

## The Scope of Public Accountability of the Army and Judiciary in Islamic Republic of Pakistan

Amir Mahmood

*Doctoral Candidate/Member Visiting Faculty, University Law College,  
University of the Punjab, Lahore*

Prof. Dr Shazia N. Qureshi

*Principal, University Law College, University of Punjab, Lahore*

### Abstract

Public accountability in any democratic state appears to be the hallmark of the rule of law and supremacy of the Constitution.<sup>1</sup> This process should equally encompass not only the individuals but also the State institutions because it would ensure the presence of the rule of law in the system wherein both shall be treated alike.<sup>2</sup> The public accountability of the State institutions is necessary because the resources entrusted and the powers vested to these institutions for utilizing such resources being the sacred trust, must not remain unaccountable in the public interest.<sup>3</sup> The misuse of public resources will not only blur the 2030 Agenda for Sustainable Development of the United Nations but will also jeopardize the valuable human rights of the citizens. The processes of accountability prevailing in the two most potent contending State institutions in Pakistan, i.e., the army and the judiciary, were examined to assess whether the forms of public accountability present in such cases are sufficient. This paper explored the significant forms of accountability present in the hierarchy of these two institutions. The army was found vertically and financially accountable, making it a disciplined institution. The case study of the judiciary demonstrates that the applicable forms of accountability fail. The judiciary protects citizens' rights and is directly linked with society. The law-and-order

situation in the country is at stake due to the lack of real accountability in this institution. This position has frustrated society and infused a sense of fear, disappointment and insecurity that eventually threatened the 2030 Agenda for Sustainable Development of the United Nations.

**Key Words:** Public Accountability, Accountability Characteristics, Accountability Mechanisms, Good Governance, Administrative Accountability, Financial Accountability, Judicial Accountability, Conceptual Framework of Accountability, Islamic Republic of Pakistan

### **Introduction**

Public accountability is a central pillar of good governance, the primary purpose of which is to judge the acts of those having public trust. It is an essential feature of good governance from the standpoint of effective bureaucracy and democracy.<sup>4</sup> It differs from the traditional concepts of equality and the rule of law in that it is poised against those entrusted with public power or State resources. Lack of trust affects the system to such an extent that it may not be able to flourish or develop any further.<sup>5</sup> A person or entity misusing such resources and public power for personal gain is termed corrupt.<sup>6</sup> The issue that any corrupt act is followed by accountability or that accountability prevents corruption remains a moot point. However, one manifest impact of every corrupt practice is that the State and its subjects are deprived of valuable public resources. Resultantly, the most vulnerable classes of society are adversely exposed to the hazards of corruption at the cost of human rights.<sup>7</sup> The State constituents and institutions needed a rapid shift in governance and rethinking public accountability beyond parliamentary, electoral or constitutional means. This paper explores the scope of public accountability by applying the proposed conceptual framework and its consequential effects on the two most powerful State institutions.

### **Characteristics and Conceptual Framework of Public Accountability**

The term 'accountability' has a chameleon-like character and nature.<sup>8</sup> Due to its varying characteristics, the jurists, political scientists and scholars of public administration needed universal consensus on its definition. No law has explicitly defined the term 'accountability' because of its varying contexts.

The term covers distinct concepts like transparency, equity, democracy, efficiency, responsiveness, responsibility, integrity, etc. Considering its nature, some essential characteristics have universally been recognized. For instance, it is admittedly retrospective, and every dimension involves at least a 'forum' taking account and an 'actor' who will give the account.<sup>9</sup> Thus, a forum seeks an actor's account based on the principle-agent model analogy.

Generally, accountability is based on the principal-agent model wherein the principal being the forum, has potential mechanisms for seeking enforceability of formal sanctions upon an agent.<sup>10</sup> *Mulgan* has defined accountability as a relationship of social interaction and exchange which involves complementary rights or mechanisms on the part of the forum and obligations on the part of the actor.<sup>11</sup> *Bovens* has described accountability as a relationship between an actor and a forum wherein the actor must explain and justify his conduct. In contrast, the forum may pose questions and pass judgment, and the actor has to face the consequences.<sup>12</sup> Considering these definitions, there is a consensus on some essential characteristics of the conceptual framework for analyzing accountability laws. These characteristics include firstly, the purpose of the statutes;<sup>13</sup> secondly, the identification of parties or actor and forum;<sup>14</sup> thirdly, the obligations of the actor;<sup>15</sup> fourthly, the autonomy and conduct of the forum;<sup>16</sup> fifthly, the relevance, practicability and scope of the accountability mechanisms to sanction an actor<sup>17</sup> and lastly the remedies available under the laws<sup>18</sup> regulating accountability.

Thus, an accountability process, although composed of the above characteristics, may be divided into three distinct phases, i.e. information, discussion and consequences.<sup>19</sup> There is a universal consensus about these essential characteristics or phases in any accountability process, which may be considered part and parcel of the related statutes governing accountability. The accountability arrangements and instruments are thus measured using these essential characteristics.<sup>20</sup>

Accountability vis-à-vis its usage has generally been identified into two distinct forms, i.e., accountability as a virtue and accountability as a mechanism.<sup>21</sup> As a virtue, it leads to the legitimacy of an actor, whereas as a mechanism, it leads to popular control, prevention and detection of corruption. Public accountability has become a general term for any

mechanism that makes powerful institutions responsive to their particular public.<sup>22</sup> The governing forum or principal evaluates the role of an actor or agent in the discharge of obligations and the nature of such obligations, whether contractual or statutory. The autonomy and conduct of the governing forum may also be examined in making an actor or agent accountable. The systematic expressions or processes which make an actor or agent accountable to the forum or principal are called accountability mechanisms.<sup>23</sup>

### **Accountability in the Public Sector**

Generally, the issue of accountability arises when the performance of an individual or organization is subjected to the oversight or direction or request of another person, organization or institution. Accountability in the public sector is an obligation placed on the public authorities to account for the exercise of the public power and usage of public resources entrusted to them.<sup>24</sup> In this sense, such accountability is called 'Public Accountability'. Public accountability has ensured that State initiatives achieve their desired purpose of good governance and the rule of law, and acts or actions of public authorities remain subject to oversight to promote transparency.

Public institutions are subject to different control mechanisms working under various forms of accountabilities, and it may be a matter of concern that they often suffer from an 'accountability overload'.<sup>25</sup> Generally, public sector accountability as to the nature of the forum included other specific or related kinds of accountabilities like administrative, political, legal, financial and professional accountability. However, regarding the nature of obligations, public accountability can be divided into vertical, horizontal and diagonal forms.<sup>26</sup> Accountability within an institution is direct or vertical, whereas, in weaker systems, accountability is indirect and horizontal. In such a case, every institution is made horizontally accountable to another institution, and accountability remains outside every institution. We may also include financial accountability, which is necessary because the financial resources used by public institutions are collected from citizens or contracted on their behalf by the State. Thus, the hallmark of public accountability is to achieve transparency and good governance and to promote the rule of law.

### **Importance of the Accountability Mechanisms**

The word 'mechanism' in law means the legal or financial tool, process or policy used to bring about any particular action or result.<sup>27</sup> Accountability mechanism means the process or procedure provided by law to induce accountability. As regards the existence and necessity of accountability mechanisms, it seems evident that the mechanisms check the ruthless exercise of public power and make the trustees of such power accountable.<sup>28</sup> These mechanisms serve as a controlling process and must be specific, target-oriented, and actionable<sup>29</sup> to fulfil the purposes prescribed by the relevant law under which accountability was mandated. These mechanisms are of diverse forms, from top-down processes to bottom-up strategies and refer to the institutionalized processes of holding the actors or public authorities to account.<sup>30</sup>

These mechanisms must augment the purposes and process of accountability.<sup>31</sup> Their nature must determine whether these mechanisms have otherwise achieved their statutory purposes and fulfilled the essential characteristics involved in any accountability process. To answer whether accountability mechanisms are sufficient in any case, system, or institution, one must go through the aims and objectives for which such public institutions were constituted under the law. Thus, the nature of the mechanisms vis-à-vis statutory purposes, their ability and relevance to achieve accountability may be evaluated to find any suitable answer.

#### **Public Accountability of the Army**

In Pakistan, armed personnel have not so far been held public ally accountable mainly because Pakistan Army is not only a non-political institution, but the governing legislation<sup>32</sup> has provided hierarchical accountability within its formations. The purposes of the governing law, as disclosed in its preamble, are 'to consolidate and amend the laws relating to the Pakistan Army'. The army is the State institution responsible for defending the geographical borders, maintaining the country's sovereignty and integrity, and raising arms against foreign aggression and internal disturbances. The purpose could not be achieved until and unless this institution is not highly disciplined. Thus, we must first assess the mechanisms responsible for inducing discipline. A careful perusal of the Act of 1952 reveals that the Federal Government has been constituted as a forum

in the cases of Pakistan Army Generals and Chief of the Army Staff. The prescribed statutory mechanisms generally tend to enforce direct and vertical accountability in the institution, and the forum acquires the ability to remove or even dismiss from service any such actor.<sup>33</sup> Thus, the governing law has established a relationship of an actor and forum wherein the President of Pakistan has been exalted to appoint such actors in consultation with the Prime Minister or may appoint, reappoint or extend the tenure of appointment of any General of the Pakistan Army as the Chief of the Army Staff.<sup>34</sup> Considering the nature of the conduct and the forum, the institution, in its present form, is subject to two different forms of accountabilities.

**i) Administrative Accountability of the Army**

A close examination of the working of the army as an institution would reveal that administratively the whole institution is vertically accountable through the Chief of the Army Staff to the Federal Government.<sup>35</sup> The entire army is otherwise under the direct command and control of the Chief of the Army Staff and is vertically accountable to him.<sup>36</sup> Accountability from this perspective is not only internal but also hierarchical. This form of accountability constitutes strict obligations of the actors and is considered the most relevant to maintain discipline in any institution where otherwise necessary. The governing law has enumerated the offences<sup>37</sup> wherein arrest and trial proceedings are commenced and concluded before the Court Martial in a summary fashion. There are offences concerning enemy and punishable with death; or not punishable with death; offences against property or persons of inhabitants of a country where serving; offences relating to sentries; offences concerning superior officers; other service offences; offences concerning persons in custody; offences concerning the Court Martial or Civil offences which are tried by the Court Martial and are punishable comparably through different severe punishments than those provided by the Pakistan Penal Code, 1860. These provisions have obligated an actor to act in a particular manner and constituted the mechanisms to ensure accountability in cases of deviations. In the recent past,<sup>38</sup> we also take the example of vertical accountability in the hierarchy when approximately six officers, including officers of the rank of a Lieutenant-General and a Major-General, were sacked.

The other statutory mechanisms generally promote hierarchical accountability in the institution by penalizing punishments in purely disciplinary matters. Even the offence of 'illegal gratification' has specifically been defined and made punishable by the Court Martial with rigorous imprisonment for up to five years or with any lesser punishment.<sup>39</sup>

ii) **Financial Accountability of the Army**

The Pakistan Army is financially accountable to the Pakistan Military Accounts Department, which oversees several Controllers who conduct internal audits of all the Units and Formations and send their reports to the Controller General of Accounts.<sup>40</sup> These reports are scrutinized and forwarded to the Military Accountant General. The Military Accountant General is eventually accountable to the Ministry of Defense by submitting periodic audit, financial and inspection reports.<sup>41</sup> The Directorate General Audit, Defense Services, conducts various audits.<sup>42</sup> Thus, the office of the Military Accountant General, Pakistan Army, is financially accountable to the State. Available financial accountability mechanisms in the institution have also induced reporting mechanisms of accountability.

From the preceding discussion, it becomes evident that administrative and financial accountability mechanisms are firmly entrenched in the Pakistan Army. The mechanisms of financial accountability are also fortifying through the reporting mechanisms. Thus, accountability within the institution itself, being administrative or hierarchical as well as vertical, may be considered a sufficient form of accountability because, in the absence of such forms of accountability, this institution may not remain disciplined. In contrast, discipline is the primary purpose for the very existence of this institution. At this stage, one may safely deduce that the only thing needed is the effective enforcement of the existing accountability mechanisms by the head of the institution as a forum for the subordinate hierarchy. Any legal interference on any pretext in the system of accountability already in vogue in this institution may undermine the organization's institutional discipline, eventually turning it into any civil department. Such a situation may result in perfect chaos, which will have far-reaching implications for national security and peace. Perhaps on this basis alone, other forms of accountability are not desirable in the case of this institution of national importance.

### **Public Accountability of the Judiciary**

*Montesquieu* suggests that one government agency should not exercise the functions of another branch and that the separation of the judiciary will have an essential role in preventing oppression. He argues that where all three powers of the government are concentrated in the same person or body of persons, it may threaten an individual's liberty. Thus, the judicial powers must always remain separated from the legislative or executive powers.<sup>43</sup>

Judicial independence relates to the rule of law, which requires equality of all persons before the law irrespective of their status, protection of fundamental freedoms and the absence of arbitrary exercise of power by the executive or the State.<sup>44</sup> The element of judicial independence presumed that the legality of all the executive acts must be judicially reviewed by judges who are wholly independent of the executive organ of the State.<sup>45</sup> Therefore, the independence of the judiciary is indispensable for protecting individual liberties and sustaining democratic governance,<sup>46</sup> besides upholding the rule of law and supremacy of the Constitution.<sup>47</sup>

Judicial accountability has not explicitly been defined, yet the concept has embodied in it the necessity by implication for the judiciary to justify its conduct or behaviour presumably to the forums constituted under the Constitution.<sup>48</sup> However, judicial independence alone does not mean giving *carte blanche* to act arbitrarily in the name of independence or exploiting the purposes for which the independence was granted as a trust. This judicial independence itself is subject to judicial accountability. Thus, judicial accountability is the flip side of judicial independence and is indispensable for granting independence as trust. Judicial accountability generally has two inbuilt forms. Firstly, it included the mechanisms laid down by the Constitution that enforce administrative accountability and, secondly, the mechanisms which induce judicial accountability of the superior court Judges.

#### **i) Administrative Accountability of the Judiciary**

Accountability is generally regarded as an administrative matter wherein a superior takes account of an inferior in the form of an explanation to maintain discipline. The Constitution of the Islamic Republic of Pakistan, 1973, has established judicature by expressly conferring jurisdiction under the Constitution or the law.<sup>49</sup> The method for appointment<sup>50</sup> of superior court

Judges has provided that the Judicial Commission of Pakistan shall, by the majority of its membership, nominate to the Parliamentary Committee one person for each vacancy of a Judge in the Supreme Court, High Courts or the Federal *Shariat* Court.<sup>51</sup> The Parliamentary Committee, on receipt of nominations, may confirm the nominee failing which the nomination shall be deemed to have been confirmed. The Parliamentary Committees may also not confirm the nominations by providing reasons with the majority of three-fourths within fourteen days. Where nominations are not confirmed, the same may be returned to the Commission through the Prime Minister, after which the Judicial Commission shall send other nominations. However, when the Parliamentary Committee confirms nominations, it shall send the name of such nominees to the Prime Minister, who shall forward it to the President for appointment.<sup>52</sup>

The above-stated process indicates that the members of the superior judiciary are initially nominated by the Judicial Commission of Pakistan and subsequently recommended by the 'Parliamentary Committee'. Although the Parliamentary Committee has a decisive role in making such appointments, it has no role in initially 'nominating an individual'. Such a situation has virtually given *carte blanche* to the Judicial Commission in subjectively nominating persons of its choice based on general standards prescribed by the Constitution and made the Judicial Commission a forum in cases of members of the superior judiciary. Thus, some objective criteria must be evolved to determine the nominations by the Judicial Commission for making appointments to the superior judiciary.

The second aspect of administrative accountability refers to the behavior or conduct of superior court Judges, which needed more stringent accountability in the context of their independence. For this purpose, the Supreme Judicial Council<sup>53</sup> has been constituted as another forum under the Constitution which has exclusive jurisdiction to examine references and to determine the conduct of the superior court Judges. The proceedings, once taken before the forum of Council, cannot be subsequently questioned in any other court or forum.<sup>54</sup>

The word 'misconduct' has nowhere been defined in the Constitution or the Code of Conduct for Superior Court Judges. It is generally described as a norm and standard for good judicial and personal behavior. Although the

Code of Conduct is silent on the definition of misconduct, the Enquiry Rules 2005, affirmed by the Supreme Court in Justice *Shaukat Aziz Siddiqui's* case,<sup>55</sup> have broadened the term without specifying its intricacies. The absence of any specific definition may promote subjectivity to the proceedings of the Supreme Judicial Council.

The Supreme Court of Pakistan, in Chief Justice *Iftikhar Muhammad Chaudhry's* case,<sup>56</sup> was pleased to observe that Supreme Judicial Council itself is not a court. Later, in Justice *Qazi Faez Isa's* case,<sup>57</sup> it was held that all acts preceding or succeeding the proceedings before the Council are not hit by the ouster clauses of the Constitution and are subject to judicial review like any other administrative or executive action. By holding so, the Supreme Court of Pakistan somehow appears to have marginalized the powers of the Supreme Judicial Council on the grounds of *mala fide*, *coram-non-judice* or without jurisdiction.<sup>58</sup> Thus, the questions that whether there is any bar on the power of the superior courts to take up the matter of misconduct by superior court Judges or whether any constitutional bar would come in the way of the superior courts to make such Judges accountable were indirectly answered.

Prima facie, there is no other limitation on the independence of the judiciary. Generally, on such pretext, reference against superior court Judges, being the sole mechanism of accountability, needs to be more effective. Practically, the independence has conferred them such sanctity which neither seems restricted by the Constitution nor by any other mechanism or process. Once appointed, a superior court Judge appears to be neither accountable nor exceptionable to anyone else. Thus, accountability or its mechanisms are practically ineffective, and the issue of the extent of judicial independence needs to be settled.

#### ii) **Judicial Accountability of the Judiciary**

Judicial accountability includes appellate review and academic criticism of judicial decisions by which Superior Court Judges are held accountable for their rulings and decisions. The doctrine of *stare decisis*, as embodied in the Constitution,<sup>59</sup> has paved the very basis of this form of accountability and any decision of a superior court on any question of law or in so far as it enunciates any principle of law is binding on all the subordinate courts of the country. Prima facie, any subordinate court may be held accountable on such basis before the forum of every superior court. However, this mechanism of

judicial accountability of subordinate courts has also become ineffective because, generally, subordinate courts are granted protection based on the Judicial Officers' Protection Act (XVIII) of 1850 or the availability of legal remedies before the higher judicial forums.

As regards the academic criticism of judicial decisions in Pakistan, the superior courts themselves have hindered the scope of judicial accountability by ruthlessly resorting to contempt jurisdiction. The superior courts have held that contempt jurisdiction is necessary to keep up the dignity and majesty of the law. Still, it is equally important that such jurisdiction should not be used for self-aggrandizement. It must be applied cautiously and only where the Constitution or the law is defeated or flouted.<sup>60</sup> Irrespective of any sub-constitutional legislation, the Constitution still empowers superior courts to punish any contemnor.<sup>61</sup> However, the courts must usually show grace and generosity towards the contemnor by taking a lenient view where a contemnor has expressed remorse at the earliest stage and tendered an unconditional apology.<sup>62</sup> Hence, fair comments about the courts generally made in temperate language and good faith in the public interest are not contempt of court.<sup>63</sup> However, it appears that sometimes judicial discretion is exercised while disregarding the rights of the litigating parties to seek further redress, adversely affecting this form of accountability.<sup>64</sup>

The efficacy of judicial accountability also appears to be dissipating because the superior courts, in recent years, repeatedly ignored their decisions vis-a-vis implementation. Such a position has constrained to presume that this form of accountability has also become ineffective. As an instance, we may quote the case titled *'Nazir Ahmed v. The State'*,<sup>65</sup> wherein the Supreme Court of Pakistan, as a forum, set aside the order passed by the petitioner-Judge in the High Court while observing that discretion exercised in passing the impugned order appeared to be somewhat colorable. Nevertheless, such an aspect was subsequently ignored, revealing the forum's weakness in enforcing this form of accountability.

Although judicial accountability appears to be the cornerstone of judicial independence, it does not mean that the accountability of superior court judges in any way opposes the concept of independence of the judiciary. The purpose of the independence of the judiciary is to infuse confidence in the

general public, which could not be achieved until and unless an impartial and fair process of accountability is not paved as a basis. It is in this background that both concepts need to be separated.

### **Conclusion**

The purpose of public accountability appears to protect the precious public resources of the State and ensure that they remain available for the benefit of rightful persons. It is on this basis that accountability seems to have promoted human rights. The principal object of making inclusive, peaceful and sustainable societies, as contained in the 2030 Agenda for Sustainable Development of the United Nations, could not be realized until and unless accountability in every system is not meaningfully induced.

In the recent few years, two major State institutions in Pakistani's. army and judiciary, have vigorously supported the process of accountability without in any way becoming its actual subjects. Both institutions have facilitated constitutional as well as legal exceptions on various pretexts. A close examination of the functioning of these two contending institutions has astonishingly revealed divergent results. In the army, various forms of accountabilities. direct, vertical, internal and administrative or hierarchical accountabilities, are sufficiently present through the Pakistan Army Act, 1952, and any outside intervention may not only disrupt its internal functioning but would indirectly endanger national security.

As regards the judiciary, the mechanisms of administrative and financial accountabilities. appointments, conduct and functioning of judges, do not appear effective. Firstly, the mechanism of appointments in the superior judiciary has neither revealed any check nor any formal regulation upon the nomination of those having clash of interests or close ties with the members of the superior judiciary. Secondly, the conduct of superior court Judges on the pretext of judicial independence has virtually elevated them to a place next above the Constitution. On this basis alone, even the mechanism to regulate their conduct through the forum of the Supreme Judicial Council also seems to have been cornered. Lastly, the judiciary as a forum still needs to ensure judicial accountability in its hierarchy, and its functioning needs to conform to the standards of equal or fair dispensation of justice.

Public accountability of the judiciary appears indispensable because it being the custodian of the rights of citizens, is eventually responsible for protecting such rights. Seemingly impartial and fair accountability at all levels may infuse the general public with a sense of security besides ensuring the rule of law. The supremacy of the Constitution in Pakistan could only be visualized and actualized with meaningful accountability of the superior judiciary. Thus, the accountability processes should not be deferred on any pretext. Failure in not taking steps towards the right direction may deprive the State of its valuable resources, besides jeopardizing the future of our coming generations.

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