judicial Martial Law? Our leader was a victim of judicial murder. Two governments of Shaheed Benazir Bhutto were removed. When we approached the court, we were denied justice but when Nawaz Sharif challenged the dismissal in court, he was given relief. What is the PPP's fault that till today it has been denied justice and fair play? Why were judgments not passed when the assembly was the outcome of rigged elections, when the LFO was passed, the 17th Amendment was introduced. The very judges had validated the unconstitutional act and Pervez Musharraf was allowed to contest elections in uniform. We are told to forget it as it pertained to the period before 2009. Was the Swiss case not registered before 2009? Cases were being opened against the PPP for which their leader had remained behind bars for eleven years, but those who were sentenced for ten years, allowed to go abroad.²⁸

Asma Jahangir, the Former President Supreme Court Bar Association, and constitutional expert argued:

The Supreme Court has not convicted Prime Minister Yousaf Raza Gillani for obstructing the administration of justice but for ridiculing the judiciary. The court has been able to do this because of the law introduced by Zia. The Article 63 (g) is open-ended and can end up being used by the judiciary to persecute the politicians. The law disqualifies anyone who has been convicted for propagating an

26 *Dawn*, June 20, 2012.

27 Frederic Grare, "Pakistan's Foreign and Security Policies After the 2013 General Elections: The Judge, The Politician and the Military," *International Affairs* 89, no. 4 (2015): 141.

28 Sharjeel Inam Memon, Information Minister of Sind Government, Press Conference, *Dawn* August 8, 2012.

opinion against the independence of judiciary of Pakistan or brings into ridicule the judiciary or armed forces of Pakistan. The constitutional provision is problematic and is meant to be as much a trap as the Article 58 (2) (b). It might be used with more frequency against political governments in future. The extra-parliamentary ouster of the prime minister by judiciary undermined parliamentary sovereignty and should be obstructed by political forces. The possible way out would be to bring constitutional amendment in that respect.²⁹

Asma Jahangir's argument carried weight as some pro Choudhry court academics had tried to prove that courts' intervention works as a safety valve as was done through 58 (2) (b) during the 8th Amendment and thus blocked the way of direct intervention of military.³⁰ They failed to understand that the so-called safety valve in the form of 58 (2) (b) had caused irreparable loss to the 'parliamentary supremacy' and democratic system as four assemblies were dissolved and governments were dismissed while none of them was provided a chance to complete their constitutional tenure.³¹ The parliament was not given any chance to discuss the inefficiency and malpractices of the government whereas an indirectly elected president who might be a ceremonial head in any true parliamentary democracy, had been given the sole authority to become arbiter of the performance of the national parliament and government.³²

It was one of the reasons that Gillani's ouster was not welcomed by more balanced and impartial academics and argued that it undermined the process of democratization and civilian supremacy. Paula News Berg as quoted by Christophe Jefferlot was of the opinion that the judgment weakened parliamentary sovereignty.³³ Similarly, Muhammad Wasim has termed that the incident would be remembered as

29 Sharjeel Inam Memon, Information Minister of Sind Government, Press Conference, *Dawn*, August 8, 2012.

30 Asma Jahangir, "Constitutional Trap", *Dawn*, May 22, 2012.

31 Cheema, "The Choudhry Court: Rule of Law or Judicialization of Politics", 198-201.

32 M. B. Naqvi, "A Needle Stuck in Grave" *Dawn*, November 10, 1996.

33 Jafferlot, *The Pakistan Paradox: Instability and Resilience*, 398-404.

an example of clash between institution of judiciary and parliament.

Aasim Sajjad, a political analyst, said:

On one hand instead of taking powers from army, the judiciary usurped powers of parliament which weakened the representative/ political institutions *vis a vis* military establishment. But on the other hand parliament was also not too democratic, and did not play its role in true sense of the word. The parliament did not save its own prime minister which was a deviation from and negation of COD.³⁴

Journalist Talat Hussain disclosed the fact that, “Just three days before his conviction, the prime minister told me in an exclusive meeting that the establishment was after his family because they want him to go against the president but he was unambiguous in saying that he would not write the letter against his own president.”³⁵

Despite continuous assurance of Iftikhar Muhammad Chaudhry to take the cases himself to logical conclusion,³⁶ the apex court supported the establishment *vis a vis* political government in certain cases. It is on record that in Multan by-polls in which Yousaf Raza Gillani’s son was contesting, Iftikhar Choudhry’s card was openly used by the rival candidate, but no *Suo Moto* notice was taken.³⁷ Moreover, Gillani talked about the nexus between establishment, Iftikhar Choudhry and his political rivals. Rather, Iftikhar Choudhry remarked that anti-army talks couldn’t be tolerated.³⁸

Despite being aware of the nexus between the judiciary and the establishment, the PPP-led government compromised the norms of parliamentary supremacy replaced the disqualified prime minister but to the extent that the new Prime Minister Raja Pervez Ashraf wrote the much controversial letter to Swiss authorities. The compromising policy of the government was quite in harmony with Lijpart Theory of Consociationalism

34 Interview with Aasim Sajjad Akhtar, Islamabad March 15, 2015.

35 Interview with Raza Rumi, July 10, 2012

36 *Dawn*, June 23, 2012

37 Interview with Raza Rumi.

38 *The News*, March 26, 2013

principle that, “a moderate attitude and a willingness to compromise are required for consociational arrangement.”³⁹ This compromising attitude has also been recommended by Katharine Adeny. In her work ‘*Inclusive Federalism*’ she has recommended consensual and reconciliatory approach on the part of Pakistan’s political leadership to steer the fragile democratic system out of crisis. She has maintained that political institutions might face a defeat for the time being but it would contribute positively to the democratic culture in Pakistan in future.⁴⁰

Of course, this consensual policy of the political leadership enabled them to steer the democratic system through challenges. No assembly was dissolved and no constitution was violated or abrogated, at least not by the *Khakies*, rather they stayed inside their barracks. The maturity of political forces successfully applied consensual and consociational strategy. The political governments and assemblies completed their constitutional tenure. Powers were peacefully transferred through elections to the majority party, which was a historic step as neither before the civilian governments in Pakistan had not completed their constitutional tenure nor had transferred powers peacefully to another civilian government.

Another important occasion where judiciary interfered in the core of parliament’s jurisdiction was during the Memogate issue. The court accepted the standpoint of deep state by initiating judicial investigation into the issues surrounding the ambiguous “Memogate” affair.⁴¹ In response to several petitions filed before Supreme Court under Article 184 (3), the Court accepted the plea of petitioners and considered the matter as justiciable and appointed a three member judicial commission which was consisted of Chief Justices of

39 Frank Cunningham, *Theories of Democracy: A Critical Introduction* (London: Routledge, 2002), 84.

40 Katharine Adeny, “The Limitation of Non-Consociational Federalism: The Example of Pakistan,” *Ethno Politics*, 8, No. 1 (2009): 144-165.

41 Watan Party and Others Vs Federation of Pakistan, *PLD SC 2012*.

Balochistan, Islamabad and Sindh High Courts to probe it in detail.

In the post-Usama Bin Laden scenario when establishment and deep state institutions were on weak wicket *vis a vis* the Parliament, the Memogate scandal was suddenly brought about and in no time it became a hot issue in Pakistan. The establishment was of the view that Pakistan's former ambassador to the US, Hussain Haqqani, had sent a memo through a Pakistani born American, Mansoor Ejaz to US Army Chief, Admiral Mike Mullen, in which the political leadership had sought his help against Pakistan military to avert an imminent coup.⁴²

Though the government publicly denied the Memo and questioned its authenticity and credibility but it came under fire in media which compelled it to refer the matter to the Parliamentary Committee on National Security for investigation. Moreover, resignation was also taken from Hussain Haqqani.⁴³

Despite referral of the matter to Parliament's concerned committee, the opposition asked for judicial investigation and filed a petition in the Supreme Court, and resultantly a judicial commission was constituted.

While knowing about the tussle between the political leadership and establishment, the apex court's decision to accept the petition was not a welcome omen at least for political forces in government. They argued that judiciary served the interests of the establishment and undermined 'parliamentary supremacy'. Prime Minister Yousaf Raza Gillani in a policy statement on the floor of Parliament termed the move as a conspiracy against the parliament and argued that, "Parliament is supreme and efforts of certain sections to establish state within the state would be foiled."⁴⁴

42 *Dawn*, November 29, 2011.

43 *Dawn*, November 29, 2011.

44 *National Assembly Debates*, November 29, 2011.

The prime minister was actually trying to draw a line between legal and political issues. The PPP circles thought the Memogate scandal purely a political issue for which they considered the Parliament as a relevant forum.⁴⁵ However, the Judiciary under Iftikhar Muhammad Choudhry had already clarified in several other decisions that the legal and political fields were interlinked and overlapped and could not be separated from each other.⁴⁶ If government started violation of the Constitution, it would be the judiciary which could check it. Here to him the complaint of judicial interference was meaningless rather it would improve governance and adherence to constitutional provisions. It would improve rule of law in the country.

However, Asma Jahangir, a human rights activist and Hussain Haqqani's counsel, questioned the impartiality of the court⁴⁷ and argued that the issue did not come under the domain of Supreme Court and considered the move as an encroachment upon parliamentary authority.⁴⁸ She questioned that "It is not within the jurisdiction of the court to initiate a probe into the Memogate because it involved political questions. The petitions are not maintainable because the case does not involve the infringement of the petitioners' fundamental rights."⁴⁹

Aitzaz Ahsan, was of the same opinion, and argued that the Supreme Court could form an investigative commission on the request of chief executive i.e. the prime minister. Since in the Memogate case the prime minister had not requested, so this commission is unlawful. The Court itself made a commission which showed its biasness towards the PPP government.⁵⁰

45 *National Assembly Debates*, November 28, 2011.

46 *Sindh High Court Bar Association Vs Federation of Pakistan*, *PLD* 2009 SC.

47 *Herald*, January 2012, 26.

48 *Herald*, January 2012, 26

49 *Mashriq*, June 13, 2012.

50 Aitzaz Ahsan interview with Asma Shirazi, *AAj TV Programme*, "Apas Ki Baat", November 2, 2016.

But the bench headed by the Chief Justice Iftikhar Muhammad Chaudhry explained that the Memogate case had two angles; “civil, which had to be investigated by the Parliament, and criminal, which did come under the domain of apex court and would be maintained by the court.”⁵¹ Therefore, a judicial commission was assigned the task to probe the origin, motives and authenticity of the memo. Since the scandal had brought the whole country into a standstill, therefore, it was utmost important to unearth real motives of the memo.⁵²

As it was expected, the Commission’s report was out which failed to perform its primary responsibility. Neither it could unearth the origin, purpose and authenticity of the memo nor could find out the real motives behind it, rather the findings of the Commission were well beyond its mandate as it declared Hussain Haqqani as a traitor.

Asma Jahangir criticized the report and argued that, “The Commission was biased and same was expected from it. The Commission had itself become prosecution agency and jury at the same time. It was not its mandate to declare anyone traitor or anything else, rather it had to submit the report to the bench and then the bench had to make the final decision.”⁵³

It can be argued that the report of the Commission further made the institution of judiciary a controversial one. Though, the decision of Supreme Court was hailed by some anchors and pro-establishment analysts who considered it as the great service to Pakistan,⁵⁴ but legal experts put a question mark upon the impartiality of judiciary.⁵⁵

51 Aitezaz Ahsan Interview with Asma Shirazi.

52 *Mashriq*, June 13, 2014.

53 Such TV, Programme, “Goya” March 26, 2016.

54 Ijaz Shafi Gillani and Moeen H. Cheema, *The Politics and Jurisprudence of Choudhry Court* (Oxford University Press, 2015), 336-338.

55 Interview with Asma Jahangir.

Hussain Haqqani was of the view that:

Commission's action is one sided and biased and I have been scapegoated. The report is an effort to divert the attention from other important issues particularly from Arsalan Iftikhar case. The report is not legal but political. Commission is not court to prove one's innocence or guilt. Those who had validated *coups* and had allowed dictators to make amendments in constitution cannot judge either mine or any other person's patriotism.⁵⁶

Farha Naz Asphahani, an MNA and wife of Hussain Haqqani was of the view that, "the Commission was tasked to unearth the facts but it came with judgments, which is beyond its mandate."⁵⁷

Conclusion

The court's interference in the domain of parliament is quite evident, and this has compromised the constitutional authority of the latter. The political leadership here again followed the spirit of Lijpart's argument of compromise and moderation. Katharine Adeney has also suggested the same approach for political forces in Pakistan. The approach safeguarded the system from being derailed. The policy to compromise over the encroachment of the institution of judiciary was more or less followed by the PML (N) government from 2013 to 2018. Though, the Prime Minister Nawaz Sharif was disqualified and overthrown through a judicial decision, which was to critics the domain of the Parliament. He was convicted as well but with all criticism the policy of Zardari government was followed. The civilian government and the Parliament avoided any serious tussle with judiciary. As a result, the policy has benefited the democratic system and safeguarded it from collapse.

56 *Herald*, January 2012, 26.

57 *Mashriq*, June 13, 2012.