

## **Impact of Judicial Activism in Pakistan:**

By

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### **Abstract:**

*Unprecedented wave of judicial activism has been witnessed in Pakistan since 2001. The fundamental rights guaranteed in the Constitution of Pakistan has broadened the scope of Judicial Activism and the volume of public interest litigation "PIL" has been expanding in all walks of life. Consistent and continuous exercise of judicial authorities by the Supreme Court of Pakistan "SCP" through "Suo Moto" (action on court's own motion) jurisdiction<sup>4</sup> have political, social, economic impacts. The Apex Court of Pakistan has delivered many judgments under Article 184 (3) of Constitution of Islamic Republic of Pakistan and assumed "Suo Moto" jurisdiction on the matters of public interest since 2001. Moreover, the Apex Court also declared many constitutional amendments, statutes and governmental policies null and void. The Judgments delivered by the Apex Court in these cases would have their long-lasting implications. Through this article I shall examine the likely outcomes of public interest litigation in the political and constitutional arena of Pakistan. Suo Moto actions by Supreme Court as a routine matter raise serious questions regarding the functioning of the executives and fulfillment of international obligations created through various treaties and agreements signed by Federal Government of Pakistan. Keeping in view the issues this paper examines the scope of judicial activism; its origin, philosophy of Public Interest Litigation, expansion in Suo Moto actions, constitutional provisions with regard to the powers of apex judiciary and its impacts on the economy of Pakistan.*

Black's Law Dictionary defines judicial activism as *“a philosophy of law-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions<sup>1</sup>.”*

The doctrine *“a philosophy of law making”* used by judges has widened the scope of judicial review for the interpretation of statutes. It has been allowed to the judges to use their own wisdom and personal views during interpretation of any legislative document. It transpires that justice must be done at any cost irrespective of its consequences and implications. Therefore, judicial activism may be defined as a process of decision making and setting the precedents through prioritizing the judicial wisdom over the strict applicability of statutes regarding public policy. This deviation from the standard law making process by legislature towards *“philosophy of law making”* by the judges has many negative impacts and bad consequences.

In recent past, it has been observed that judges all over the world have been using the authority to declare statutory provisions as unconstitutional, ultra vires and void through a process named judicial review. Through this process judiciary has been authorized to declare the laws/statutes passed by the legislature inconsonance with the provisions of the constitution of the country and should be abrogated. This judicial activism resulted in heated debate about the justification and legitimacy of declaring laws and policies annulled in every democratic system.

### **Theoretical Basis of Judicial Activism:**

The concept of judicial activism is mainly based upon following theories:

#### **1. The Vacuum Filling Theory:**

This theory describes that the lack of action on part of one pillar of state creates a vacuum in the proper functioning of the government and resultantly the vacuum has to be filled by the other organ of the state. Speaking from these aspects, this theory would be applicable when the legislature and the executive do not perform their mandated functions adequately, the vacuum shall be filled by the courts.

#### **2. The Social Want Theory:**

This theory postulates that the failure of existing and proposed legislation by the legislature to solve the problems of society, compels the courts to find a solution of the existing problems and therefore they go for the interpretation of the statutes and policies for greater welfare of the society.

### **Origins of Judicial Activism:**

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<sup>1</sup> Andrew P. Napolitano: *Lies the Government Told You: Myth, Power, and Deception in American History* (7<sup>th</sup> edn, Nashville Tennessee Thomas Nelson Inc 1999)

Bohde finds<sup>1</sup> presence of judicial activism since 1607-1608 when a controversy had been observed between the King of England, King James and Chief Justice Justice Coke on accepting the jurisdiction by the King and its adjudication. Chief Justice viewed firmly that law is supreme and King is also subject to law. Resultantly King James is not empowered to impose import and export tax as CJ Coke declared it illegal and ultra vires. He affirmed that the parliament was the sole authority to impose taxes<sup>2</sup>. Chief Justice Coke declared the College of Physician Act 1553 unlawful and void on the ground that, where an Act passed by the legislature is violative of common rights and reasons *the* same should be governed and assessed under common law and in many cases the common law will control the Act of Parliament<sup>3</sup>. Despite of strong criticism, the court laid the principle by pronouncement of judgment in the Bonham case that the act passed by the legislature is subordinate to the common law and can be declared unlawful and ultra vires by the court. Literature available on contemporary judicial activism by means of issuing writs of “*Prohibition*<sup>4</sup>, *Mandamus*<sup>5</sup>, *Certiorari*<sup>6</sup>, *Habeas Corpus*<sup>7</sup> and *Quo Warranto*<sup>8</sup>” and judicial review over the Act of Parliament suggests that, it dates back to Marbury vs. Madison<sup>9</sup> In this case John Marshal chief justice of US Supreme Court declared that, an act of any branch of state which is contrary to the provisions of the constitution is ultra vires and void ab initio. The CJ upheld the supremacy of constitution and all other laws of the country are subject to the constitution. The SC assumed the jurisdiction to implement the rights which have been guaranteed in the constitution by issuing writ of mandamus. CJ Marshal also declared the Judiciary Act of 1789 as ultra vires and unconstitutional<sup>10</sup>. He stated that it is duty of the courts “*to say what the law is*”<sup>11</sup> It was the first evidence of its nature through which judicial review recorded in the history of law and an act of Parliament had been declared unconstitutional and ultra vires. Dictum laid down in the judgment provides guidelines for the countries which are governed through written constitution, CJ Marshal

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<sup>1</sup> V.A. Bohde, ‘The Rise of Judicial Power’, (re produced in), ‘Law and Justice: An Anthology’ Delhi Universal Law Pub. Co. Soli Sorabjeeed (2004)

<sup>2</sup> Coke, Sir Edward (1552-1634); the forum at the online library of liberty, A project of library fund Inc

<[http://oll.libertyfund.org/index.php?option=com\\_content&task=view&id=226&Itemid=270](http://oll.libertyfund.org/index.php?option=com_content&task=view&id=226&Itemid=270)> accessed 21 April 2013

<sup>3</sup> *Dr. Bonham*, 8 Co. Rep. 114 Court of Common Pleas [1610],

<sup>4</sup> Restraining lower courts from hearing a case for lacking jurisdiction

<sup>5</sup> Commanding to act in certain way

<sup>6</sup> Protect the fundamental rights of the citizens by calling all the records and evidence in the court and adjudicate the matter

<sup>7</sup> ‘let us have the body’ order to produce a detained person before the court

<sup>8</sup> Challenging the someone’s right to hold an office or government privilege

<sup>9</sup> *Marbury v. Madison* [1803] 5 U.S. 137

<sup>10</sup> ‘*Marbury v. Madison*’, U.S. Supreme Court, [1803], document no. 005-0137, reproduced in, ‘*Howe Electronic*

*Data Supreme Court Reports*’ CD-ROM Portland, Oregon, (1995).

<http://laws.findlaw.com/us/5/137.html>

<sup>11</sup> ‘*Marbury v. Madison*’ (p. 178)

held that, “...principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void and that courts, as well as other departments, are bound by that instrument.”<sup>1</sup>

Mr. William Rehnquist, former Chief Justice of Supreme Court of United States declared it top most contribution of US in the art of government<sup>2</sup>. The Marbury vs Madison case strengthened the power of US courts to interpret and review the enactments of the legislature and policies of the executives. The Marbury case played significant role in judicial review and could not be overshadowed despite of 210 years’ elapses.

McCullough vs. Maryland<sup>3</sup> is another example in which CJ Marshall significantly authorized by the unanimous decision (7-0) that Federal constitution was supreme and it rejected the assertion of the State of Maryland, that States were sovereign because constitution was ratified by the State Conventions. Judgment annulled the act passed by the legislature of Maryland State for imposition of tax on Federal Bank. In Brown v. Board of Education<sup>4</sup> the US Supreme Court removed segregation of schools between blacks and whites. Petitioners assailed the doctrine of “*separate but equal*” adopted in Plessy v. Ferguson<sup>5</sup> that claimed the right to admission and asserted that segregation was in contravention to the “*Equal Protection Clause of the Fourteenth Amendment of the constitution.*” In its unanimous decision of (9-0) the court dismissed the case of Plessy v. Ferguson<sup>6</sup> and declared that, “*separate but equal*” schools on racial basis are in contravention to the spirit of equal protection clause of the constitution. The Brown case guaranteed the enforcement of 14<sup>th</sup> amendment of the constitution with its full letter and spirit first time in 86 years after its enactment. The Judgment laid the basis of enactment of the Civil Rights Act of 1964 in the US in just ten years.

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<sup>1</sup> ‘*Marbury V. Madison*’ (p 180):Kermit L. Hall, “The Oxford Guide to United States Supreme Court Decisions” edited (p.174) Oxford University Press(15 Feb 2001)

<sup>2</sup> Newsweek Staff, ‘Why Marbury V. Madison Still Matters’ (Newsweek, 20 February 2009)

< <http://www.thedailybeast.com/newsweek/2009/02/20/why-marbury-v-madison-still-matters.html> > accessed 18

April 2013

<sup>3</sup> ‘*McCulloch v. Maryland*’ 4 Wheat.(17 U.S.) 316, 4 L.Ed. 579 [1819] April 2013

Cornell University law school, Legal information institute accessed 26 April 2013

<sup>4</sup> *Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 [1954], Cornell University law

school, Legal information institute <

<http://www.law.cornell.edu/supremecourt/text/347/483>> accessed 16

February 2013

<sup>5</sup> *Plessy v. Ferguson* 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 [1896], Cornell University law school, Legal

information institute < <http://www.law.cornell.edu/supremecourt/text/163/537> > accessed 16 February 2013

<sup>6</sup> ‘*Brown v. Board of Education of Topeka*, (p.347)

In its latest judgment in the case titled *Citizens United v. Federal Election Commission 2010*<sup>1</sup> the US Supreme Court decision was split (5-4) this reaffirmed its jurisdiction to review any policy or piece of legislation enacted by executive or legislature. The court found it unlawful and ultra vires to the first amendment of the constitution to prohibit the corporations to finance for the political campaigns. SC declared that, by following the first amendment of the constitution corporations and unions have the rights equal to an individual. Therefore act passed by the Congress debarring them from utilizing their general funds for election campaign of the candidate of their own choice is unconstitutional and illegal<sup>2</sup>. The said judgment also overruled two earlier judgments<sup>3</sup> regarding provision of election funds. US President Obama showed his dissatisfaction on the verdict and called it victory of Wall Street<sup>4</sup>.

In the case titled *National Federation of Independent Business v. Kathleen Sebelius, Secretary of Health*<sup>5</sup> twenty six States along with several individuals have challenged the vires of Health Care Law “*Patient Protection and Affordable Care Act 2010*” and threatening the States to deprive them from their funding is violation of constitution<sup>6</sup>. Court partially allowed those under question, the legislation by considering the view taken in the case of *Ayotte v. Planned Parenthood*<sup>7</sup> where it was held that, while dealing with the vires of an act the interpretation of the court should attempt to save the legislation rather than destroy it.

The above mentioned instances confirms that, the US Superior courts always exercised its judicial mandate on the written petition of the aggrieved parties and the act passed by the legislature or executive is examined through judicial review. The nature of disputes relates to the constitutionality of the law and action or omission of executives.

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<sup>1</sup> *Citizens United v. Federal Election Commission* [2010] Appeal from the United States District Court for the

District of Columbia No. 08–205 Decided January 21, 2010

<sup>2</sup> ‘*Citizens United v. Federal Election Commission*, (paragraph 913)

<sup>3</sup> *Austin v. Michigan Chamber of Commerce*, [1990] 494, U.S. 652 , which held that political speech may be banned

based on the speaker's corporate identity and (2) *McConnell v. Federal Election Comm'n*, [2003] 540 U.S. 93, 203–

209, which upheld a facial challenge to limits on electioneering communications.

<sup>4</sup> Kristin Sullivan, ‘*Citizens United v. Federal Election Commission*’, ‘OLR Research Report’ (2<sup>nd</sup> March 2010)

< <http://www.cga.ct.gov/2010/rpt/2010-R-0124.htm> > accessed 18 February 2013

<sup>5</sup> *National Federation of Independent Business Et Al. v. Sebelius, Secretary of Health and Human Services* [2012]

et al. Supreme Court of the United States No. 11–393. Decided June 28, 2012 1

Certiorari to the United States Court

of Appeals for the Eleventh Circuit March 2013

<sup>6</sup> *National Federation of Independent Business Et Al. v. Sebelius, Secretary of Health and Human Services* [2012]

(pp.45-58)

<sup>7</sup> ‘*Ayotte v. Planned Parenthood of Northern New Eng*’ 546 U. S. 320–330. pp. 60–61.

### **Emergence of Judicial Activism in Pakistan:**

In Pakistan emergence judicial activism is quite a recent and new phenomenon as compared to the USA and it has its own reasons and relevance. Through Public Interest Litigation (PIL) the exercise of suo moto jurisdiction started from the case of Darshan Mashi v the State<sup>1</sup>. The applicants requested to then CJP for getting them released from detention and for considering the matter as public interest litigation and enforcement of fundamental rights. The CJP relaxed the standard procedural requirements and heard the matter under Article 184(3) of the Constitution of Pakistan. Similarly the Supreme Court of Pakistan exercised its suo moto jurisdiction on a letter<sup>2</sup> drawing the attention of the CJP towards construction of a power station and their apprehensions about hazardous impacts of power house on the health of the public at large. People of Pakistan do have great deal of hope and expectation with the Apex judiciary because of the inaction and failure of other pillars of the State to deliver and due to privileged discriminatory and ambiguous enactments providing protection to the corrupt practices<sup>3</sup>. Active participation of lawyers, civil society and media in restoration of judiciary, firstly in 2007 and secondly in 2009<sup>4</sup>, demonstrates their confidence on superior judiciary.

The SCP has broadened the scope of PIL by establishing the Human Right Cell (HRC) in the SC. In the beginning the HRC used to receive approximately 500 applications every day seeking remedy directly from the SCP. However, after restoration of judiciary in 2009 the number of applications received to HRC increased to 139906 in just two years 2009-2011. During the said period the SCP granted maximum relief to people on 85489 applications by seeking report from the relevant departments whereas the CJP entertained 87 Human Right applications and PIL matters directly in the SCP<sup>5</sup>.

The supporters of suo moto and original jurisdiction of SCP argue<sup>6</sup> that PIL play significant role for the enforcement of constitutional fundamental rights and rule of law; hence, it is required to be strengthened further in the present circumstances. It is a strong and effective tool for the benefits

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1 Darshan Mashi V. the State, PLD [1990] SC, 513

2 Shehla Zia v. Wapda and others, PLD [1994] SC, 693

3 Nasir Iqbal, 'CJ has changed course of history says Justice Javid', Dawn News, (5th March 2010)

4 Azhar Masood, 'Prime Minister through executive order reinstates Chief Justice', Pakistan Times (16 March 2009)

5 Justice Abdus Sattar Asghar, 'Public Interest Litigation' paper presented in International Judicial Conference organised by Pakistan Law Commission at Supreme Court Building Islamabad Pakistan on 12, April 2011

6 Khadim Hussain Qaiser, 'Public Interest Litigation' Additional Advocate General Punjab paper presented in International Judicial Conference organized by Pakistan Law Commission at Supreme Court Building Islamabad Pakistan on 12, April 2011

of general public who have been deprived from their rights and have no resources to seek justice from ordinary courts. The gap between poor citizens and elite class is evident in our society and Pakistan traditional legal system has no capacity to fill this gap, therefore, PIL helps to fill the gap between poor and elite class in relation to knowledge and power structure. These factors amongst other favors the *gradual shift from the mechanical justice to human welfare justice*<sup>1</sup>. Similarly, it is also argued that the other organs of the State have lost their credibility and trust of the people due to their inaction and only apex judiciary has proved to restore its authority by means of PIL. It also helps to prevent the persistent traditions of misuse and abuse of authority by the government and its officials to violate the Constitution, law, rules and to deprive ordinary people from their fundamental rights. In the present circumstances, it is the only remedy available to people by means of PIL<sup>2</sup>.

The above mentioned discussion transpires that, generally the courts seize their jurisdiction on the petition of the party feeling aggrieved on certain action or omission of the respondents. However in Pakistan it differs, under suo moto jurisdiction the courts<sup>3</sup> take notice and assume jurisdiction of a specific matter involving public interest or enforcement of fundamental rights on their own motion. The SCP frequently exercises its suo moto and original jurisdiction by hearing political, social, commercial, human rights and constitutional issues<sup>4</sup>. There is an exhaustive list of the cases, which have been heard by the SCP in few years highlighting the maximum use of the original and suo moto jurisdiction. The SCP who took notice<sup>5</sup> on import of poultry feed containing pig meat and directed to destroy the entire imported poultry feed. The apex court also directed to take stern and strict action against those who were responsible. The SCP also got undertaking from the importers and concerned authorities for being vigilant next time. The SCP also directed to cancel the lease given to McDonald's restaurant constructed in F/9 Park Islamabad as well as Hot Shot bowling club<sup>6</sup>. The SCP has also given landmark judgments against the projects fatal for the environment such as Margala housing society,

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<sup>1</sup> Justice Abdus Sattar Asghar, 'Public Interest Litigation' paper presented in International Judicial Conference organised by Pakistan Law Commission at Supreme Court Building Islamabad Pakistan on 12, April 2011

<sup>2</sup> Justice Mohammad Azam Khan, 'Public Interest Litigation Scope, Limitation and Reforms' Concluding address by: Chief Justice of Azad Jammu and Kashmir. At the occasion of Seminar held by Supreme Court Bar Association of Pakistan on 21.12.2012 at Aiwana-e-Iqbal, Lahore. Published in Pakistan Law Journal

<sup>3</sup> Here word "courts" represent the Supreme Court of Pakistan and Subordinate High Courts.

<sup>4</sup> Rental power projects, Reko Diq mining project in Baluchistan, NRO Case and NICL are few names among hundreds of the cases

<sup>5</sup> Suo Moto case No. 15 of 2007, [2011] SCMR 255

<sup>6</sup> Human Rights Cases Nos. 4668 of (2006), 1111 of (2007) and 15283-GOF (2010) [P L D 2010] Supreme Court of Pakistan

Islamabad chalets and Pir Sohawa valley villas<sup>1</sup>, developing the New Muree City project by cutting the trees in the vast area<sup>2</sup> and banned the said schemes.

Apart from the first phase of judicial activism, at present circumstances, the SCP has widened the scope of PIL and enforcement of fundamental rights. It exercised its authority on a variety of cases comprising of corruption such as arrangements of pilgrimage called Hajj scam<sup>3</sup>, the Bank of Punjab scam<sup>4</sup> and NICL scam<sup>5</sup>. Appointments<sup>6</sup>, promotion of police officers<sup>7</sup>, seniority of bureaucrats<sup>8</sup>, transfer and appointments of investigation officers of important cases<sup>9</sup>, levy of carbon and general sales tax<sup>10</sup>, the price fixation of sugar<sup>11</sup>, fuel, gas, and electricity<sup>1</sup> on several

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1 Suo Moto case No. 13 [2005] Environmental Threats caused by the Housing schemes

2 Suo Moto Case No. 10 of [2005] (Environmental Hazard posed by the New Muree Project): Quarterly Pakistan

Forest Digest Vol. 01, No. 02 ISSN: 2218-8045 July – September, (2010)

3 Suo Motu case No 24 of 2010 PLD [2011] SC 963

4 Suo Motu Case No. 24 OF 2010 [P L D 2011] Supreme Court 277

5 Suo Moto Case 18 of 2010 PLD [2011] SC 821. National Insurance Company scam

6 ‘Shahid Orakzai v Pakistan’ PLD [2011] SC 365 Appointment of Chairman National Accountability Bureau by

the President of Pakistan was declared illegal: P L D [2011] Supreme Court 213

(appointment of President of

National Bank of Pakistan The SCP declared the amendment in S 11(3)(d) in the Banks’ Nationalisation Act 1974

through Finance Act 2007 as void and unconstitutional hence directed the President National Bank to leave the post

immediately): ‘Adnan A. Khawaja versus The State’ Suo Moto Case No. 4 of [2010] and Civil Miscellaneous

Applications In The Supreme Court of Pakistan January [2012]; Appointments of Mr.

Adnan Khawaja as Managing

Director of the (OGDCL) against merit and appointment/promotion of Mr. Ahmed Riaz Sheikh as Additional

Director, (FIA) at a time when both of them were convicted persons were declared illegal and order to proceed

against all those who were responsible for such appointments/promotion

<sup>7</sup> *Suo moto case No 03 of [2012] Supreme Court (SC) of Pakistan*; The promotions of some 4,676 police constables

elevated to higher ranks on the basis of favoritism were repealed

<sup>8</sup> *‘Tariq Azzizudin and other’* [2010] SCMR 1301, The SCP exercised its judicial review authority

<sup>9</sup> OGRA scam more than Rs. 83 billion: Rs.54 billion in ISAF containers scam: Rental power scam of Rs. 16.6 billion

and additional liabilities \$ 1.7 billion against GOP: Hajj scam Rs. 36 million: Ephedrine scandal Rs.7 billion: The

Bank of Punjab scam more than Rs.10 billion: NICL scam Rs.1.6 billion: Money laundering case \$6 million against

then President of Pakistan before Swiss authorities: , (citations are given in foot note above)

<sup>10</sup> ‘SC declares 1% increase in GST null and void’ the Express Tribune with the international Herald Tribune 21

June 2013 <http://tribune.com.pk/story/566330/sc-declares-1-increase-in-gst-null-and-void/> accessed on 1st October

2013

<sup>11</sup> ‘LHC takes suo moto notice of raised sugar prices’ Daily times 14 August 2009: Sugar cartel case where Chief

Justice of Lahore High Court took Suo Moto notice



instances<sup>2</sup> and contracts awarded by corporate bodies such as Capital Development Authority “CDA”<sup>3</sup>. Similarly it assumed jurisdiction on law and order situation in the city of Karachi<sup>4</sup> and in the province of Baluchistan<sup>5</sup>. The SCP also exercised its original and suo moto jurisdiction over various constitutional issues and disputes. Some of the examples are, National Reconciliation Ordinance “NRO” case<sup>6</sup>, proclamation of Emergency order “PCO” of 3rd November 2007 and declaring them ‘void ab initio’ and ultra vires to the provisions of the constitution. Similarly the cases of removal of judges of Apex Courts<sup>7</sup>, 18<sup>th</sup> constitutional amendment<sup>8</sup>, revisiting the Contempt of Court Act 2012<sup>9</sup> and recently the proceedings of hi-treason against former President

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[http://www.dailytimes.com.pk/default.asp?page=2009\08\14\story\\_14-8-2009\\_pg7\\_7](http://www.dailytimes.com.pk/default.asp?page=2009\08\14\story_14-8-2009_pg7_7) accessed/26 June 2012

<sup>1</sup> All news channels reported Suo Moto Notice on increase of petroleum and electricity prices on 1<sup>st</sup> October 2013:

‘SC summons electricity tariff hike notification’, Dunya News TV

<http://dunyanews.tv/index.php/en/Pakistan/194535SC-summons-electricity-tariff-hike-notification> accessed on 1<sup>st</sup>

October 2013: ‘SC summons electricity tariff hike notification’ Business Recorder Tuesday, 01 October 2013

<http://www.brecorder.com/pakistan.html> accessed on 1<sup>st</sup> October 2013

<sup>2</sup> ‘CJP takes suomoto notice on price hike of petroleum products’, the Express Tribune with the international

Herald Tribune June 14, 2013 <http://tribune.com.pk/story/563079/cjp-takes-suo-moto-notice-on-price-hike-of-petroleum-products> accessed on 1<sup>st</sup> October 2013

<sup>3</sup> *Suo Motu Case No 13 of 2009 PLD [2011] SC*

619-[http://www.supremecourt.gov.pk/web/user\\_files/File/SMC.13-2009.pdf](http://www.supremecourt.gov.pk/web/user_files/File/SMC.13-2009.pdf)

<sup>4</sup> *Suo Moto case No. 14/2009 before Supreme Court of Pakistan* : Qaiser Zulfiqar, ‘Karachi suo motu: Verdict out’

the Express Tribune with the international Herald Tribune, October 6,

2011 <http://tribune.com.pk/story/267671/lawand-order-supreme-courts-verdict-in-suo-motu-karachi-violence-case-today> accessed on 24 June 2013

<sup>5</sup> ‘*CJ takes suo motu notice of mayhem in Balochistan*’, the Express Tribune with the international Herald

Tribune August 11, 2013 <http://tribune.com.pk/story/588755/supreme-court-takes-suo-motu-notice-of-mayhem-in-balochistan> accessed/20 August 2013 ‘Chief Justice takes suomotu notice of law & order’ The Nation August 12,

2013 <http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/national/12-Aug-2013/chief-justice-takes-suo-motu-notice-of-law-order> accessed/20 August 2013

<sup>6</sup> *Dr. Mobashir Hassan and others V. Federation of Pakistan*, etc In the Supreme Court of Pakistan (Original

Jurisdiction) Constitution Petition Nos. 76 To 80 Of 2007 & 59/2009 and HRC

Nos.14328-P To 14331-P & 15082-

P of 2009 [http://www.supremecourt.gov.pk/web/user\\_files/File/NRO\\_Judgment.pdf](http://www.supremecourt.gov.pk/web/user_files/File/NRO_Judgment.pdf) accessed on 14/02/2013

<sup>7</sup> *Nadeem Ahmed Advocate V. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad*

*and others*’ the Supreme Court of Pakistan (original jurisdiction) short order dated 31<sup>st</sup> July, [2009] in

Constitutional Petitions Nos.8 and 9 of 2009

<sup>8</sup> *Supreme Court Bar Association v. Federation of Pakistan and others*’ PLD [2011] SC 269 constitutional petition

No. 14/2010

<sup>9</sup> Act gave immunity to the President, Prime Minister, governors and chief ministers on contempt of court. This act was abolished by the SCP

and Army Chief of Pakistan<sup>1</sup> have gained significance in recent constitutional and judicial struggle of Pakistan. By exercising of maximum authority has witnessed to implement of NRO judgment and the SCP during miscellaneous proceedings and taking suo moto<sup>2</sup> sentenced and sacked the elected Prime Minister of the country holding him guilty of contempt of court<sup>3</sup>. Furthermore SCP verdicts in steel mills privatization case, Rental Power case and miscellaneous proceedings for implementation of this judgment<sup>4</sup>, and Reko Diq gold and Copper Mines' case are also gained significance in the context of international relations, treaty obligations and attraction and protection of FDI.

Privatization of Pakistan Steel Mill "PSM" case was the first major and important case<sup>5</sup> gained attention of general public in 2006, since then high profile cases against executives were taken up by the SCP more frequently<sup>6</sup>. The larger bench of SCP annulled the \$362 million bid for the privatization of PSM. It was believed that SCP's verdict saved Rs.18 billion losses and Rs. 33.67 billion extra benefit to the bidder.

But, the saving in PSM's privatization case has proven to be a short time saving when the new government announced the cost of Rs 23 billion as loss in PSM during its first financial year<sup>7</sup>. It has crossed the barrier of 100 billion in December 2013<sup>8</sup>. It is worth mentioning that in the financial

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<sup>1</sup> who was also army chief and dictator (case is under proceedings at the movement)

<sup>2</sup> Suo Moto Case No 4 of 2010. PLD [2012] SC 553

<sup>3</sup> To get this judgment implemented SCP ordered the government to write a letter to Swiss authorities requesting to reopen corruption cases against sitting President of Pakistan. On non-compliance SCP charged and sentenced the Prime Minister for contempt of court and sacked him from his office and disqualified him to contest future election.

As a result to this order cabinet was also dissolved and parliament elected new prime minister, new PM was also called in the SCP for implementation and charged with contempt of court at last he wrote the letter to Swiss

authority as desired by the SCP

<sup>4</sup> Human Rights Case No. 7734-G/2009 & 1003-G/2010 (Alleged Corruption in Rental Power Plants) and other connected Human Rights Case No. 56712/2010 (Fraud in payment of Rental Power Plants detected by NEPRA).

Supreme Court of Pakistan (original jurisdiction) [2012 SCMR 773] 30.3.2012 and C.M.As.NOs.3685-3686 of 2012 in HRC No.7734-G of 2009

<sup>5</sup> Wattan Party and others v Federation of Pakistan and others [2006] SC, SCP Constitution Petition No. 9 of 2006 & Civil Petition Nos. 345 & 394 Of 2006

<sup>6</sup> Some important cases were, Privatisation of steel mill case: construction of McDonald's restaurant in F/9 public park Islamabad case: case against leasing the public parks to commercial ventures such as restaurant and mini golf clubs: New Muree City project closing the substandard private educational institutes and medical colleges.

In coming years SCP continued with more high profile and important cases

<sup>7</sup> Faisal H. Naqvi in 'The economics of Judicial Intervention', The Friday Times dated 19.03.2010 <http://www.thefridaytimes.com/beta3/tft/index.php> accessed on 22/02/2013

<sup>8</sup> Report telecasted on Major Pakistani TV channels on 19<sup>th</sup> December 2013

year 2007-08, PSM earned Rs. 2.3 billion profit despite having Rs7 billion debt liability<sup>1</sup>. According to the report on the performance of Pakistan steel, it has been mentioned that production of Pakistan steel dropped to 6% conversely. It was 92% in April 2008 till the new government was sworn in. The report further indicates that the PSM has faced Rs. 79 billion losses till October 2012 since annulment of its privatization by the SCP. The SCP has assumed suo moto jurisdiction<sup>2</sup> on these massive corruption reports and bad administration in PSM. Through the said Judgment \$362 million inward FDI is discouraged which is supposed to be paid as winning bid and \$250 million that investor pledged to invest in the project.

The “Rental Power Project” “RPP” case<sup>3</sup> is another significant example which would have ever lasting impacts on political, commercial and international arenas of Pakistan. In its judgment in RPP case, the SCP declared the rental power projects in Pakistan invalid by highlighting massive corruption allegedly \$5 billion, bribe, lack of transparency and kickbacks. Resultantly the SCP ordered all the rental power projects agreements illegal, unlawful and *void ab initio*<sup>4</sup>. The SCP directed to initiate immediate criminal action against the responsible and ordered to recover entire amount already paid for these projects with interest<sup>5</sup>. The SCP observed that the increase from 7% to 14% in advance payment runs to billions which is unacceptable without calling fresh bids to ensure transparency and fair competition amongst bidders<sup>6</sup>. Agreed tariff for electricity generation with RPPs was very high which varied from Rs.35/- to Rs.50 per unit extremely higher than agreed tariff per unit set by the Independent Power Plants “IPPS”. The SCP held all relevant governmental authorities along with Ministers of Water and Power responsible for the violation of PPRA rules and principles of transparency during the period (2006 to 2008) RPPs agreements were signed. The SCP directed NAB to take action against the said responsible for their involvement in corrupt practices as well as corruption and deriving

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<sup>1</sup> Khaleeq Kiani, ‘Steel Mills debt liability exceeds Rs82bn’ Daily Dawn & DawnPakistan.com 10th November, 2012 <http://dawn.com/2012/11/10/steel-mills-debt-liability-exceeds-rs82bn/> accessed on 22/02/2013

<sup>2</sup> *Suo Moto Case No 15 of 2009* PLD [2012] SC 610 [http://www.supremecourt.gov.pk/web/user\\_files/File/SMC15OF2009.pdf](http://www.supremecourt.gov.pk/web/user_files/File/SMC15OF2009.pdf) >

<sup>3</sup> *Human Rights Case No. 7734-G/2009 & 1003-G/2010* (Alleged Corruption in Rental Power Plants) and other connected Human Rights Case No. 56712/2010 (Fraud in payment of Rental Power Plants detected by NEPRA).

Supreme Court of Pakistan (original jurisdiction) [2012] SCMR 773, 30.3.2012 [http://www.supremecourt.gov.pk/web/user\\_files/File/HRC7734-G\\_1003\\_GOF2009](http://www.supremecourt.gov.pk/web/user_files/File/HRC7734-G_1003_GOF2009) [Alleged Corruption in Rental Power Plants]. pdf

<sup>4</sup> [2012] SCMR 773, Paragraph 83(3)

<sup>5</sup> ‘The Supreme Court on Friday Declared Rental Power Projects (Rpps) As Illegal and also Ordered them to be Shut Down’ Dawn news Report 30th March 2012. <http://dawn.com/2012/03/30/rpps-declared-illegal-by-supremecourt/>

<sup>6</sup> [2012] SCMR 773 Paragraphs 78 and 79

financial benefits from the RPPs. Subsequently the SCP noticed willful reluctance on part of NAB authorities regarding implementation of paragraph (iii), (ix) and (x) of judgment in the RPPs case. The SCP held to proceed under Contempt of Court Ordinance 2003 and Art 204 of the Constitution of Pakistan, who are liable for reluctance in obeying this order. The contempt of the court notices were issued to the Chairman NAB and others<sup>1</sup>. The SCP vide its order passed on 8/11/2012 restrained one of the RPPs namely “*Barage Mounted Karkay*” a Turkish company from sailing out of Pakistan waters without clearing the outstanding dues against it. It is also pertinent to mention that Karkay had been allowed by the NAB to sail out of Pakistan without effecting recovery of outstanding amount. Consequently the SCP declared that the responsibility will lie with the Chairman NAB if Karkay’s ship sails out of Pakistan without recovery<sup>2</sup>.

The said judgment on RPPs will have a long lasting economic, international, constitutional and political impacts. The SCP’s judgment demonstrated RPPs as a symbol of corruption and abuse of authority and power by executives and saved billions of dollars. The judgment also saved money which was likely to be milked from the poor people in the head of unprecedented high tariff<sup>3</sup> and huge foreign exchange. Because of high electricity tariff there will be increase in production cost and resultantly all type of domestic industries and export of growing economy were prone to negative impacts.

Whilst RPP’s judgment on the other hand has several negative impacts. The senior judicial officers raised objections on the authority of the SCP to intervene within the investigation whereas the senior officer of civil bureaucracy while highlighting its draw backs has questioned the SCP’s suo moto authority<sup>4</sup>. By highlighting the reservation and resentment over the SCP’s authority in writing, the senior officer alleged that unnecessary interference of the SCP may adversely affects the free and transparent investigations. The SCP’s Proactive role has become an issue of importance for the national and international jurists and researchers equally. The Asian Human Rights Commission “AHRC” showed its reservation on the legitimacy of the SCP’s orders of arrest of PM and twenty-seven others in the RPPs scam. AHRC named it debatable/contentious especially in relation with Right to Fair Trial under

<sup>1</sup> Order dated 15/09/2012 in implementation of RPPs case CMA No.4649 of 2012

<sup>2</sup> Summary of the order dated 18/11/2012 in Paragraph 2 of C.M.As.NOs.3685-3686 of 2012 in HRC No.7734-G

of 2009 (Implementation of judgment of this Court, dated 30.3.2012 passed in HRC No.7734-G of 2009 regarding alleged corruption in Rental Power Plants) Date of Hearing: 31.01.2013

<sup>3</sup> “Per unit cost of electricity produced by the RPPs is on very high side, e.g., Karkey is ranging from Rs.35/- to

Rs.50/-; Gulf from Rs.18/- to Rs.19/-...” [2012] SCMR 773 paragraph 82 of the RPPs judgment

<sup>4</sup> Contents of letter was reproduced in paragraph 4,5,6 of the order dated 31/01/2013 in the C.M.As.NOs.3685-

3686 of 2012 in HRC No.7734-G of 2009 (Implementation of judgment of this Court, dated 30.3.2012 passed in

HRC No.7734-G of 2009 regarding alleged corruption in Rental Power Plants)

article 10-A of the constitution<sup>1</sup> and due process of law, contrary to the Article 9 of the constitution<sup>2</sup> and violate the dictum laid down in Jogindar Kumar's case<sup>3</sup>. AHRC highlighted that exercise of the judicial authority at extreme level would generate political instability in the country which will cause more harm to Pakistan and its citizens than the benefit derived from such actions.

Reko Diq project of gold and copper mines is another case which has been decided in its original<sup>4</sup> and appellate jurisdiction<sup>5</sup> simultaneously. In the beginning BHP Billiton after signing joint venture "JV" with Baluchistan Development Authority "BDA" for exploration of minerals at Chaghi Hills in 1993 discovered gold and copper deposits. Similarly, as practice in other projects involving FDI, allegations of shady deals, getting bribes, alleged corruption, and lack of transparency. Receiving kickbacks from investors created doubts on the future of Reko Diq project. Print and electronic media highlighted illegalities and irregularities in the entire process and \$260 billion assets (at current price)<sup>6</sup> at Reko Diq are sold for nothing. Signing of Reko Diq agreement by the governor of the Baluchistan without the approval of cabinet, purchase of project files by Antofagasta and Barrick Gold in \$200 million<sup>7</sup>, grant of 30 years lease to TCCP on 23rd May 2008 without considering the expiry of exploration license "EL 5" in 2011, relaxation in application of the mining rules 1970,

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1 'Right to Fair Trial, Judicial System' Statement document AHRC-025-2013 dated 18/01/2013

<http://www.humanrights.asia/news/ahrc-news/AHRC-STM-025-2013> accessed on 24/04/2013

2 No person shall be deprived of life or liberty, save in accordance with law

3 Jogindar Kumar versus the State of UP [1994 ] (4) SCC 260

4 Watan Party and another V. Federation of Pakistan and others Constitution Petition No.69 of 2010: Qazi Sirajud-Din Sanjrani and another .V Federation of Pakistan & others Constitution Petition No.1 of 2011: Senator

Mohammad Azam Khan Swati, etc. V. Federal Government etc. Constitution Petition No.4 of 2011 & CMA No.295 Of 2011: Human Rights Case No.5377-P of 2010

Application by Kh. Ahmed Tariq Rahim, Sr. ASC

[http://www.supremecourt.gov.pk/web/user\\_files/File/CPLA\\_796\\_2007\\_ETC\\_SHORT\\_OR](http://www.supremecourt.gov.pk/web/user_files/File/CPLA_796_2007_ETC_SHORT_ORDER_REKO_DIQ_CAS)  
RDER\_REKO\_DIQ\_CAS  
E.pdfaccessed/20/4/2013

<sup>5</sup> *Maulana Abdul Haque Baloch and others V. Government of Balochistan through Secretary Industries and*

*Mineral and others* on appeal from the judgment of the High Court of Balochistan, Quetta dated 26.06.2007 passed in Constitution Petition No. 892/2006)

<sup>6</sup> The Reko Diq mine is expected to yield 10 billion kilograms of copper and 368 million grams of gold over the 50-60 year lifespan of the project. Since Reko Diq project is likely to compete in 60 years hence following the

increase of gold and copper price worth of the project is estimated \$1000 billion with future prospect to reach up to one trillion dollar. Pakistan Today 23/11/2010

<http://www.pakistantoday.com.pk/2010/11/23/news/national/thereko-diq-scandal/?printType=article>

<sup>7</sup> Statement of Advocate General of the province of Baluchistan before Supreme Court of Pakistan in Reko Diq case hearing on 9th December 2012

dubious transaction of entire<sup>1</sup> share of Baluchistan government in EL6, EL8 and RL7<sup>2</sup> without any compensation or consideration, conducting 270000 meters drilling in contrary to Baluchistan Mineral Rules 2002, misstatement about the quantity/value of discovered resources<sup>3</sup>/disclosing less than originally discovered resources in order to hamper the Baluchistan's share and many more<sup>4</sup> irregularities are included in the list.

International mining circles stated that, *"It would be the mother of all the deals*

*and grandfather of all the corruption cases in Pakistan, put together,"*<sup>5</sup> the SCP exercised its original jurisdiction under Article 184(3) of the Constitution of Pakistan on several petitions filed directly before the SCP and assumed Appellate jurisdiction<sup>6</sup> on appeal against the judgment of the Baluchistan High Court<sup>7</sup>. One of the interesting part of the deal was the liability of Baluchistan's provincial government to contribute in the expenditures following the ratio of its 25% share. This may be simplified that, other parties to Joint Venture (JV) acquired 75% rights in the project without making any payment to the Governments of Baluchistan (GOB) and Pakistan. Similarly, the TCCP in strange and dubious circumstances able to get 100% shares in two gold and copper deposits namely EL6 and EL8 without Pakistan's 25% share. The mining committee of provincial mining department during the course of proceedings dismissed TCCP's application for conversion of exploration license into mining license. In the meantime, GOB decided to explore some pockets of deposits by itself. The TCC Australia being aggrieved filed the case for specific performance of the Joint Venture Agreement along with application for grant of provisional relief in the International Centre for Settlement of Investment Disputes

(ICSID) by invoking the provisions of Pak Australia Bilateral investment treaty "BIT" 1998. Under the provisions of JVA<sup>8</sup>, TCC also filed an application for specific performance before international Chamber of Commerce "ICC". The TCC seeks direction for issuance of mining lease of 14 deposits of Riko Diq located in 99 kilometers area by invoking the

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1 which was 25% of the project

2 Exploration licence

3 Reko Diq is \$260 billion as per records of the Canadian company (at today's gold/copper international market

rates), the government and former Finance Minister Shaukat Tarin said its value was \$500 billion but in July the

President of Barrick Gold came to PM Gilani and said the value was only \$50 billion. Pakistan Today 23/11/2010

<http://www.pakistantoday.com.pk/2010/11/23/news/national/the-reko-diq-scandal/?printType=article>

<sup>4</sup> 'Governor signed Reko Diq accord without cabinet's approval, says AG Kanrani', Dawn.Com 10<sup>th</sup> December

2012 <http://beta.dawn.com/news/770294/reko-diq-case-sc-resumes-hearing-2> accessed on 08/10/2013

<sup>5</sup> Pakistan Today 23/11/2010

<http://www.pakistantoday.com.pk/2010/11/23/news/national/the-reko-diq-scandal/?printType=article>

<sup>6</sup> Article 185(3) of the Constitution of Pakistan 1973 deals with leave to appeal before SCP

<sup>7</sup> *Constitutional Petition No. 892 of 2006* Baluchistan High Court decided on 26<sup>th</sup> June[ 2007]

<sup>8</sup> Article 15.4.8 of Chagai Hill Exploration Joint Venture Agreement "CHEJVA"

ICC jurisdiction. By its short order the SCP held that the JVA 1993<sup>1</sup> is *illegal, void and non-Est* being executed in violation and contradiction with the statutory provisions<sup>2</sup>. Various agreements<sup>3</sup> emerged from the JVA have also been held illegal and void. Through a unanimous judgment of SCP, it was declared that, none of the said agreement created or established any rights mentioned in those agreements to the BHP, MINCOR, TCC, TCCP, Antofagasta or Barrick Gold. It was declared that EL-5 is deemed to be exploration in contradiction with the rules and regulations as JVA itself an illegal and invalid document which therefore confirms to be non-est. The SCP also held that incorporating the GOB as party to the JVA, is contrary to the Baluchistan Mining Rules 2002 Rule 7 and the rules of business of GOB. The court mentioned that the said changes raise serious questions over the process of approval of addendum<sup>4</sup>. Similarly without narrating any plausible reason GOB approved the relaxation in the BMR 2002 too violates the Rule 98<sup>5</sup>. The SCP further observed that apart from these irregularities the TCC has submitted to the jurisdiction of the SCP<sup>6</sup> by invoking appellate and original jurisdiction. The detailed judgment<sup>7</sup> will further unfold the reasons and legal arguments for declaring the entire process illegal and void ab initio. The SCP judgment on Reko Diq will also have a long lasting impact on the inward flow of Foreign Direct Investment (FDI) in Pakistan.

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<sup>1</sup> Chagai Hill Exploration Joint Venture Agreement “CHEJVA” 1993

<sup>2</sup> Mineral Development Act, 1948, the Mining Concession Rules, 1970, the Contract Act, 1872, the Transfer of Property Act, 1882, etc

<sup>3</sup> The Addendum No. 1 dated 04.03.2000, Option Agreement dated 28.04.2000, Alliance Agreement dated 03.04.2002 and Novation Agreement dated 01.04.2006

<sup>4</sup> Para 7 of Reko Diq judgment of the SCP in C.P.796 OF 2007 ETC. (SHORT ORDER) dated 7/01/2013

[http://www.supremecourt.gov.pk/web/user\\_files/File/CPLA\\_796\\_2007\\_ETC\\_SHORT\\_ORDER\\_REKO\\_DIQ\\_CAS.E.pdf](http://www.supremecourt.gov.pk/web/user_files/File/CPLA_796_2007_ETC_SHORT_ORDER_REKO_DIQ_CAS.E.pdf) accessed/20/4/2013

<sup>5</sup> Para 9 Reko Diq judgment of the SCP in C.P.796 OF 2007 ETC. (SHORT ORDER) dated 7/01/2013

[http://www.supremecourt.gov.pk/web/user\\_files/File/CPLA\\_796\\_2007\\_ETC\\_SHORT\\_ORDER\\_REKO\\_DIQ\\_CAS.E.pdf](http://www.supremecourt.gov.pk/web/user_files/File/CPLA_796_2007_ETC_SHORT_ORDER_REKO_DIQ_CAS.E.pdf) accessed/20/4/2013

<sup>6</sup> Para 10 Reko Diq judgment of the SCP in C.P.796 OF 2007 ETC. (SHORT ORDER) dated 7/01/2013

[http://www.supremecourt.gov.pk/web/user\\_files/File/CPLA\\_796\\_2007\\_ETC\\_SHORT\\_ORDER\\_REKO\\_DIQ\\_CAS.E.pdf](http://www.supremecourt.gov.pk/web/user_files/File/CPLA_796_2007_ETC_SHORT_ORDER_REKO_DIQ_CAS.E.pdf) accessed/20/4/2013

<sup>7</sup> Para 12 of Reko Diq judgment of the SCP in C.P.796 OF 2007 ETC. (SHORT ORDER) dated 7/01/2013

[http://www.supremecourt.gov.pk/web/user\\_files/File/CPLA\\_796\\_2007\\_ETC\\_SHORT\\_ORDER\\_REKO\\_DIQ\\_CAS.E.pdf](http://www.supremecourt.gov.pk/web/user_files/File/CPLA_796_2007_ETC_SHORT_ORDER_REKO_DIQ_CAS.E.pdf) accessed/20/4/2013

The Reko Diq mining project has the capacity to attract the largest ever FDI in Pakistan's mining history with US\$ 3.3 billion<sup>1</sup>. In addition to this, the Tethyan Copper Company (TCC) and its parent companies Barrick Gold and Antofagasta Minerals with the most up-to-date technology and time proven expertise would be introduced in Pakistan's mining field. The project has the capacity to create approximately 2500 job opportunities permanently in addition to that the 11500 jobs during construction of the project<sup>2</sup>. The gold and copper resources discovered in Riko Diq are deemed as a jackpot for the backward areas in the country. By processing 110000 tons of metal ores on daily basis can generate 200000 ton copper and 250000 ounces of gold annually for next 60 years<sup>3</sup>. The TCC stated that despite spending billions of dollars and years of time in exploration field it discovered nothing really comparable and compatible with Reko Diq. TCC further stated that resources discovered in Reko diq is an "*irreparable asset*" which is most likely to produce more metals and mineral in near future<sup>4</sup>. However due to non-serious and illogical attitude of both the parties<sup>5</sup> towards execution of commercial accords, once again opened the space for judicial interference resulted in the annulment of Reko Diq agreement and arbitrational proceedings at international forums. It also gave rise many important questions with regard to Pakistan's treaty obligations and responsibility on undermining international treaties.

### **Analysis of Legitimacy of Judicial Activism and Constitutionality of Original and Suo Moto Jurisdiction of Apex Judiciary:**

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1 'Pakistan's top court rules Reko Diq mine deal invalid' Reuters Toronto Canada Jan 7, 2013  
<http://ca.reuters.com/article/businessNews/idCABRE9060TZ20130107accessed08/09/2013>

2 At para 81 Tethyan Copper Company Limited V. The Islamic Republic of Pakistan ICSID Case No. ARB/12/1  
[https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2752\\_En&caselId=C1980](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2752_En&caselId=C1980) accessed on 11/10/2013

3 Reko Diq first phase of two deposits on H14 and H15 has been estimated to have between \$150bn and \$260bn of deposits by many international experts. So why a treasure so big is still being considered for \$52 billion (only 8 billion to GOP and GoB) and that too receivable in 56 years? There are reported to be 48 deposits in Chaghi as per research of Antofagasta-related geologists. Dawn.Com 10th December 2012  
<http://beta.dawn.com/news/770294/reko-diq-case-sc-resumes-hearing-2accessedon/08/10/2013>:

4 At para 77 Tethyan Copper Company Limited V. The Islamic Republic of Pakistan, ICSID Case No. ARB/12/1  
[https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2752\\_En&caselId=C1980](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2752_En&caselId=C1980) accessed on 11/10/2013

<sup>5</sup> State organs and foreign investors



According to the constitution of Pakistan 1973<sup>1</sup> the Supreme Court of Pakistan (SCP) is established and derives its powers from the constitution. The Constitution provides principles and procedure of appointment, retirement<sup>2</sup> and removal<sup>3</sup> of judges from their office. The constitution confers the SCP the role being custodian of the constitution<sup>4</sup> and guardian of human rights<sup>5</sup>. In order to discharge its constitutional functions the SCP is empowered with original<sup>6</sup>, “*Suo Moto*” (actions taken in own motion),<sup>7</sup> appellate<sup>8</sup>, advisory<sup>9</sup>, and review<sup>10</sup> jurisdictions.

Part VII and Chapter 1 of the Constitution of Pakistan 1973 deals with the establishment of courts in Pakistan and their jurisdiction. Article 175(2) of the Constitution may be reproduced as under;

*(2) “No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.”*

The SCP derives its “suo moto” jurisdiction to enforce fundamental rights<sup>11</sup> under article 184(3), which may be reproduced as under;

*“Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II is involved have the power to make an order of the nature mentioned in the said Article”.*

The SCP is empowered with the authority to take judicial notice and pass an appropriate order or direction to the public functionary on violation of fundamental rights guaranteed in the Constitution or where question of public interest arises. The court is empowered with the authority of directions of prohibition or mandamus to the public functionary in the

<sup>1</sup> Art 175 Constitution of Pakistan 1973, Chapter 1 the Courts Part VII the Judicature <http://www.mohr.gov.pk/constitution.pdf> Accessed on 27/04/2013

<sup>2</sup> Arts 176- 182 Constitution of Pakistan 1973 Part VII chapter 2

<sup>3</sup> Art 209 Constitution of Pakistan 1973, PART VII Chapter 4: General Provisions Relating to the Judicature

<sup>4</sup> Oath of the office of Chief Justice of Pakistan or of a High Court or Judge of the Supreme Court or a High Court

*“That I will preserve, protect and defend the Constitution of the Islamic Republic of Pakistan”* Third Schedule,

Constitution of Islamic Republic of Pakistan 1973: <http://www.mohr.gov.pk/constitution.pdf> Accessed on 27/04/2013

<sup>5</sup> Chapter I of Part II of the constitution of Pakistan 1973

<sup>6</sup> Art 184 Constitution of Pakistan 1973 Part VII chapter 2 <http://www.mohr.gov.pk/constitution.pdf> Accessed on 27/04/2013

<sup>7</sup> Art 184(3) Constitution of Pakistan 1973 Part VII chapter 2

<sup>8</sup> Art 185 Constitution of Pakistan 1973 Part VII chapter 2

<sup>9</sup> Art 186 Constitution of Pakistan 1973 Part VII chapter 2

<sup>10</sup> Art 188 Constitution of Pakistan 1973 Part VII chapter 2

<sup>11</sup> Chapter I of the part II of constitution deals with the Fundamental rights

manner in which court deems appropriate for the enforcement of constitutional rights<sup>1</sup>. Constitution of Pakistan delegates several powers to the SCP to strengthen its authority further to ensure the administration of justice and implementation of its orders. The SCP is empowered summon any person including public functionary, document, executive or/and judicial authority for its support and issue all such directions, orders which it deems appropriate<sup>2</sup>. All the State functionaries either from executive or judiciary are bound by the constitution to act in aid of SCP<sup>3</sup>.

Part VII, Chapter 2 of the Constitution of Pakistan exclusively dealt with the jurisdiction of the SCP. Article 184(3) of the Constitution empowers the SCP to take suo moto and original jurisdiction. It empowers Apex court to take judicial notice on violation of any fundamental rights guaranteed in chapter I of the part II of the constitution. The SCP can issue an appropriate order or direction to the state functionaries to do or refrain from doing something particular which appears to the SCP just and proper for the enforcement of rights under question<sup>4</sup>. To take jurisdiction and exercise authority, the SCP refers and relies upon two phrases provided in 184 (3) of the constitution

*“A question of public importance”* and

*“Enforcement of any of the Fundamental Rights conferred by Chapter I of Part II of the constitution is involved”*

The framers of Constitution of 1973 interested to introduce the phrase, “*a question of public importance*” intentionally for specific purposes. They made the SCP bound to exercise its authority subject to two prerequisites. The phrase has never been interpreted by the legislature neither in the constitution, nor in any statute or in the Supreme Court rules 1984. Interpretation of the phrase can only be traced in the judgments of apex courts. The court had examined the phrases in several aspects/angles and have set principles for taking original or suo moto jurisdiction in PIL.

In order to invoke the jurisdiction of the SCP u/a 184(3), the petitioner is required to establish that the matter raised by him is of general public

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<sup>1</sup> Mr. Justice Khilji Arif Hussain, *Prime Minister’s disqualification case dated 19/06/12 (Additional note)*, Describing the scope and limits of art 184(3) of the constitution, Fundamental rights and locus standi to invoke jurisdiction of SCP. Paragraphs 12 to 15 dated 04/072012

<sup>2</sup> Art 187 Part VII chapter 2

<sup>3</sup> Art190 Part VII chapter 2

<sup>4</sup> Mr. Justice Khilji Arif Hussain, *Prime Minister’s disqualification case dated 19/06/12 (Additional note)*, Describing the scope and limits of art 184(3) of the constitution, Fundamental rights and locus standi to invoke jurisdiction of SCP. Paragraphs 12 to 15 dated 04/072012

importance and meets the said prerequisites<sup>1</sup>. Composition of Art 184(3) *require to claim the violation of matter of public importance and infringement of fundamental rights* enumerated in the Constitution of Pakistan. Therefore the apex courts are required to examine the composition of phrase “*public importance*” on case to case basis<sup>2</sup>. It cannot be applicable on the cases, where outcome of the case benefits to an individual or a group of individuals only. It is applicable only if outcome relates to the right and liberty of the public as a whole or collectively. The word “*public*” denotes something used collectively such as owned by the nation, large fragment of the society or the State. Case of public importance cannot be established where the controversy pertains to the interests of one or a group of people<sup>3</sup>. Remedy under this Article is only available to the breach of constitutional rights of large segment of the society and matter of general public importance. Absence of any of these prerequisites results in refusal of the SCP to assume suo moto jurisdiction. In order to enforce its judgments and orders, during recent phase of judicial activism, the SCP has widened the scope of constitutional and fundamental rights<sup>4</sup> and public interest litigation. The SCP held that;

*“Any case which raises a matter of constitutional interpretation and enforcement regarding the composition, processes and powers of the legislatures is thus by its very nature a case of public importance, as it affects the rights of the public at large, and also affects the Fundamental Rights of the citizens<sup>5</sup>.”*

The SCP has issued guiding principles for exercising writ jurisdiction to the courts. Through their judgments they advised to the courts not to be influenced from any sensational reports of media and to open their decisions for criticism<sup>6</sup>. The current situation of the courts is that they are

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<sup>1</sup> ‘Malik Asad Ali v. The Federation of Pakistan’ P L D [1998] SC 161 paragraph (d) constitution of Pakistan Arts 184(3), 199 & 187

<sup>2</sup> ‘Mian Muhammad Shahbaz Sharif v Federation of Pakistan’ P L D [2004] SC 583 p 595&596 head note D

<sup>3</sup> Syed Zulfiqar Mehdi v. PIA [1998] SCMR p 801

<sup>4</sup> Chapter I of Part II of constitution of Pakistan 1973; Art 9, Security of person - Art 10, Safeguards as to arrest and detention - Art 11(4), Slavery, Forced labour etc. - Art 14, Dignity of man - Art 15, Freedom of movement - Art 16, Freedom of assembly - Art 17, Freedom of association - Art 18, Freedom of trade - Art 19, Freedom of speech - Art 19A, Right to information - Art 20, Freedom of religion - Art 22 (3), Safeguards as to religious institutions - Art 23, Provision as to property - Art 24, Protection of property rights - Art 25, Equality of citizens - Art 25A, Right to education - Art 27, Safeguards against discrimination in services - Art 28, Preservation of language, script and culture.

<sup>5</sup> Additional note by His Lordship Mr. Justice Khilji Arif Hussain dated 04/07/2012 in Prime Minister’s disqualification case dated 19/06/12

<sup>6</sup> PLD [1971] SC 677 p 694

taking notices on almost each and every sensational report of media which is completely in contradiction with the said precedents. It is a long standing and firm view of the SCP that following the principle of tripartite and separation of powers envisaged in the constitution, judiciary cannot compel the legislature to enact the law even if constitution clearly ordered the legislature to pass such legislation. There have a clear line been drawn between functions of the legislature, executive and judiciary<sup>1</sup>. Courts are desired to interpret the constitution under writ jurisdiction in the context of whole constitution<sup>2</sup>.

The SCP cannot question the validity of any law in exercise of its suo moto and original jurisdiction unless the law is enacted in clear and direct violation of constitutional fundamental rights<sup>3</sup>. The presumption will go in favor of validity of the enacted law and same should not be annulled on technical grounds. The SCP may question the competence of the legislator on the enactment of certain Law under its original jurisdiction subject to the conditions that it was beyond the authority of the legislator to pass the said law and the same violates the constitutional fundamental rights. The SCP is required to refuse the original jurisdiction, if such law does not amount to infringe the fundamental right, though otherwise it is in breach of the constitutional provisions. Almost similar approach has been witnessed in USA where its Apex Judiciary handed down its verdict on policy judgment of the government under PIL. It has been observed universally that, the courts are bestowed with the authority to interpret the constitution and law. Judges do not have the authority or mandate to deliver policy verdicts, such powers rest with the elected representatives by majority votes of people. Courts are restricted to intervene into the matters, to protect the people from the outcomes of their wrong political decisions. People are empowered in democratic system to throw their leaders out of office if they do not conform to their policies<sup>4</sup>. Consequently, governments have authority by constitution to take policy decisions and all the State organs are bound to perform their functions in accordance with the constitution.

### **Conclusion:**

Every Organ of State must use its authority and power carefully and should follow the limitations and norms enumerated in the constitution and law, otherwise such authority will be a curse rather than a blessing.

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<sup>1</sup> PLD [1961] Supreme Court 192 P 193

<sup>2</sup> PLD [1958]SC (Pak) 437 at p. 441

<sup>3</sup> '*Jamat-e-Islami through Amir and others versus Federation of Pakistan and others*', P L D [2009] SC 549

<sup>4</sup> '*National Federation of Independent Business Et Al. v. Sebelius, Secretary of Health and Human Services*',

[2012] et al. Supreme Court of the United States No. 11–393. Decided June 28, 2012 1 Certiorari to the United

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Institutional clash could be reduced by these binding forces which have the capacity to restrict institutions in their limits. *Suo Moto* jurisdiction is a constitutional authority which should be applied carefully and in accordance with the true spirit of the constitution. Undoubtedly the judgments of the SCP in the prevalent phase of judicial activism would have long lasting impacts. It has deeply affected all State organs with regard to their limits and scope of parliament, executives and judiciary. It is pertinent to mention that whenever other State organs tried to cross their constitutional limits and boundaries, the apex judiciary never hesitated to exercise their authority by extending and broadening its constitutional limits. It has been observed that major portion of civil society, media and legal fraternity never noticed the constitutionality of *suo moto* actions and judgments pronounced on these notices. But ground realities are that, the proactive role of judiciary and pronouncement of judgments on *suo moto* notices have adversely affected the commercial arena as well as resulted in international and economic repercussions.

The consequences of striking down the privatization deal of PSM by SCP, transpires that PSM earned nothing other than loss. The SCP judgment on PSM deal not only put international relations at stake but the PSM judgment also resulted in the loss of millions of dollars. It left a question mark on the credibility and reputation of a sovereign government to execute its foreign deals and commercial contracts. It is worth mentioning that no improvement has yet been witnessed in respect to the affairs of PSM despite SCP continuously hearing the case on subsequent maladministration in the PSM. It therefore appropriate to suggest that due to declaring the PSM deal illegal, unlawful, void and in contradiction with provisions of constitution the SCP has sacrificed plenty of time on PSM matters. SCP may use this precious time, wisdom and energy on constitutional and statutory matters for better dispensation of justice in the society.

The policy makers of our country are likely to face some bitter lessons from the instant case, perhaps at the cost of poor people of Pakistan. The Turkish firm Karkay Karadeniz Elektrik Uretim "KKEU" initially signed an agreement with NAB to settle its accounts in compliance of SCP judgment. But later on they refused to accept the SCP's ruling in RPPs case and seek recourse from international arbitration against Pakistan., The KKEU through legal notice issued to Pakistan government on 19/05/2012 demanded for damages for loss it had suffered due to the alleged violation of Rental Service Contract (RSC)<sup>1</sup> and to stop the inquiry initiated by the NAB authorities. The firm further contended that Pakistan has violated Pakistan and Turkey BIT obligations. Recently international arbitration forum (ICSID) has decided against the government of Pakistan and imposed huge penalty. Similarly, the SCP judgment on Reko Diq case

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<sup>1</sup> Zafar Bhutta, "Ruling on rental power plants: Turkish firm takes dispute to international court" The

Express Tribune with the International Herald Tribune Published on : May 27, 2012  
<http://tribune.com.pk/story/384768/ruling-on-rental-power-plants-turkish-firm-takes-dispute-to-international-court/>

appears to save Pakistan's billions dollar assets from being looted by the foreign investors. But, later on of Reko Diq case converted into costly international arbitration as well as delay in valuable and vital projects at risk and the cost of Pakistan's poor nation.

Conclusively, this research could not justify the expansion of PIL and suo moto jurisdiction on fundamental rights and to bring a variety of matters including commercial and FDI within their ambit. Therefore, in order to avoid negative impacts on inward flow of FDI and to build reliability at international arena it is absolutely imperative to redefine the scope and applicability of PIL, suo moto and original jurisdiction regarding FDI, commercial and BIT matters. Finally, in a particular political, social, bureaucratic and economic environment of Pakistan, judicial activism is the most desirable and popular phenomenon. It emphasized that all organs of the State should work within their constitutional domains to uphold the *sovereignty, integrity, solidarity; wellbeing and prosperity of Pakistan* and to preserve it against any likely threat<sup>1</sup>. The above mentioned research transpires that the courts in Pakistan are working as court of justice, rather than courts of law therefore any infringement of constitutional authority or abuse of power would allow the SCP to intervene into their domain. Foreign investors are also required to follow parameters define in domestic law and be vigilant while executing commercial agreement. The SCP has shown no reluctance in exercising exercise its extended judicial authority blatantly on shady commercial deals. The SCP has proved that it believes in, *Fiat Justitia Ruat Caelum: Let Justice Be Done Though the Heavens Fall*.

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<sup>1</sup> Paragraphs 78 and 79 of Rental power case

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