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Judicial Activism in Pakistan and its Impacts on Tripartite Governance: Lessons from the US Constitutional Construct

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Abstract

The judiciary played a significant role in the evolution of democracy in Pakistan. Throughout history, the military remained at the core of politics and as an avoidable stakeholder influenced the judiciary in validating its extraconstitutional actions. However, after 2009, the judiciary emerged as exceptionally independent invalidating extraconstitutional actions and stretching its authority to take up matters else within the jurisdictional province of the other state organs, resulting in judicial overstretch. Excessive judicial activism had evident adverse impacts on the equilibrium of the state organs, imposed financial liabilities, and compromised its dignity. By employing qualitative research methodology, this article considers the judiciary as a double-edged weapon and critically examines the cases where the judiciary deviated from the international treaty obligations, leaving the fragile economy of Pakistan to a blow of penalties. Lastly, the research contributes to what Pakistan can learn from the US Constitutional construct.

Keywords: Democracy, Judicial Activism, Parliament, Reko Diq, ICSID, Suo Motu, Separation of Powers, US Constitution

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The judiciary played a significant role in the evolution of democracy in Pakistan. Throughout history, the military remained at the core of politics and as an avoidable stakeholder influenced the judiciary in validating its extraconstitutional actions. However, after 2009, the judiciary emerged as exceptionally independent invalidating extraconstitutional actions and stretching its authority to take up matters else within the jurisdictional province of the other state organs, resulting in judicial overstretch. Excessive judicial activism had evident adverse impacts on the equilibrium of the state organs, imposed financial liabilities, and compromised its dignity. By employing qualitative research methodology, this article considers the judiciary as a double-edged weapon and critically examines the cases where the judiciary deviated from the international treaty obligations, leaving the fragile economy of Pakistan to a blow of penalties. Lastly, the research contributes to what Pakistan can learn from the US Constitutional construct.

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Introduction

The Constitution of Pakistan, 1973 envisaged trichotomy of powers to ensure equal distribution of powers among legislature, executive, and judiciary for running governmental affairs. Apart from their autonomous status, the state organs are subject to reasonable control from the other state organs to check and control misuse of its authority. The judiciary remained vulnerable to the military, which has been a major stakeholder in the evolution of democracy in Pakistan. After its restoration in

March 2009, the judiciary emerged as exceptionally autonomous, invalidated extraconstitutional acts of the military previously validated by the Superior Courts. With this judicial activism, the judiciary invalidated extraconstitutional actions and narrowed down functional space for the executive by overstretching its jurisdictional bound. The scope of *Suo motu* action, which has been assumed by the Supreme Court of Pakistan in *Darshan Masih v. the State* (1990) under Article 118(4) of the Constitution of Pakistan, 1973. The Court outlawed bonded labor



in contradiction to Article 11 of the Constitution and assumed to act on its own accord, which resulted in significant development in Pakistan's legal regime. Over the period, this authority was expanded, and the Court took cognizance of the matters considered purely executive, leading to judicial overreach. This judicial activism impacted the trichotomy of powers and sustained significant losses to the public treasury.

The Constitution of Pakistan does not unequivocally provide for the separation of powers among the state organs as exhibited by the US Constitution. Through judicial scholarship, it has evolved and established as a constitutional concept referred to as the trichotomy of powers (Munir, [2020](#); Jurists Foundation v. Federation of Pakistan, [2020](#)). This concept has been established by the apex court of Pakistan in various leading judgments: in a case, Dr. Mubashir Hassan v. Federation of Pakistan ([2010](#)), the Court held that the Constitution envisages the trichotomy of powers wherein every state organ has designated a constitutional mandate, and none transgresses its authority into the affairs of the others. The Court declared that under a written constitutional scheme powers and functions of the state organs are defined by the Constitution to run the state affairs. The trichotomy of powers we are familiar with is the constitutional construct that outlines the functions of each organ where none is permitted to intrude in the legitimate circle of the others. Though the doctrine is not expressly articulated in the letters of the Constitution, it is deep-rooted and immersed in the spirit of the Constitution (State v. Zia ur Rehman, 1973). The courts have liberally interpreted the doctrine and diluted its true essence. In the US Constitution, however, this concept is explicitly exhibited and referred to as the doctrine of separation of powers. Rule of law is one of its essential functions and the state officials derive their authority from the constitution and are restrained by it. The division of powers has been translated as a significant factor for the rule of law and good governance. Countries with well-established power divisions indicate effective and autonomous institutions promoting good governance, transparency, accountability, and distinctive jurisdictional bounds. Conversely, overlapped executive and judicial organs indicate compromised institutional capabilities,

jurisdictional confrontations, and political controversies.

With the help of qualitative research methodology, primary and secondary sources have been considered, and most of the data and literature are extracted from the author's unpublished PhD Thesis submitted at the International Islamic University. This research examined how systematically the judiciary mitigated unbridled military extraconstitutional discourse and secured its autonomy. Nevertheless, this judicial activism created challenges for other state organs, which resulted in the imposition of huge penalties by the International Centre for Settlement of Investment Disputes (ICSID) for vitiating foreign investment contracts. The article examined how this judicial activism could be transformed into judicial imperialism, how it could create prospects for confrontation with other state organs, and how it could adversely affect the economic life of the country. This research paper has been divided into the following segments: the first segment highlights an overview of the research article and examines how judicial review is a two-edged weapon. The second segment considers the test of judicial review concerning constitutionalism. The third segment explicated judicial populism and executive response. The fourth segment highlighted the impacts of judicial activism on the other state organs and its economic consequences. The last segment explains the US concept of judicial restraints enabling each organ to work in its respective domain. This segment concludes the research article and contributes meaningful suggestions to overcome the dilemma of judicial overreach and its associated challenges.

Judicial Review: A Double-Edged Weapon

This segment highlights the two-pronged tendency of the judiciary: the judiciary's operational dynamics and its approach to interacting with the executive branch, particularly during the post-Musharraf democratic transition. Proclamation of emergency on November 3rd, 2007, the Chief Justice and other dysfunctional judges were turned into martyrs for the cause of judicial independence. The restoration of the judges, after the lawyers' prolonged movement, supplemented by media, civil society, and sincere efforts of the political leadership, transformed them into heroes (Waseem, [2012](#)). After

its restoration in March 2009, the judiciary started functioning with real autonomy. A newly independent judiciary not only strived to ensure its autonomy from the entrenched military but also sought its independence from the control of other state organs resulting in another confrontation. The judiciary has repeatedly invalidated executive and legislative actions to maintain and reinforce its authority.

At the expense of the other state organs, the judiciary earned a populist role due to its active accountability mechanism. The Superior Judiciary expanded its authority conferred under Article 184 (3) of the Constitution. This extraordinary expansion of jurisdiction adversely affected and narrowed down the functional space for the executive branch of the government. There were two competing approaches towards emerging judicial activism in Pakistan: political opposition, influential people from the business and professional community, bureaucrats, technocrats, and their followers in media and civil society supported and advocated this activism. However, the ruling government considered it a tool to undermine the democratic process.

Nevertheless, the supporters of judicial activism felt alienated within two years of its restoration on various grounds: firstly, judicial oversight of the executive's functioning in matters about the appointment, transfer, and promotion of the bureaucrats and the judges. Secondly, the constitutionality of certain laws created more public concern to challenge this hyper-judicial activism. The recent interbranch conflict between the judiciary and executive emerged as a real challenge to democratic transition.

In the trichotomy of powers, the executive is controlled through judicial review. For successful democratic consolidation, the government should not decide the extent of judicial oversight: to which the government shall or shall not tolerate and accept that the judiciary should interfere. Rather, the courts should realize and demonstrate how much misuse of authority they will permit. In Pakistan, the dynamics of judicial review reflect a broader political environment, which is beyond the doctrine of separation of powers for the institutional architecture, and which is more typical in the Presidential form of government (Domingo, 2000).

The Judiciary has increasingly penetrated the affairs of representative governments to keep

surveillance over the affairs of the latter, which is not limited to constitutional matters, rather it covers all aspects of its functional sphere. This judicial control holds other state organs responsible for acts of their omissions and commissions. This judicial accountability often leads to circumventing the formal legislative process, i.e., legislation through parliament. The judiciary virtually assumes governance by directing the executive to undo its actions (Waseem, 2012).

Another aspect of this judicial activism is that the judiciary invalidates the laws with disregard for the opinion or consideration of the political leadership. In *Mahmood Khan Achakzai v. Federation of Pakistan* (1997), the petitioner challenged the validity of a constitutional amendment, Article 58 (2) (b), whereby the President was authorized to dissolve assemblies at his discretion as evident four times in less than a decade. The Court confirmed the alleged amendment and declared it a valid provision of the Constitution. The confirmation and validation of the alleged Article put the responsibility on Parliament not to omit the same from the constitutional scheme. The validation of constitutional provisions such as Article 58 (2) (b) is regarded as more distractive to the democratic transition than that of martial law itself (Siddique, 2005). Despite the fact the Court upheld the constitutionality of the amendment, the Court acknowledged the significance of the basic structure of the Constitution. The Court held that parliament could amend the constitution unless it alters the salient features of the objective resolution such as Islamic provisions, federalism, independence of the judiciary, and parliamentary democracy. *Sindh High Court Bar Association v. Federation of Pakistan* (2009), led to the restoration of the judiciary and reinstated deposed judges. This case redefined the balance of power, confirmed the role of the judiciary in upholding constitutional order, and constrained the executive authority to go beyond its constitutional mandate. Among other things, the Court declared actions including the PCO, the Oath of Office (Judges) Order, and amendment to the constitution during the imposition of the emergency of 2007 to be unconstitutional. The political parties also reached a consensus and signed the Charter of Democracy, brought about constitutional amendments to prevent potential military

intervention, imposed modest judicial restraints on the judiciary not to validate any extraconstitutional action, and institutionalized the mechanism of judges' appointments to the Superior Courts, which the Court considered an attack on its autonomy and directed the parliament to make amend the constitution in light of its recommendations: to increase the number of judges in the Judicial Commission and the Parliamentary Committee was also obliged to give sound reasons in case of rejection of the nomination of the Judicial Commission. Consequently, 19th constitutional amendment was introduced.

In *District Bar Association (Rawalpindi) v Federation of Pakistan* (2015), the SC upheld the 18th constitutional amendment. The amendment led to a severe reaction from its critics, considering it against the basic structure of the Constitution. The alleged issues were about the composition of the Parliamentary Committee, having final authority to approve or disapprove the judges' appointments, and the jurisdiction of the Court, to invalidate a constitutional amendment. The Supreme Court, in its proceedings wherein the 18th Amendment was challenged, also referred to the Indian case laws (*Golaknath v state of Punjab*, [1967] SC 1643 AIR, the Court held fundamental rights have constitutional protection and Parliament cannot abrogate them; *Kesavananda Bharati v. State of Kerala*, [1973] SCC 225, the Court laid down a doctrine for the protection of the salient features of the Indian Constitution. According to the doctrine, Parliament could not alter basic structure of the Constitution.) on salient features and the basic structure of the Constitution. The legal opinion has been divided into two discourses: one group advocated the Indian pattern and argued that superior courts conceived a similar architecture of the Indian basic structure doctrine. From Pakistan's perspective, it includes protection of Islamic provisions, a parliamentary form of government, federalism, and judicial autonomy (*Mahmood Khan Achakzai v. Federation of Pakistan*, 1997; *Zafar Ali Shah v. General Pervez Musharraf*, 2000). The other group debated the incompetence of the judiciary to strike down constitutional amendments. The Court recognized and acknowledged some fundamental features of the Constitution but declared it beyond its mandate because it is within the exclusive domain of the parliament. In *District Bar Association v. Federation of Pakistan* (2015), the Court for the first time, with

a majority view, agreed that the judiciary can review the substance of the constitutional amendment if it alters, abrogates, or repeals the salient features of the Constitution. Cases challenging the 18th and 21st Amendments to the Constitution redefined the idea of parliamentary sovereignty (Mir, 2015; Munir et al., 2021).

Judicial Populism: Executive Response

One aspect of judicial activism is to fill the executive vacuum. The judiciary comes forward when the government fails to deliver as per public expectations. People of Pakistan who are very much disappointed and frustrated with their democratic institutions, appreciate the courts' *suo motu* actions on executive matters. This wave of judicial activism wins public confidence in the judiciary at the cost of the civilian government. The opponents of judicial activism believe that the superior judiciary reached the exalted position of governance to win the minds and hearts of people at the cost of representative governments. The Court took cognizance of various issues of public interest and received appreciation across the board. The Court entertained matters of public importance through simple applications, news reports, or media talks. The Supreme Court, without considering any legal formalism, entertains those matters by invoking its original and *suo motu* jurisdiction, guaranteed by Article 184 (3).

The Constitution envisages two tests, as elaborated by the Superior Courts' judgments, for invoking the jurisdiction of the Supreme Court under Article 184 (3): a matter of public interest and violation or enforcement of fundamental rights. For this purpose, the Supreme Court of Pakistan established the Human Rights Cell, which annually receives thousands of applications, and the Court disposes of those applications accordingly. This is the best way to resolve their grievances expeditiously. Nevertheless, there are so many implications attached to the exercise of this power: it is affecting the dignity and functioning of other state organs and officials and leaving adverse impacts on the judiciary and the constitutional role of the apex court.

By exercising *Suo motu* jurisdiction, the Court addressed common issues, ranging from the highest level to the pettiest nature. The judiciary used this card wisely against military dictators and their affiliates and the civilian governments to earn the

title of 'people's judiciary' (Abbasi, 2009). The Supreme Court dealt with numerous corruption cases. (In the ETPB case, the Supreme Court took cognizance of the impugned sale, blocked the controversial sale of 240 acres worth billions of Evacuee Trust Property Board, Karachi land, and directed the government for a new survey to be conducted by the ETPB and its price be fixed accordingly. In the Bank of Punjab case, the Court took cognizance of the mega corruption case where Haris Steel's owner with the convenience of the Bank of Punjab's president, Hamish Khan, took a financial facility of 8.6 billion Rupees fraudulently on bogus documentation. The Court ordered the confiscation of their property, to recover the alleged amount. In the Murree Gas Pipeline Project, the Court took cognizance of the Muree Gas Pipeline Project where alterations were made to facilitate the Chief Minister's son Hamza Shahbaz Sharif's bungalow at Dunga Gali. This construction could cost 750 million extra coupled with cutting down thousands of trees. Similarly, the Court also took cognizance over the extension of the canal road, Lahore, aimed to facilitate a particular segment of the society at the expense of hundreds of trees. In the Federal Government Housing Foundation case, the Court took cognizance of the government land given by the Federal Government Housing Foundation for peanuts and the purchase of 2000 kanals in the out suburbs of Islamabad for the government housing scheme. The Court directed an inquiry into the matter, which reported irregularities in the plot's allotments. The Court took cognizance of the Pakistan Cricket Board, which alleged to have been involved in embezzlement of Rs. 07 billion Rupees. The Court took cognizance of electricity theft by Ex-Army Chief, Musharraf and some other influential located at Chack Shezad, Islamabad. The Court ordered a proper inquiry into the matter.) In the ETPB case, the Supreme Court took cognizance of the impugned sale, blocked the controversial sale of 240 acres worth billions of Evacuee Trust Property Board, Karachi land, and directed the government for a new survey to be conducted by the ETPB and its price be fixed accordingly. In the Bank of Punjab case, the Court took cognizance of the mega corruption case where Haris Steel's owner with the convenience of the Bank of Punjab's president, Hamish Khan, took a financial facility of 8.6 billion Rupees fraudulently on bogus documentation. The

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Unlike corrupt politicians, the Supreme Court claimed moral uprightness for the judiciary and cultivated its image as a guardian of the interest of the exploited people. In a society where people always remained vulnerable to discrimination, injustice, and exploitation, and were deprived of their necessities, public interest litigation earned a very positive name for the judiciary, and it turned out to be a legal mechanism for its populist stance. Nonetheless, an unenthusiastic inclination towards adjudication is a real challenge. A five to ten percent conviction rate made the justice system unavailable and disappointing. Within the judicial fabric, the judiciary faces so many challenges: inadequate number of judges at the domestic level, lack of professionalism, lack of accountability, and uncontrolled corruption, which is coupled with procedural delays and non-delegation of authority and its exercise in the garb of *suo motu* litigations.

The overwhelming flow of public interest litigation created obstacles to the constitutional

functioning of the Court. The Superior Judiciary is more likely to respond and adjudicate upon the matters leading to its populism, contrary to the exercise of its appellate, interpretive, and advisory jurisdiction. Contrary to the general principles where a dispute is initiated at the civil court as a court of first instance the SC is considered a final forum to resolve the dispute. However, in matters of public interest litigations under Article 184(3), the Supreme Court takes cognizance in the first instance or refers it to the subordinate courts.

The expansion of *suo motu* jurisdiction not only increases the workload on the Superior Judiciary but also adversely affects its dignity for the Supreme Court is neither a trial court nor a civil court of first instance to deal with petty offenses. As evident from the *suo motu* cases, where the judiciary frequently assumes legislative and executive functions, the Supreme Court is neither expected to supervise the investigation nor to exercise pure executive functions. Despite bringing reforms in the judicial apparatus, the Supreme Court is reducing functional space for the executive. Instead of its performance, the superior judiciary achieved more from the executive loss in governance. In some cases, the Court, while dictating its authority directed the government to implement a particular action and left the latter with no other option. In most public interest litigation cases, the Superior Courts undermined the executive. In response, the executive recourse to delaying tactics to comply with the court's directions by filing review petitions or misinterpretation of decisions.

The government strategy is characterized by a problematic association between the two sides. The Court intended to keep the prerogative of interpretation and implementation of laws at its discretion. Simultaneously, the Court aimed to put certain institutional arrangements to avoid potential threats to judicial autonomy. At the same time, the judiciary felt obligated to undertake governance to address people's grievances. Nevertheless, this judicial activism also opened an avenue of criticism: the extent to which the government was put on the defensive side on the issues about governance; the judiciary was discredited in public correspondingly. These public interest litigations also sustained huge losses to the public treasury, shook public trust in the elected representatives, created elements of disrespect to international treaty obligations, and

created prospects of jurisdictional conflicts with international forums.

Furthermore, the Superior Judiciary ensures its supervisory oversight through judicial review but remains unaccountable to others on the pretext of judicial independence. Generally, the Court held itself accountable, for its decisions, to the public at large, which is a very hypothetical and abstract term. In the post-2009 democratic transition, coupled with judicial activism, the government felt overly constrained in its dealings with the judiciary. Besides its legal obligation to comply with the court's directions, the government was required to show serious concerns to public opinion, to which it must appeal in the final sense.

Impacts of Judicial Activism on Democratic Institutions and its Economic Repercussions

Since its restoration in 2009, the Superior Judiciary has exercised its authority more rigorously with maximum judicial activism. The appointments and promotions in the bureaucratic fabric are purely executive functions. In a case, the Court set aside the impugned order of promotions on the pretext of being violative of service laws and rules. On November 6th, 2009, the petitioner moved an application to the Court regarding the promotions of various Civil Services Groups from BS 21 to BS 22 without considering seniority, merit, and fair play. The petitioner alleged that the applicant's juniors have been promoted superseding the former without any reasonable justification. The Court required comments from the concerned authorities and decided to fix the matter in Court by notifying all the concerns.

Meanwhile, other aggrieved persons of the impugned order also approached the Court, whose petitions were clubbed with this petition. The petitions challenged the impugned order on various grounds: the authorities must exercise discretionary powers as sacred trust with the application of mind, ensuring equal opportunities as contemplated by the Constitution. The Government promoted a junior lady surpassing the seniority principle. The alleged promotions were made without assigning any reason regarding the exercise of such discretion. The government challenged the jurisdiction of the Court and contended about the trichotomy of powers. In the instant case, the subject matter is

purely executive as articulated in Article 240 of the Constitution.

The Court observed that good governance is based on strong and honest bureaucracy. The civil services, being an essential part of our administration, depend upon the purity of the services. The purity of services can be achieved only if merit prevails and the promotions are made on merit, according to the rules, laws, and the Constitution, without favoritism and nepotism. Promotions in disregard of seniority are expected to obliterate the service structure. The Court quashed the impugned order of promotion and demoted the promoted officers to their previous positions. The government was further directed to consider the cases of all other officials already serving in the BPS-21 for fresh promotions. In the instant case, despite exercising its authority to demote officials, the Court should have referred the same to the government for reconsideration.

Similarly, in another case (*Hajj Corruption Case*, [2010](#)), the Supreme Court of Pakistan received a letter as well as a request from Senator, *Khalid Muhmood Soomro*, through a TV channel regarding alleged corruption in Hajj arrangements by the Pakistani officials who were responsible to hire a building for the pilgrims. The officials hired a building that was distantly situated from *Masjid al-Haram* at inflated rates. The Prime Minister constituted a Committee of Parliamentarians to visit Saudi Arabia and observe the Hajj arrangements. The Committee reported corruption and malpractices by the Ministry of Religious Affairs in hiring buildings for the pilgrims.

The alleged matter was of public interest and was greatly concerned with the country's prestige. The Court called for comments from the Sectary of Religious Affairs and the Ministry of Foreign Affairs. As per the news reports, *Rao Shakeel Ahmed*, former DG Hajj, was appointed in violation of the rules. The Court was informed that *Rao Shakeel Ahmed* was facing two cases when his name was approved by the Prime Minister for the appointment as DG Hajj: criminal proceedings before the accountability court and he was also facing the NAB investigation on the charges of having assets beyond known sources of income. By the time of the appointment, his name was already on the Exit Control List (ECL).

On the Court's directions, the DG FIA, Mr. *Waseem Ahmed*, post submission of the report

constituted an investigation team headed by Director FIA, *Hussain Asghar*, to further probe into the matter. In the preliminary report, the DG FIA urged further inquiry to ascertain the real culprits in alleged corruption and mismanagement. The report also highlighted that the Sectary has no control over the DG Hajj who assumed uncontrolled authority in financial matters and administration. It was also alleged that the hiring process, followed by the repatriation of *Shakeel Ahmed Rao*, was not according to government policy, which reflects mismanagement and the Sectary's lack of control.

The Director FIA unleashed various aspects of the alleged Hajj scam and collected sufficient material against influential persons. He was transferred to Gilgit Baltistan as an Inspector General Police. The Court sought an explanation from *Malik Muhammad Iqbal* who had assumed charge of the DG FIA. He expressed consent and wrote to the authorities to re-post *Hussain Asghar* to complete the investigation, but no response was received. The Court directed the Sectary Establishment Division to issue transfer orders for resuming his duty to probe the case otherwise the former shall face contempt proceedings. In compliance with directions of the Court, Sectary Establishment, *Sohail Ahmed*, who issued notification of *Hussain Asghar's* transfer, was made OSD by the government.

Consequently, two significant points regarding the jurisdiction of the Court have been raised: transfer and posting, considered executive functions. Further, the Court cannot keep surveillance in the investigation of a criminal case. The Court admitted the fact and justified its stance that even though transfer and posting is an executive function, the Court can pass such orders in exceptional circumstances. The Court observed that an investigation is nothing but the collection of evidence, leading the court to a fair conclusion about the accused. *Hussain Asghar* was impartially investigating under the supervision of the Court. So, his re-posting on the same matter would not cause any problems. The Sectary who complied with the Court's order has been penalized as OSD.

The Court held that the discretionary authority vested in the officials should be exercised judicially, fairly, and reasonably, and the same should not be exercised whimsically, capriciously, or arbitrarily (*Walayat Ali v. PIAC*, [1995](#); *Abid Hussain v. PIAC*,

2005; Abu Bakar Siddique v. Collector of Custom, 2006; Tariq Aziz-ud-Din & others, 2010; Munir at al., 2020). The Court directed the Federal Government to implement notification regarding the re-posting of the Director FIA. The Court held that notification of *Sohail Ahmed* as OSD is also not maintainable in law. The Court directed the authorities either to repost him as a Sectary Establishment or post him against any other assignment commensurate to his status, abilities, and work.

The Court admitted the fact that transfer and posting are not exclusively within the court's jurisdiction, they fall within the authority of the executive. Nevertheless, the Court assumed these powers in exceptional cases, which may lead to various potential threats: the confrontation between the state organs, clashes within the bureaucratic fabric, disrespect towards government policies and wisdom, and public distrust in state officials and representative institutions.

Similarly, the fixation of the price of daily commodities is purely an executive function. The Lahore High Court took cognizance of oil and sugar price hiking. Without any parliamentary oversight, the Ministry of Petroleum authorized a group of oil companies, the Oil Companies Advisories Committee (OCAC). The Committee increased oil prices according to the increase in the international market but has not reduced the prices correspondingly. The Court took cognizance of the matter and directed the NAB to investigate the matter (Ghias, 2010).

Likewise, the Lahore High Court also took cognizance of the sugar price hike and directed the NAB to probe into the matter. The NAB report implicated the involvement of eight Ministers and Government's soft policy was held responsible for the sugar crisis. The Court fixed the sugar price to Rs. 40/ kg to control the inflation rate and to ensure its availability to common people. In response, the Pakistan Sugar Mills Association and the government challenged the impugned order at the Supreme Court on the pretext that the sugar industry would turn to chaos and could require a huge subsidy of Rs. 40 billion. The Court, however, upheld the impugned order and held that sugar should be sold at the same price fixed by the Lahore High Court till the determination of the new price ("LHC verdict on sugar prices", 2009).

Likewise, the privatization of Pakistan Steel Mills (PSM) was one of the most important cases against executive actions taken up by the Court, heading its way to further judicial activism (Awan, 2014). The Court quashed a USD 362 Million bid for the privatization of the PSM on the pretext of illegalities and commissions. Despite the claims that the Court has saved billions by striking down the privatization of the PSM, the succeeding government declared that the PSM caused a loss of Rs. 23 billion in one financial year. Even though, the Federal Government has given a bailout package of 14.6 billion to the PSM. The liability of its payable debt reached 82 billion by October 31st, 2012, which crossed 100 billion in December 2013. Following the invalidation of the privatization policy of the government, the PSM has not made any profit rather it bore huge losses.

The country received another blow when the Court took cognizance of the Rental Power Plants (RPPs) on the applications of the parliamentarians, *Faisal Saleh Hayat* of PML (Q) and *Khawaja Muhammad Asif* of PML (N) under Article 184 (3) of the Constitution. Besides eight private international companies, *Barge Mounted Karkay* was granted a five-year contract on differential terms: the agreed tariff, Rs. 35/- to Rs. 50/- per unit, was much higher than that of the Independent Power Plants (IPPs). The Court invalidated the contract based on huge corruption and observed that it exercised its authority to review the legality and transparency of the policy implementation on the grounds of fairness, open competition, and legality. The Court observed that without calling fresh bids, an increase in advance payment from 7% to 14%, runs to billions leads to non-transparency, and fails the test of fairness and open competition. The Court declared the contract violates Articles 9 and 24 of the Constitution and Regulatory Laws. The Court rendered the contract *ab initio void* and declared that functionaries of the regulatory bodies are *prima facie* involved in the corrupt practices. The Court directed the NAB authorities to arrest 27 officials of the regulatory bodies and public representatives, including the Prime Minister, *Raja Parvez Ashraf*. The NAB authorities attempted to settle the issue with the *Karkey* amicably, but the Court staved off the same. Consequently, *Karkey* approached the International Centre for Settlement of Investment Disputes (ICSID), which was a mutually agreed

international arbitration forum in the contract, against the government of Pakistan for damages for noncompliance with the terms of the contract. On August 22nd, 2017, the ICSID declared an Award of \$1.2 bn against the government of Pakistan.

The Supreme Court of Pakistan, without realizing the terms of the contract where the ICSID was an agreed forum for the settlement of the disputes, invalidated the contract. The Supreme Court further aggravated the situation by prohibiting the NAB authorities from amicably settling the alleged matter with the *Karkey*, which turned out to be a huge penalty against the government of Pakistan as compensation for the violation of the contract. These decisions are potentially creating jurisdictional conflict with the international legal forums. The ICSID is a dispute settlement forum under the auspicious of the World Bank Group. If the Court declines to implement the Award against the government, the international community, particularly, the World Bank may adopt a non-cooperation policy with the government of Pakistan. Foreign investors will barely consider investing in Pakistan where the judiciary is not showing respect to international rules, treaty obligations, and Awards of the international forums.

The Asian Human Rights Commission also showed concern about the judiciary's supervisory role in the investigation (Awan, 2014). Keeping in view the concept of fair trial incorporated in the Constitution under Article 10-A, the supervisory role of the judiciary is considered violative of Article 9 of the Constitution. Furthermore, such contradictory decisions create public distrust in the civilian governments and may lead to inter-state conflict, which is more disastrous than its short-term advantages.

In another case, the *Reko Diq Reko Diq is a small town in Chagi District, Balochistan. It got impetus for its huge gold and copper reserves. It is the world's 5th largest gold deposit which was discovered by the Geological Survey of Pakistan Gold and Copper Mines Project*, the Court took cognizance of the alleged corruption and kickbacks in the foreign investment companies. There were so many allegations: the Governor of Baluchistan Province signed the *Reko Diq* agreement granting a lease for 30 years without the approval of the cabinet to Tethyan Copper Company A joint venture between Chiles Antofagasta and Canada's Barrick Gold

Corporation, without considering the expiry of its exploration license, relaxation of the mining rules of 1970, transferring Baluchistan's government share, permission for drilling in contradiction to Baluchistan Mineral Rules, 2002, and concealment of the discovered resources (Awan, 2014).

In the alleged project, the TCC held 75% of the shares while Balochistan had 25% of the total shares with 2% royalty from the extracted minerals. The TCC and the government of Balochistan reached a deadlock on two main issues: the TCC wants Balochistan to bear 25% financial liability as per its share in the project, which the latter refused, and the alleged involvement of the Chinese company. For five years, the TCC claims to have invested over \$500 million in the exploration, and the total investment was projected to be \$5bn (Bhutta, 2017).

The Court rendered the contract void *ab initio*, executed in violation of various statutory provisions (Mineral Development Act of 1948; the Mining Concession Rules of 1970; the Contract Act of 1872; the Transfer of Property Act of 1882). In 2012, the TCC submitted arbitration claims at the ICSID for compensatory damages amounting to \$9.1bn USD, based on the fair market value of its investment and additional claims of \$2.3bn as pre-award compound interest. The ICSID has rejected Pakistan's allegations of corruption and malpractices by the TCC in the alleged project and ruled against the former for unlawful denial of the mining lease to the latter in *Reko Diq*. Consequently, Pakistan faced a penalty of \$1bn. A country passing through severe financial crises cannot afford such huge penalties. However, the government successfully resolved the matter through an out-of-court settlement in both cases and saved Pakistan from a huge financial liability.

Considering the Supreme Court's populism stance, without realizing the consequences and magnitude of the actions, motivated the High Courts to follow the same pattern of adjudication. In several cases Zarco Exchange Fraud Case; 2010 the Medical Negligence Case; Sugar and Oil Prices Case and increase in the public transport; suo motu action on the news regarding the death of a child who died by falling in an uncovered main hole and issued directions for registration of a criminal case against the responsible officials of the concerned provincial government; The Peshawar High Court took suo motu, based on a news report, regarding

the selling of substandard meat and grills, chapli kababs, and summoned senior provincial officials: the director general health, the director food, the capital city police officer (CCPO), the director general livestock, and a show cause notice to the Chief Secretary of the Province. The Court directed the authorities to amend the outdated and ineffective Food Ordinance of 1965; the Court also took cognizance of illegal car-parking and bus stops and summoned the senior most provincial officers, to explain their position on the alleged issue: the Secretary of Transport, the Commissioner and the Deputy Commissioner, the CCPO, and the additional inspector general of traffic police; the Peshawar High Court took cognizance, based on a news report of a TV channel, against disallowing women to cast a vote during local body elections. The Court ordered the withholding of election results in two constituencies and directed the arrest of the responsible persons to restrict women from casting their votes. On the next hearing, the Court was dissatisfied with the turnout and directed the Election Commission of Pakistan to conduct re-election in more than fifty-four polling stations and suspended elections in two constituencies. The Court directed the ECP to forward the immediate summary to the government of Pakistan suggesting essential changes in the Representation of the People Act, 1976 to ensure strict action against preventing females from casting votes. The Court also directed the government to amend the alleged Act to ensure women's participation in the election. However, on appeal, the Supreme Court quashed the impugned order and held that the High Court has no power to intrude into the ECP's sphere nor can it assume such authority not delegated by the Constitution, the Lahore High Court has taken cognizance of the matters about fundamental rights having public importance. The superior courts without realizing its intensity, kept on taking cognizance of the issues reported on the media or news. Judicial activism in such cases creates so many complications and repercussions: a huge loss to the national exchequer, confrontation with the executive, jurisdictional conflict with international legal forums, discouragement of foreign direct investment in Pakistan, public distrust in the civilian governments, and Court's supervisory role in the investigation and trial, which is considered against the international standards. This judicial overreach could lead to interbranch confrontation

compromising its dignity, international distrust, and huge financial implications for the government.

The Supreme Court has admitted that the judges' oath required them to comply with the law and the Constitution. The judges cannot act like kings, to do whatever appeals to their mind. The Supreme Court observed that the judiciary should not indulge in matters which are not in its jurisdiction. While responding to the *suo motu* actions of the High Courts, the Supreme Court prohibited the High Courts from intruding in the matters of the Election Commission of Pakistan. The Court observed that the exercise of extraordinary jurisdiction is subject to the non-availability of alternative adequate remedies (Awan, 2014).

As a result of the *suo motu* actions, the Court directed the executive to the availability of certain commodities to the masses at a particular price that further aggravated the situation and consequently earned a bad name to the judiciary. The SC, without focusing on its constitutional role to adjudicate upon the long-awaited cases, took cognizance of the petty cases and called explanations of the high officials, which amounts to direct intervention in the executive sphere. The Superior Courts also directed the legislature to amend and pass statutory laws, to accommodate or ensure certain facilities for the public. Considering the excessive judicial activism, the critics believe it creates apprehension of judicial governance leading to another confrontation of power shift between the judiciary and parliament.

Lessons from the USA

Pakistan's constitutional scheme of trichotomy of powers is based on the US constitutional doctrine of separation of powers and a system of checks and balances. In the US, jurisdictional provinces among the state organs are clearly defined and the SC has evolved certain standards to define and restrain its authority. Article I grants legislative powers to Congress. Article II confers all the executive powers in the US President. Article III entrusts all the judicial powers to the Supreme Court and other inferior courts ordained and established by Congress (Art. I, II, and III of the US Constitution, 1787). To avoid further implications over the disruption of powers, Pakistan can learn from the US experience where courts have evolved certain standards for taking up a case: first is the standing of a party, which refers to the aggrieved person to initiate a

case. It is the entitlement of the proper party to have the court decide the controversy (*Warth v. Seldin*, 1975). It advances the concept of division of powers which the court considered a fundamental idea of the doctrine of separation of powers (Scalia, 1983; *Allen v. Wright*, 1984). Its underlying objective is to preclude the judicial process from usurping the powers of the other governmental branches (*Clapper v. Amnesty International*, 2013). In Pakistan, nevertheless, there is no need to be an aggrieved person to invoke the original jurisdiction of the Supreme Court, rather a violation of a fundamental right that affects the public at large is sufficient ground for taking up a case (Art. 184 (3) of the Const. of Pakistan, 1973). The second is ripeness, which deals with when the court should take up a matter. The third standard is mootness, which imposes limitations on the judiciary for the existence of the controversy throughout the proceedings. If a dispute is resolved at the subsequent stage of filing the case, the petition should accordingly be dismissed. Likewise, the political question is a substantial doctrine that evolved through the judicial scholarship of restraining itself from resolving political controversies, leaving it for political resolution. It enables the judiciary to avoid politically controversial disputes by imposing restrictions on its authority which is regarded as a passive virtue (Bickel, 1961, 1962; Munir, 2024). The government also intends to put limits on the judiciary. President Biden, for instance, calls for the following three reforms: the supremacy of law where no one is considered above the law, including the president and judge. Imposing age limits on the judges of the US SC, and code of conduct coupled with ethics rules for the Court. Considering the US constitutional construct of the separation of powers, judges' realization of self-restraints, and congressional oversight, the US Supreme Court has evolved significantly to realize its jurisdictional bounds. Pakistan can learn from the US experience to appreciate legislative oversight and self-realization of judicial restraint to keep the judiciary on track of its jurisdictional bounds to avoid further interbranch conflicts. The SC (Practice and Procedure) Act, 2023 is a positive initiative to regulate the operation of Article 184(3) of and circumscribe the unlimited authority of the Chief Justice of the SC to take cognizance of the

governmental actions, resulting in judicial overreach.

Conclusion

The judiciary plays an incredible role in shaping the democratic system. Since Pakistan's inception, the judiciary was not fully independent and was forced to validate extraconstitutional actions and military takeovers. With the passage of time and its constant efforts, the judiciary secured autonomy and reinforced civilian rule, invalidated extraconstitutional actions, and constrained the unbridled authority of the military. While validating military regimes, the judiciary kept circumscribing space for military dictators to render power to the civilian government. After its restoration in March 2009, the judiciary emerged quite differently. Judiciary invalidated military takeover and its ancillary orders. As a result of the Charter of Democracy, the civilian government brought about the 18th constitutional amendment to stop potential military intervention, withdraw the president's discretion to dissolve the assembly unilaterally, and prohibit the judiciary from validating extraconstitutional actions.

The newly independent judiciary, however, secured judicial autonomy from the military dictators and their affiliates and sought independence from the civilian governments. The Supreme Court, by expanding the scope of Article 184 (3), invoked its *suo motu* jurisdiction and felt obliged to address public grievances. The Superior Judiciary expanded the scope of its *suo motu* jurisdiction and took cognizance of issues highlighted by media, press, or private individuals. The Court's cognizance of the matters – ranging from the mega corruption cases to the petty cases – earned a populist stance for the judiciary. The judiciary, as per public motivation through media, technocrats, civil society, and political opposition, took cognizance of matters that were pure of executive nature. This judicial activism brought about so many challenges and implications in the democratic and judicial system: further undermined fragile civilian governments, created distrust in the representative institutions, created prospects of jurisdictional conflict with international legal instruments already ratified by the government of Pakistan, created concerns about international treaty obligations, imposed huge financial liability to public exchequer, shook its

credibility in terms of its functioning, non-delegation of authority to the district courts, and lack of reforms in the conventional system of dispensation of justice.

Instead of confrontation with the other branches of government, the judiciary should ensure functioning with cooperation and coordination, to foster public welfare for which the judiciary and other public institutions laid their foundations. Instead of creating hindrances for each other, state organs should acknowledge the existence and sovereignty of other state organs. Furthermore, the judiciary is neither a panacea for every wrong nor

should supervise and guide the executive in running its affairs or policy matters. The judiciary should not compromise its impartiality by any means and should avoid selective justice, and governance at the expense of representative institutions. The excessiveness of judicial activism could push Pakistan to a more sophisticated regime of activism, which may be identical to the military regime, whereby the civilian government would be dysfunctional, and the judiciary would virtually assume the executive authority. Pakistan should learn from the US experience to reform the conventional justice system which will repose public trust in the institutions.

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