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Supremacy of Parliament Undermined by Irregular Promulgation of Ordinances (A Case Study with Reference to Pakistan)

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Abstract

Pakistan claims to have parliamentary system of government under the Constitution of Pakistan 1973. First constituent assembly introduced a marvelous accumulation of supremacy of Islamic principles within the Constitutional framework based on ideology of liberation movement. The principles of this ideology have been given an overwhelming space in the preamble of Constitution. This claim boosted expectations of the nation to work out a political heritage of faith blended with proceeds of modern popular democratic culture. The governing system of State which had to strictly follow the Constitutional ideals seems to have misplaced its direction. It is in similarity of the colonial system against people struggled for their independence. Several reasons of failure have been alleged but the real cause is having no adherence for principles which the constituent assembly framed for the State Constitution. Resultantly, Constitutions of State (for no reason) were abrogated and held in abeyance twice under the executive decree. Dictatorial regimes promulgated series of irregular Ordinances and Provisional (un)Constitutional Orders. People and institutions needlessly were blamed for failure. State system took refuge in promulgation of Ordinances and autocratic Constitutional orders. Most of the Ordinances were used to implement arbitrary administrative actions and were given the colour of royal decree. Several Ordinances are being enforced regardless of their theoretical characteristics. This is reducing the parliamentary legislation inflicting serious blow to the grooming structure of State. The constitutionality of these Ordinances is still in question in superior courts. This study intends to determine the consequences of such extra-constitutional practices and the dimensions of loss to political system of State. The doctrinal method of research was adopted to conduct the study.

Keywords: Constitutional practices, Legislation, Ordinance, Promulgation, Proclamation, Supremacy of Parliament.

Introduction

The most important distinction of the modern civilized world is that people are no more subject to any law or order made by anybody except a system constituted by delegation of their own consent. Public representative institutions like Parliament and Congress are power apparatus for determination of the balance of public rights and obligations through legislation. Parliaments, all over the world, enjoy real respect and admiration due to public faith reposed by their own collective will (Petersen, 2005)

Legislation in parliamentary system is the basic function and prerogative of elected parliament. There is trichotomy of power under the Constitution of 1973. Each organ of the State has its defined role. Parliament has legislative supremacy; executive has independent working domain and is bound to enforce laws while judicial organ is empowered to interpret the laws. Pakistan is being governed under the parliamentary system, therefore, legislation is the exclusive privilege of Parliament. Islamization of laws (a dream of Pakistani society) is to be processed through parliamentary legislative procedure. Executive organ must strictly follow the law made by the Parliament without question. Independent judiciary must implement the law and cannot amend or refuse to follow it except ruling on inconsistency between the law and Constitution (Willis, 1935). The purpose of the instant study is to examine validity of provisional enactment of ordinances by the executive.

As Stated above Pakistan is being governed under the parliamentary system of government, Parliament is the country's sovereign legislative body comprising of the President, National Assembly and Senate (Wolf, 2015). All the three are elected Constitutional authorities symbolizing delegation of public power, trust, and consent duly expressed under the democratic process. Parliament combinedly represents the public who deserves to be administered under a democratic, judicious and trust-worthy system of governance. Parliament legislates for the whole Federation in accordance with the powers provided in the Federal Legislative List (Arowosegbe, 2014). Parliament, through its debates, discussions, adjournment motion, question answer sessions and Standing Committees, performs its role as a watchdog over Executive function and makes sure that the government manages its activities according to the principles of the Constitution and must not infringe the fundamental freedoms of the citizens (Breukel *et al.*, 2017). National Assembly, comprising of population based numerical representation, has been empowered distinguished functions regarding financial matters through its various accounts committee and authorities prescribed under the Constitution.

Pakistan is a Federal State consisting of four provinces and Islamabad as the Federal Capital. These federating units have their own legislatures and enjoy provincial autonomy in their respective domains as provided by the Constitution (Pigeon, 1951). Parliament has distinguished Constitutional role among three major organs of State; it's both Houses work together in separate as well as joint domains (assigned under the Constitution) to carry out the basic work, i.e., law making (Javaid and Ahmed, 2017).

Parliamentary Legislation

The Constitution prescribes legislative lists and a Bill concerning an item from the federal legislative list may be introduced in any House of the Parliament. If a House passes it by a majority vote, it is then sent to the other House for further legislative procedure and approval. The other House, if, passes it without any condition, it is submitted to President for his assent. But, if the Bill approved by one House fails to get approval from other House, it is then presented for discussion (in a joint sitting) before both the Houses summoned by the President on the request of the House which introduced the Bill. In case the Bill gets approval in the joint sitting of both Houses, with and

without modification, by the majority votes of both Houses, it is submitted to the President for his approval (Mahmood, 2020). Under the Constitution, Parliament, may also enact laws for Provinces on their request.

Legislative functions of Parliament stand enhanced if emergency is proclaimed in the whole country or in one of the provinces. Parliament is authorized to extend duration of a term of the lower House, i.e., National Assembly. The Parliament, under the Constitution, may also, by law, on the Federal Government's request, confer certain functions upon those authorities/officers who are subordinate to Federal Government (Saif, 2021). Bills, so passed during the State of emergency, lose their force after the expiration of a time period of six months.

While performing prescribed Constitutional role, the Parliament also has other important functions to perform in respect of certain areas not included in provincial territorial domain. President of State is elected by members of both Houses of Parliament and the Provincial Assemblies. He is ceremonial head enjoying symbolic position as custodian of seal of federation and must perform most of the functions on the advice of federal cabinet (Choudhury, 1956). Prime Minister, although elected by national assembly, command all the executive powers of State as head of the government. The upper House, Senate, of course representing the provinces, has significant role in making the law and in formation of government of State.

Constitutional Mechanism

Constitutions framed in Pakistan inherited certain provisions out of Government of India Act 1935 in material resemblance of colonial legal legacy. Required improvement had to be made in the text for its democratic application. The Constitution of 1973 prescribes a detail law-making procedure for enacting the law as required for the State system (Linde et al., 1975). However, there is also a Constitutional provision that authorizes the executive to enact Ordinance provided the legislature is not in session and there is urgent need of enactment. President has a formal role in this, and all other regular enactments are procedurally presented for his assent. Constitution of Pakistan under Article 89 empowers the President to promulgate an Ordinance if circumstances exist which render it necessary. President can do so when the Parliament is neither in session nor there seems any possibility of its meeting urgently. The determination of urgency for drafting Ordinances is function of exclusive nature to be proposed and prepared by law and justice division of the government (Nourse and Schacter, 2002).

The said provision is conditional and is to be applied in extraordinary circumstances. This provision clearly depicts that the legislation must be of such an imperative nature that it cannot be deferred till convening regular or urgent session of the Parliament (Kerrison, 1814). From the beginning of independence, executive organ, most of the time, arbitrarily using the option issued two thousand and five hundred (2500) Ordinances. Subsequently, if we analyze the circumstances since the enforcement of 1973 Constitution in which Ordinances were promulgated, there are hardly convincing reasons to justify the two important conditions like enactment due to urgent nature and no possibility of calling parliament session as required under the Constitution.

The Ordinances were enacted like royal or executive decree deliberately bypassing the Parliament because the governments were not capacitated to legitimately process the proposed law via Parliament. It seems that the executive organ did so for multiple reasons like lacking required majority in the Parliament, defeating the genuine partaking of opposition, lack of leadership perception, delaying and covering lingering and pre-designed self-centered policies. Apparently, this is Constitutionally permitted option but practicable under the circumstances for justifiable application. If it is not so reasoned, it runs averse to the essence of parliamentary system and deregulates democracy (Takahashi, 1990).

Supremacy of Parliament

Supremacy of parliament is a popular theme of argument as well as analytical understanding for the purpose of this study (Limbach, 2001). Doctrine of parliamentary supremacy is generally described as:

- Legislative functions of Parliament are unrestricted, and it can make any law whatever on any subject.
- The laws made by Parliament possess absolute validity and no institution including the courts can question its legitimacy.
- The law-making powers of Parliament are unlimited.
- No Parliament can bind its successor; it cannot make a law restricting law-making by future Parliaments.

Parliament in Pakistan is not as supreme as generally understood in relation to doctrine of supremacy of British Parliament (Russell, 1997). The preamble of the Constitution 1973 vibrantly prescribes supremacy of injunctions of Islam as laid down in Holy Quran and *Sunnah* over entire enactments made or to be made in future (Nor, 2018). Nevertheless, it is clearer than anything else that once Parliaments enact any law, it stands at highest place of binding force as compared to any other command or order illegitimately issued by anyone else. Constitution, within its provisions, has provided institutions like Council of Islamic Ideology and Federal Shariat Court to give practicality to this Constitutional mandate. Islamic Council comprising of the eminent scholars has the jurisdiction to examine and guide parliamentarians to ensure compliance of Article 227 to 231 of chapter IX. Parliament, similarly, can refer to Islamic council to examine any existing or proposed law for guidance as prescribed in the Constitution (Stahnke and Blitt, 2004).

Historical Evolution of Ordinance

Legal system at the earliest form was combination of theological believes, customary rules or at the most imperial dictations. Enforcement or mode of promulgation of Ordinance practically resembles the royal decree. Before the advent of popular movement of defiance against imperialism, there was no concept of separation of powers among the three organs of State. Kings, dictators, usurpers and all types of autocrats have been accumulating or keeping all the State functions in their hands or at their discretion (Arato, 2013). Basic priorities were always confidentially dealt in the royal courts amongst closest partners. Subsidiary functions of State were delegated to their executors or disciples. Such functionaries had to follow the dictation of their regulators or according to their presumed sweet-will or pleasure. In the absence of laws, system had to operate as it was understood by State officials under imperial system.

The term Ordinance became legally significant in England when there was competitive assertion of supremacy of law between King and Parliament (Tamanaha, 2004). During this power scuffle, law-making process was based on consensus-building between the King and Parliament and this situation continued up to 1650. Therefore, the body of law passed short of Royal assent was signified as Ordinances. Confidence building and restoration of normal interaction, with the passage of time, paved the way for resumption of Constitutional monarchy to work. Consequently, all the Ordinances lapsed, and no new Ordinances were passed.

Introduction of Ordinance outside Great Britain manifested later. English Royal Charter granted to the Governor and company of merchants of London with the East Indies, in 1600, introduced the Ordinance. During the British rule in India, there was a gradual development of legal system, and the term Ordinance was first used in the famous Indian Councils Act of 1861. Legislation under the

Indian Act was the function of Governor General performed in Council. This Council comprising of British and Indian nationals were appointed by the British government (Kip, 2020).

The term Ordinance has also been in use under the Australian law but in a very insignificant form. It is applied as form of delegated legislation which applies only in limited sense and in local areas. Some Ordinances in commonwealth jurisdiction are classified as legislative instruments. Purpose of these instruments solely means that they are published and deemed as an authorized version. The word Ordinance also has religious application in Christianity. It is described as religious ritual whose intent is to demonstrate an adherent faith.

Ordinance as Legislative apparatus

Almost all States with parliamentary system have similar Constitutional provisions regarding law-making. Under basic structural building developments of Pakistan, provision relating to Ordinance was first introduced under Article 69 of the Constitution of 1956. In 1960, when Constitution making process was again launched, the Constitution commission headed by Sir Shahabuddin keeping in view experience of governing style, strongly criticized the idea of passing Ordinances. However, the law-making process through Ordinance making, attracted the military leader and the same was incorporated under Article 29 of the Constitution of 1962 (Rahman, 1973). This Constitution was also abrogated due to its undemocratic features by another succeeding General namely Yahya Khan. The above autocratic un-Constitutional exercise resulted in separation movement of East Pakistan. The use of force caused lack of faith in pure parliamentary system and nation had to face irreparable loss of division of the State in two parts (Mustafa and Nawaz, 2014).

After break-up, the Constitution of 1973 was framed for remaining Pakistan. The Ordinance making function was bestowed again to the executive under Article 89 of the Constitution (Hassan, 2008). People of Pakistan has been facing misuse of Ordinance in multiple way. Firstly, legality of promulgated Ordinances has been a question mark for being in strict accordance in purpose and procedure. Secondly, Ordinances are issued in anticipation of its placement before the Parliament; the requirement of its provisional nature has mostly been ignored. Preference of the executive should have been to fulfill within the stipulated time frame in order to signify the faithfulness of the executive organ to trust based reposition arrangement of the Constitution. Further, those reasons of enacting Ordinance were not of non-anticipatory character. Executive organ failed to maintain a reasonable level of conscientiousness to anticipate forthcoming emergency, necessitating the use of delicate Constitutional provisions and their limitations. Family affairs like protection of parents are not a subject for which Ordinance is required but the same was issued on 9th May 2021 and which is known as the Protection of Parent Ordinance, 2021. Thirdly, the most deplorable argument is the glaring derogatory use of this provision for no reasons else then suppressing pride and prestige of social contract of the nation.

Constitutional history of Pakistan is breathing it's hard to contain disgraceful account of un-constitutional maneuvering in the name of Constitutional devotion. These political tragedies were applied from the very first decade of its grooming. Political leadership was ruthlessly eliminated from the political landscape to keep the reins of State exchequer at their disposal. The facts were that President Iskandar Mirza inflicted a deadly blow by enacting an Ordinance to dissolve local government elected by popular vote replacing that with selected administrators. He did so to favour Republican Party in the upcoming election. Mr. Justice Kaikus taking serious notice of the unconstitutional action struck down superfluous misuse of the Ordinance provision (Mughal and Ahmad, 2013). The court emphasized that the Ordinance making power was not so manageable and could not be used in a routine manner. This judicial response illuminated the dark shadow over politically dispirited environment due to authoritative jump of the dictator.

A few famous Ordinances as mentioned by Cheema and Mustafa (2008) are still termed as Ordinances. The notable examples are as follows:

1. The West Pakistan Rent Restriction Ordinance, 1959.
2. The Muslim Family Law Ordinance, 1961.
3. The West Pakistan Press and Publication Ordinance, 1963.
4. The Investment Corporation of Pakistan, Ordinance, 1966.
5. The Enforcement of Hudood Ordinance, 1979.
6. The Sindh Rented Premises Ordinance, 1979.
7. The Establishment of Courts of Qazi's Ordinance, 1981.
8. The Establishment of the Office of Wafaqi Mohtasib (Ombudsman) Order, 1983.
9. The Prohibition and Punishment Ordinance, 1984.
10. The Qanun-e-Shahadat Order, 1984.
11. The Contempt of Court Ordinance, 1998.
12. The National Accountability Bureau Ordinance, 1999.
13. The Industrial Relations Ordinance, 2002.
14. The Pakistan Medical and Dental Council Ordinance, 2019.

Governing Laws and Conventions

In its origin and incorporation, provisions on Ordinance do not carry malafide substance. Its application within the Constitutional parameter is a legal as well political necessity. All legal and Constitutional obligations can better be performed by strictly following not only law but also morality-based conventions. Conventions derive their force from political conscience of the nation. Constitution is by and large a political document and collective will of the leaders of the nation. That is why although enforcement of Ordinance originates from the corridors of executive as trustee of parliamentary trust, nevertheless, its application, enactment, annulment, and withdrawal in totality rests on the discretion of Parliament. This exercise is regulated by parliamentary conventions. If the powers of Parliament are once exercised by the executive, then any law improperly enforced develops its own implications and immediate withdrawal may lead to embarrassment of State system.

The foundation of the Ordinance under the of 1973 rests upon the principle of trichotomy of State power structure. This function initiated by one organ and its fate handed over to another supreme organ becomes ground of mutual accountability. Therefore, conventions are more relevant than law in ascertaining the rationality and legitimacy of emergent executive action assuming the power of Parliament. Although in developing countries, theoretically, Parliament is supreme in law-making, yet practically parliamentarians have been made hostages in the hands of usurpers due to non-adherence of parliamentary conventions. Where confidence of Parliament is pre-requisite for executive to be seated in power, it may assume the capacity to subordinate parliamentarians to work as desired by the executive due to unstable democratic conventions.

Under the law, the conspicuous condition attached to enacting Ordinance is its fixed duration. No ordinary legislation is time limited except the Ordinance. Once Ordinance is passed as the circumstances warrant, it must be the utmost responsibility of the government to prioritize its democratic processing and leave its fate liberally in the hands of parliamentarians. After enforcing the Ordinance, executive organ has not been as conscious as would have been upon any provisional arrangement necessarily known for losing its validity within specified time. Therefore, Ordinances were reused many times to prevent operation of time duration prescribed under the law. It was a usual practice of irresponsible executive to promulgate Ordinance days before Parliament was convened. In this manner, it was practically defying the very essence of the Constitutional provision on Ordinances. There was originally no provision permitting promulgation of Ordinance, but

Ordinance has been given second term several time in history. This irregularity was treated in 2010 for this purpose of rationalization its application by 18th Constitutional amendment. This amendment barred arbitrary promulgation of Ordinance enlarging the prescribed time limit under the present Constitution (Article 89).

Statistical Facts of Defiance

Parliamentary supremacy suffered several setbacks in intervals. There have been twenty-eight governments of various nature including elected, caretaker and military rulers. All of them observed the same defiance for this Constitutional provision. This was glaring breach of trust that military rulers illegitimately usurped the executive organ. The two military rulers General Zia and General Musharraf usurped the State powers without material justification and had taken refuge in proclaiming state of emergency and promulgating series of Ordinances (Qureshi, 2009). These military governments illegally modeled their status into civilian costume with all dictatorial powers in hand without accountability. During this period, at least 680 Ordinances were promulgated. It was free time for those who had no consciousness of democratic limitations and the ratio crossed 63 Ordinances per year. These governments unfortunately succeeded in securing provisional legitimacy from courts for exercise of Ordinance provision. Ten caretaker governments within time duration of two years enforced 140 Ordinances, which were approximately 59 Ordinances per year (Mehboob, 2019). Elected governments were not remained behind, i.e., fifteen elected governments in governing period of 33 years, issued 954 Ordinances in the country.

This study indicates that military governments promulgated average 63 Ordinances per year. Governments for provisional caretaker setup, though, had to procedurally depend upon interim arrangement, yet they also promulgated equal number of Ordinances during their combined duration. Comparative restraint was observed by elected governments which enacted 30 Ordinances per year during their period of governance. Elected government of Pakistan People's Party (PPP) and government of Nawaz Sharif (PML-N) promulgated 170 presidential Ordinances from 2008 to 2018. The executive organs of developed democracies have the tradition to observe restraint in using powers to issue Ordinances. These powers are used only in unforeseen or urgent matters requiring immediate legislative action and further adopting regular legislative procedure analysis and debates of Parliament. A formal comparison depicts those Pakistani governments since August 1973 enacted 1774 Ordinances as compared to 533 by India (more than three Ordinances in Pakistan versus one in India).

Ordinances of Present Regime

Pakistan Tehreek e Insaf (PTI) which got power in August 2018 promulgated 51 Ordinances. This promulgation of Ordinances clearly means that more than half of the legislative function was assumed by the executive ousting the parliamentarians from exercising their basic function (Pal, 2016). Ironically, several Ordinances were placed in Parliament after some of the Ordinances had lost their validity due to lapse of their time limit. The government of PTI, which was determined to ensure righteousness, enacted 92 laws, of which 51 were Ordinances (Geo TV, 2021; Tribune, 2021).

The criticism attained the momentum when President Arif Alvi, in a single day, on 30th day of October 2019, promulgated eight Ordinances (Asad, 2019). The opposition protested by claiming that president, while promulgating the said Ordinances, had good reasons to be aware of the forthcoming session of Senate starting on 5th day of November 2019 as well as the upcoming session of National Assembly starting on 7th day of November 2019. It was alleged that the President, knowing the fact that sessions of both Houses were summoned by his order, hurried to

promulgate the said eight Ordinances in violation of the spirit of Constitution. The promulgated Ordinances included as follows:

1. The Letter of Administration and Succession Certificates Ordinance, 2019.
2. The Enforcement of Women's Property Rights Ordinance, 2019.
3. The Benami Transaction Prohibition Amendment Ordinance, 2019.
4. The Superior Courts (Court Dress and Mode of Dress) Order Repeal Ordinance, 2019.
5. The National Accountability (Amendment) Ordinance, 2019.
6. The Legal Aid and Justice Authority Ordinance, 2019.
7. The Whistleblower Protection and Vigilance Commission Ordinance, 2019.
8. The Civil Procedure Code Ordinance, 2019.

After careful examination of the titles and substance of above Ordinances, most of the topics are of general nature and are regular topics of public and State concern. These are of no such unforeseen and unexpected nature requiring immediate legislation via Ordinance by the executive. Apparently, it seems an endeavor to work as solo flight reserving the credit for parties in power and keeping parties in opposition away from the process of legislation. It is the spirit of parliamentary democracy to involve all political parties of State including public at large in all constructive political work for strengthening virtuous democratic characteristics of tolerance and mutual co-existence.

Judicial Proceeding on Contentious Ordinances

The National Reconciliation Ordinance (NRO), 2007

The history of promulgation of certain Ordinances generally portrays gloomy picture of background under which these were enforced. Reconciliation term is very popular terminology in political parlance. But reconciliation process putting back violation of laws, commission of crimes and terrorist actions for the sake of political gain by dictatorial regime is inexcusable wrong committed against the State. Same is the case with this Ordinance. Army Chief, General Pervez Musharraf, On October 5, 2007, enforced this Ordinance. By virtue of this Ordinance, he intended to grant amnesty to so-called politicians and bureaucrats who were accused of serious crimes. These crimes, which General Musharraf wanted to compromise, include corruption, murders and terrorism during the period of 01-01-1986, and 12-10-1999. The Supreme Court, later, declared the Ordinance unconstitutional. Mr. Iftikhar Chaudhry (Chief Justice of Pakistan) suspended the said Ordinance on 12-10-2007, only a week after its promulgation (Khan, 2007). The Supreme Court declared the Ordinance unconstitutional 16-12-2009 (Dr. Mubashir Hasan case, 2010). The question mark of the whole exercise turned so violent that before Ordinance was declared unconstitutional, thousands of offenders got released and Chief justice faced dismissal as consequential action of the military dictator.

The Protection of Pakistan (Amendment) Ordinance, 2014

Missing persons is a delicate issue adjudicated in the courts. Pakistan, no doubt, has been suffering from unlimited range of terrorism. All the three organs of State must share responsibility for timely response to such grievances. As usual, the government had to adopt convenient methodology of promulgating Ordinance. The Protection of Pakistan is of course a sacred ideology of the nation, but the contentious issue has been the wonderful methodology adopted for its execution which was against law and Constitution. Ordinance had to provide legal cover to forced disappearance of alleged accused(s) as well as State officials committing illegal actions. It was challenged before the Supreme Court. Federal government was respondent in the petition. It was alleged that Ordinance authorized the security officials to conceal information about the identity of a detainee and place of

detention. It was submitted that it was inconsistent with the fundamental rights of citizens as provided in the Constitution. The petitioner added that no law was above the Constitution. Article 10 does not allow detention without being informed of the grounds for such arrest. The accused would have to be produced before magistrate and would be allowed to consult legal practitioner which was impossible without information. The petitioner emphasized that amendment stood in contradiction with Article 10-A (Constitution of Pakistan, 1973).

The promulgation of said Ordinance was in contradiction of law and Constitution as well as against the democratic norms of the world. This Ordinance obviously characterized that there was lack of confidence in the minds of its designers for solution under the normal justice system.

The Pakistan Medical Commission Ordinance (PMCO), 2019

On 20-10-2019, the President of Pakistan promulgated Pakistan Medical Commission Ordinance, 2019 (Ehsan and Raza, 2022). The alleged facts were that Federal Government did not seek any advice before the promulgation of Ordinance in terms of the Mustafa Impex case (2016) and thus, the President did not achieve the required satisfaction before promulgation of PMCO, 2019. The court held that:

“Neither a secretary, nor a minister and nor the Prime Minister are the federal government and the exercise, or purported exercise, of a statutory power exercisable by the federal government by any of them, especially, in relation to fiscal matters, is Constitutionally invalid and a nullity in the eyes of the law....”

The President earlier promulgated the Pakistan Medical and Dental Council Ordinance, 2019, which was laid before the Senate but was not approved. Later, the President again promulgated the same rejected PMDC Ordinance, 2019 (with identical provisions) having same preamble. It was done although the Supreme Court in its judgement in PMDC v. Fahad Malik (2018) declared the re-promulgation of identical and similar Ordinance as fraud because requirement of Article 89 had not been applied before re-promulgation (Rana, 2020). Under the Ordinance, members of PMDC were appointed without following the criteria for selection on merits and eligibility. Services of 220 employees (petitioners) of the PMDC were terminated without serving any prior notice.

The Court after hearing the facts and arguments declared that in case of upcoming emergent situation, the Federal Government would promulgate any Ordinance if it would state the justified grounds before its approval in subordination of the Rules of Business, 1973, coupled with the procedural principles in the light of terms of Mustafa Impex case. Nevertheless, it would be unlawful where an Ordinance would get promulgated when the Parliament would exist, and dates of its meetings were not fixed for a limited time. Thus, the practice of the Federal Government shows its inability to organize the political authority of the Parliament conferred by the Constitution may be due to their dearth of majority or poor advice by the advisors who are not armed with the spirit of law. The judgment declared that the said PMC Ordinance was ultra vires the Constitution (Malik, 2020).

The National Accountability Ordinance, 1999

In the current scenario, the two most contentious Ordinances are under criticism and debate about victimization of political leadership via several modes of accountability has been in practice throughout the history of military regimes in Pakistan. Civilian rulers also adopted persecution by targeting opponents in the following years. In most of the time, Ordinances were issued as convenient mode alternative to regular law framed by the legislature. The National Accountability Bureau (NAB) was established on November 16, 1999, under the National Accountability Ordinance (XVIII OF 1999). This was a federal executive agency which functions under the

mandate to work for prevention of corruption by raising public awareness and enforcement of anti-corruption measures. The main task of the institution was undertaken by its four key divisions: Operations, Prosecution, Awareness and Prevention assisted by Human Resource and Finance Divisions.

The process of accountability took a sharp turn when the President promulgated the National Accountability (Amendment) Ordinance, 2021. The Ordinance, as pronounced by the present government was promulgated for effective elimination of corrupt practices (Anwar *et al.*, 2021). However, the campaign has been alleged by the opposition as discriminatory in nature. Most of the opposition leaders were on the radar of the NAB and were arrested by NAB authorities and later released by the courts numerous times. NAB has been largely unsuccessful in regularly pursuing the corruption cases in accountability courts against front line politicians including the opposition leader of the National Assembly (F. Khan, 2016). The chairman has been alleged by the opposition to focus the references against the opposition parties leaving the ruling ministers unaccountable. Famous helicopter case against Prime Minister along with other cases like Malam Jabba and Rawalpindi Ring Road are alleged to have been thrown in cold storage. Opposition parties exerted public pressure for indiscriminate accountability against leaders of the coalition partners. This Ordinance also reduced the jurisdiction of the National Accountability Bureau for the above stated purpose. The controversial part of the Ordinance is that it excluded the federal and provincial cabinets from accountability process. Rest of the other institutions mainly dealing financial matter like Council of Common Interests, National Economic Council, National Finance Commission and State Bank of Pakistan are also out of operation of NAB. The NAB Ordinance also excludes taxation and other levies, i.e., refunds, loss of exchequer (pertaining to taxation from the accountability courts), etc. Besides, NAB cannot proceed against a person/entity due to procedural errors in any public/governmental scheme or project, except where it is expressed that a public office holder, etc. has availed any pecuniary or other similar advantage out of certain public/governmental work. Paradoxically, the responsibilities of due care of executive functions have been shifted over the shoulder of public to prove official secrets.

In the meantime, term of the bureau chief came close to expire, yet the government wanted to continue with existing chairman NAB. The Ordinance promulgated by President enabled the President to re-appoint NAB chairman or extend his tenure. Most contentious clause of the Ordinance is amendment in sub-section (b) of Section 6 of the National Accountability Ordinance. This clause is meant to grant extension in tenure of the chairman in office whose working has also been in criticism under observations of the superior courts. The term of service of the NAB chairman under the law is four years and cannot be extended through law. The clause prescribes extension in the fixed term of chairman by excluding the word non-extendable from the statute. The amendment has also introduced fundamental change in the mode of consultation between the opposition leader and the leader of the house in the National Assembly. The feature of material consensus between leader of the house and leader of the opposition for chairman NAB has been given a twist in the manner that president would consult both on the appointment of NAB chairman.

Opposition parties expressed strong reaction over the amended terms which are contrary to original scheme of transparency of accountability. Opposition describes it as deliberated attempt to frustrate the purpose of accountability by excluding actual fields of financial irregularities. For this purpose, Prosecutor General of NAB has been given an extended crucial role in advising the chairman to file or withdraw any reference from the court. Mainstream parliamentary parties are of the unanimous view about nature and purpose of Ordinance. PPP's Information Secretary said that the government plan, to extend the term of NAB Chairman through a presidential Ordinance, was equivalent to altering the Constitution and law of the country. She claimed that the NAB chairman had given relief to the ministers and advisers of the government. They wanted to breach the law by retaining the outgoing NAB chairman, whose actions lack transparency. PML-N spokesperson termed the

move as political victimization. Awami National Party (ANP) has also rejected the extension in the tenure of the NAB chairman through the Ordinance and described the decision in violation of the Constitution. General Secretary of ANP Mian Iftikhar Hussain said that the government was running all affairs through presidential Ordinances as if it had lost control of its own members of the Parliament (Asad, 2021).

Freedom of thought and expression is fundamental right under the Constitution of Pakistan 1973. Imposition of restriction over press and media has long history of struggle made for development of democratic culture worldwide. Parliamentary system represents rule of public historically grown with freedom of association and expression. Political struggle bestowed freedom and sovereign status to the people of Pakistan in 1947. Press and publications played significant role in awakening the urge and movement of liberty. As soon as political system was derailed in the country, freedom of press was also curtailed as an attempt to keep public ignorant of loss of political gains and put cover over misdeeds of dictatorial rulings.

The Press and Publication (Amendment) Ordinance, 1963

Military regime in 1958-1969, promulgated the Press and Publication (Amendment) Ordinance on September 2, 1963. Independent and progressive newspapers suffered the most oppressive decade long control of the executive. The Press and Publication (Amendment) Ordinance known as “National Press Trust” took over at least fourteen established dailies and weeklies. Ayub Khan (military dictator) nationalized large parts of the press and took over one of the two largest news agencies (Parveen and Bhatti, 2018).

Freedom of press nurtures in a democratic culture for appreciation of upright and popular decisions and indication of erroneous direction of State organizations. Media and Press plays key role as social mirror in keeping State direction as desired by public. Freedom of thought and opinion at individual level and expression of collective resolve by press is Constitutional right. Both modes provide active and continuous public participations in democratic system all over the civilized world. Freedom of press in Pakistan is at preliminary stage of development. Modern means of communication have connected and assembled world media as striking force for designing a common platform for expression of knowledgeable force all around the world (Balkin, 2017). Grooming press and publication organization has yet to obtain freedom in Pakistan in a manner as an emerging organ of State. Now, this is also under increasing threat due to its unlimited criticism on maladministration of public institutions.

Pakistan Media Development Authority (PMDA) Ordinance, 2021

The present administration in its effort to avoid criticism had to control the freedom of press. The proper course was to present the matter before the Parliament for enacting regulatory law on merit. Present government, in May 2021, proposed an Ordinance to develop a centralized media regulatory authority, named Pakistan Media Development Authority. Human rights activists and journalists in Pakistan and abroad objected the move calling PMDA a draconian institution. Establishing PMDA through an executive Ordinance attracted criticism from opposition parties. Parties stressed for Constitutional mode but the government, instead of discussing and voting on it in the Parliament, resorted to promulgation of Ordinance. It was done so for bypassing Parliament in fear of its rejection from parliamentarians due its undemocratic character. There are two main objectionable contentions in PMDA Ordinance. First, it is undemocratic attack on freedom of the press. Secondly, Ordinance enhanced the role of executive to regulate digital and social media of the country. It was equivalent to bring the media under subordination of the executive organ. Freedom of press has always been presumed a forum of public interest. This is a medium of public participation in public affairs and serves to measure popularity of administrative functions. In order

to obtain public support for its planning, executive should present all its legal requirements in the form of bill before the Parliament for discussion. Parliamentary debate is important to standardize executive functions as public information is an additional support for improving positive democratic trends in the society.

Promulgation of Ordinance is generally measured as an abrupt legislative move of executive to protect administrative segments of State (Pal, 2016). Social organizations and media are under apprehension of untoward implications of the proposed Ordinance on the democratic system of the country. The Ordinance prohibits publication of comments against head of State or members of the armed forces or legislative or judicial organs of the State. Liability of such nature is to be fixed and punishable by the administrative tribunals. Ordinance requires all media channels (electronic and digital) to obtain license on annual basis for the purpose to keep operational. Non-compliance would result up to five years of imprisonment and millions of rupees in fine. Jurisdiction of court against decisions of the councils and the authority has been excluded and conferred to media tribunals. Senior Journalists believe this move as replica continuation of dictatorial censorship regime as experienced during all the military rules in the past.

Critical analysis of State policies in Pakistan is prohibited area and may result in frequent abduction and assault on journalists. This alleged arrogance of law enforcement agencies has pushed Pakistan's rank in the global freedom of press index much lower than ever expected. The licensing system for digital media and verification of accounts of media persons indicate controlling mechanism of the executive organ. Such oppressive and undemocratic nature of laws is not expected to be passed by the Parliament. Enactment of such type of important law must be placed before the Parliament. There is no situation justifying the matter as so urgent to bypass supremacy of parliamentary consideration.

Promulgation and repromulgation of Ordinance is not simply a legal proposition. This practice, moving beyond its domain, creates public hardships on the ground. Executive organ, not taking multiple decisions of the superior court serious, must pacify increasing public pressure (Asad, 2021).

Indian Supreme Court's Rulings on Ordinances

Indian government has also been under strong criticism on the issue promulgation of irregular Ordinances. Recent comments and analysis also surfaced in Indian media on 20-4-2021. It was reported that Ordinance making was not plausible and repromulgation not credible (Madhavan, 2021). The statements and comments described associated issues resulting in frequent application of Ordinances as non-acceptable practice for dignity of parliamentary traditions.

Indian Constitution carries similar Constitutional provisions regarding promulgation of Ordinances (Article 123). The courts in various rulings declared the practice of promulgating Ordinances as violation of law and usurpation of legislative power by the executive. Courts remarkably ruled that an Ordinance would cease to operate as soon as Houses of Parliament would reassemble for legislative business. Supreme Court in RC Cooper case (1970) ruled that promulgation of Ordinance could be challenged if essential requirement necessitating enacting of Ordinance like urgent need and avoiding parliamentary considerations, are on the face of record.

Supreme Court ruling in DC Wadhwa case (1987) was response to frequent and prolongation of Ordinances on various pretexts. The practice clearly indicated deliberate mode of avoidance of its placement before Indian Parliament. This observation was in response to the fact that eleven Ordinances were kept alive for more than 10 years.

Similarly, in Krishna Kumar case, the Supreme Court ruled on very important aspect of Constitutional trust reposed in the government for faithfully executing the prerogative of Parliament. The court termed it absolute conditional entrustment to be executed like when necessary and immediate action is required. At the same time court denounced re-promulgation of Ordinances observing the practice as fraud and subversion of the Constitution (Safaya, 2021).

The Supreme Court in another famous Kesavananda case (1973), adjoining the notion with doctrine of separation of powers ruled the subject as violation of the famous doctrine. The court termed the separation of powers as a “basic feature” of the Constitution.

Conclusion and Recommendations

The topic of the study has been examined with reference to several aspects including Constitution, law, moral and equitable conditions of State functioning, etc. Apart from these aspects of legislation, promotion of democratic culture demands that ordinary law or Constitution be not amended by Ordinances, instead enacted by popular means of legislation. Parliament command supremacy in the sense that it represents the public in general. Executive should not take place of parliamentarians and should never commit breach of parliamentary trust in the interest of promotion of democratic culture. Executive must keep vigilant and conscious of its future requirements of public administration necessitating enactment of law well in time. Nevertheless, if the circumstances are so demanding, then legislative provisions must take prescribed legal mode and Ordinance should be placed before Parliament without delay.

Public participation is indispensable requirement of promotion of modern democratic culture. Public awareness sessions like seminars, workshops, conferences, webinars and trainings should be organized to create public participation seeking public support for active performing will for legal obligations. Public in general can develop proper resistance against frequent promulgation of Ordinances which not only puts the State institutions and public in state of uncertainty but also supports unconstitutional longevity. More serious situation develops when the Ordinance is not passed or is found redundant necessitating withdrawal by invoking strategy of lapse. In the past, during the period of military ruling soon after the promulgation of Ordinance regarding reconciliation offenders involved in serious crimes were released without waiting legal and political reaction. Although, the Ordinance was denounced by Supreme Court and latter it was turned down by the Parliament, but consequences had happened defeating regular system of legal justice. The most beneficiary class which emerged was the corrupt politicians, autocrats, and hardened criminals.

The earliest manipulation of President Iskandar Mirza must have been taken a warning signal by the legislature when he applied an Ordinance not within the stipulated conditions of promulgation. The function was meant to defeat rule of law and destroy evolution of basic democratic institution. Dissolution of elected local government for unconstitutional replacement cannot be justified by Ordinance. The Ordinance provisions might have been restricted with more strict condition of the Constitution. It was an attack on the parliamentary democracy inflicting serious blow on system of public chosen representation. This action of Mirza was designed to bring non-representative Parliament by means of managed elections as facilitator of usurpers. Justice Kaikaus performed a great national service as custodian of Constitution in reverting down this superfluous use of Ordinance.

To strengthen the parliamentary system and rule of law in the country public in large must realize their responsibility and take practical step forward in this direction. Legal fraternity and politicians have been active, but the prevalent administrative system operated by untruthful politicians assisted by corrupt State machinery has developed maneuvering system to counter political policies.

Political system has been gripped in captivity of non-political milieu operated by financial beneficiary of State resources. Public must come forward to watch their social, legal, and Constitutional rights and privileges guaranteed under the Constitution.

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