



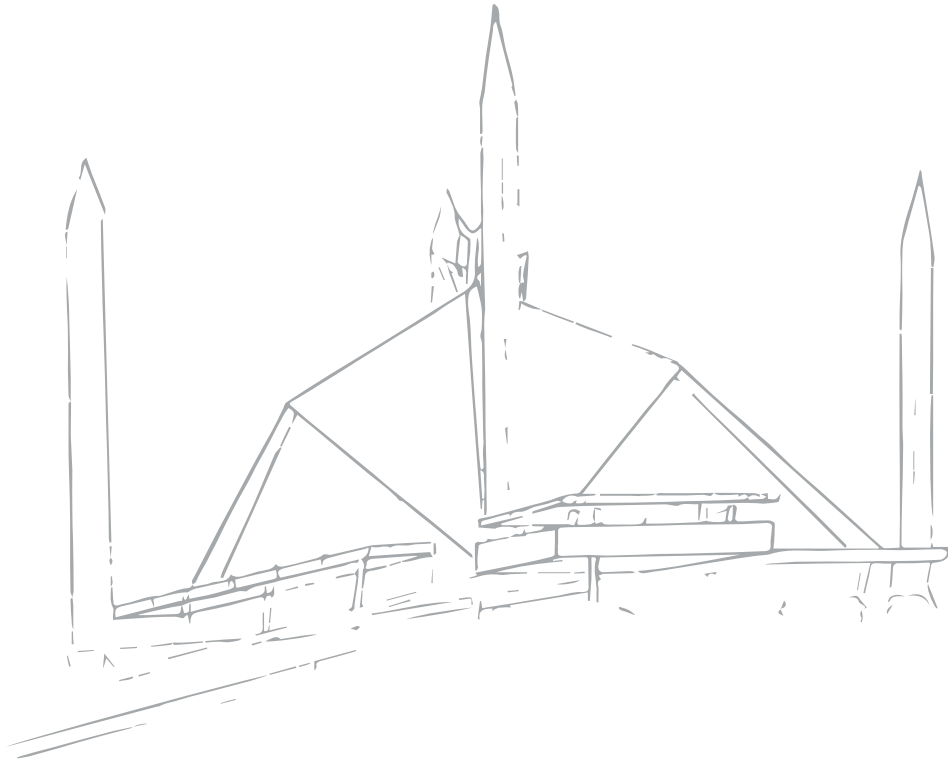
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# Impact of the Original Jurisdiction of the Supreme Court on Its Appellate Jurisdiction and Pendency of Cases in the Apex Court

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## Abstract

*This paper mainly focuses on the judicial system of Pakistan particularly the Apex Court; as Supreme Court of Pakistan is one of the highest judicial bodies under the Constitution of Islamic Republic of Pakistan 1973. It analyzes the powers and functions along with various kinds of jurisdiction of the Supreme Court. It also throws light on the impacts of the original jurisdiction of the Apex Court of Pakistan on the appellate jurisdiction. Similarly, it also focuses upon the perpetuating impacts by the actions taken by the Supreme Court in form of suo motu over certain important public issues. As the suo motu action might have an obvious impact on the very important fundamental right, that is, Right to Fair Trial. It also intends to discuss the increasing ratio of pending cases due to suo motu actions of the Supreme Court as well as its impact on the Right to Fair Trial and oversee possible solutions.*

**Keywords:** *Supreme Court of Pakistan, Jurisdiction, Public Importance, Pendency*

## 1. Introduction

Supreme Court of Pakistan, set up in 1956, is the top court in the judicial hierarchy of Pakistan, the ultimate arbiter of legal and constitutional litigation and exercising original, appellate, advisory and review jurisdictions. All other courts of the country are bound to obey its decisions. Law implementing and law making agencies are needed to behave in assistance of the Supreme Court.

Forming a trichotomy of power system, the Constitution gives to the Supreme Court the sole obligation of safeguarding consistency and stability among the state's three pillars, namely; the lawmaking department, the law enforcing institution and the

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law interpreting body. The aim is to guarantee that municipal structures in their specified fields perform their corresponding tasks. As a constitution guardian, this document must be preserved, protected and defended by the court of law. The apex court is also a guardian as well as upholder of the rights and duties of citizens.

The country top court is made up of a chief justice and sixteen other judges chosen by the president on the nomination of Judicial Commission of Pakistan as well as parliamentary committee approval. A Supreme Court judge retains office until he reaches 65 years of age. There is also provision to appoint acting judges and ad-hoc judges. The number of judges has been determined by a Parliament Act. The total number currently fixed is 17. It has a perpetual office in the capital Islamabad and local office registries at all provincial headquarters, Peshawar, Lahore, Quetta and Karachi. The Court currently is working with complete strength. It had an amount of *de jure* powers described in the constitution, including constitutional jurisdiction and appeal, and on its own motion authority to seek issues relating to human rights.

## 1. Supreme Court of Pakistan as A Constitutional Court

### 1.1 Article: 184 Original Jurisdiction of Supreme Court

Article 184 of the Constitution describes the jurisdiction of the Supreme Court of Pakistan as following:

“Original jurisdiction of Supreme Court.-(1)” “The Supreme Court shall, to the exclusion of every other Court, have original jurisdiction in any dispute between any two or more Governments.”

**Explanation.** - “In this clause, Governments means the Federal Government and the Provincial Governments.

(2) “In the exercise of the jurisdiction conferred on it by clause (1), the Supreme Court shall pronounce declaratory judgments only.”

(3) “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.”

## 1.2 *Suo Moto* Power with Case Laws

Under Article 184(3) of the Constitution, the apex court enjoys *suo moto* authority to deal with any issue of public importance with regard to the application of any of the fundamental rights. Read with “complete justice<sup>1</sup>” the jurisdiction on its own motion is challenging. In the case of infringement of a fundamental right of an individual, high court can directly be petitioned for immediate relief. Where enforcement of fundamental right is sought in a matter of public interest, Supreme Court can be petitioned under abovementioned article. A number of fundamental rights are enshrined in Part II of the Pakistan Constitution, entitled Fundamental Rights and Principles of Policy. The Supreme Court has expanded the scope of public interest litigation (PIL) and Constitutional Fundamental Rights over the previous century as guardian of the constitution and fundamental rights enshrined in the Constitution. It has conferred upon the people simple and inexpensive right to sort to justice against all kinds of state official’s indiscriminative actions.<sup>2</sup>

Practicing *Suo Motu*, Chief Justice of Pakistan (CJP) relaxes all procedural criteria to launch lawsuits against accidental and immoral offences. The Apex Court has set up a method of solid check and balance over the law implementing and law making body’s *ultra-virus* actions. Likewise, the SCP plays its part in enforcing legislation on all people by interpreting the constitution, states and regulations, assuming that no one is above the law in the state and that everyone is equivalent.<sup>3</sup>

Article 184(3) can be invoked only when there is three elements i.e. “question of public importance; question of enforcement of fundamental rights and fundamental rights sought to be enforced as conferred by Chap.1 Part 2 of the Constitution.” We can see these three elements in the following case laws.<sup>4</sup>

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<sup>1</sup> Art.187 of the Constitution reads: “The Supreme Court shall have the authority to grant instructions, Orders or decrees as may be essential in any situation or matter pending before it, including an order to secure any person's participation or to discover or produce any paper.”

<sup>2</sup> Aman Ullah, “Public Interest Litigation: A Constitutional Regime to Access to Justice in Pakistan”, *Pakistan Vision*, Vol.19 No.2, p-168. Available at: [http://pu.edu.pk/images/journal/studies/PDF-FILES/Article\\_12\\_v19\\_2\\_18.pdf](http://pu.edu.pk/images/journal/studies/PDF-FILES/Article_12_v19_2_18.pdf).

<sup>3</sup> *Baz Muhammad Kakar & others v. Federation of Pakistan through Ministry of Law & Justice, Islamabad & others.*

<sup>4</sup> Art. 184(3) of the Constitution of Pakistan.

Similarly, In the case of *Federation of Pakistan vs. Munir Hussain Bhatti and Others*,<sup>5</sup> Article 184(3) of the constitution has expressly empowered Supreme Court to exercise the powers vested in a High Court under Article 199 of the Constitution subject to the two fold rider that the matter should be one of public importance and should relate to the enforcement of fundamental rights.<sup>6</sup> Likewise, according to the decision in *Muhammad Azhar Siddique and Others vs. Federation of Pakistan and Others*,<sup>7</sup> It is competent to ensure enforcement of the fundamental rights of the citizens in all matters of public importance.<sup>8</sup> On the same presumption in the case of *Watan Party & Others vs. Federation of Pakistan*,<sup>9</sup> public importance is one of the components to attract the said jurisdiction of Supreme Court coupled with the facts that three elements i.e. question of public importance; question of enforcement of fundamental rights and fundamental rights sought to be enforced as conferred by Chap.1 Part 2 of the Constitution are required to be satisfied for public importance.<sup>10</sup>

### 1.3 Question of Public Importance

Whenever the Top Court takes action under Article 184(3), the most important factor to be measured in consideration is the question of public importance. There are many *suo motu* actions which are taken by the August Top Court without the basis of the matter of public importance. It is confused whether or not the matter comes under public importance and protection of public interest. However, the term public importance is not defined in the constitution. But, according to the *suo motu* case 7/2017 two pre-requisites must be there; the matter of public importance and one of the fundamental right must be infringed. It is not sufficient that the matter is only of public importance but it must involve the right of the public too.<sup>11</sup> It would be up to the apex court to look attentively in such a situation whether the component of public importance is engaged in enforcing the Fundamental Rights having respect to the implication of the verses public

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<sup>5</sup> PLD 2011 S.C. 752.

<sup>6</sup> Ibid.

<sup>7</sup> PLD 2012 S.C. 660.

<sup>8</sup> Ibid.

<sup>9</sup> PLD 2012 S.C. 292.

<sup>10</sup> Ibid.

<sup>11</sup> *Suo Motu* Case No. 7/2017 (*Suo Motu* Action regarding Islamabad-Rawalpindi Sit-In/Dharna).

importance, regardless of the violations of the class of persons or the infringements of a group or individual.<sup>12</sup>

#### 1.4 Public Interest Litigation

Public interest Litigation (PIL) in the adjudication region is a new developing concept. Public Litigation implies litigation in the interest of the general public, which includes all sectors and sections of culture without distinction in social status, gender, financial background, ethnic origin, religious credibility or traditional coordination. In a way, litigation in the public interest is a legislative response that offers them the right to seek justice to solve the underprivileged problems. That is to say, to allow the poor and lowly to go into the holy place and obtain the blessing of the goddess of justice.<sup>13</sup>

In the Constitution of Pakistan, the comparable provisions are Articles 184(3) and 199. These articles provide broad powers to implement fundamental rights to the superior judiciary, provide all citizens with access to justice and certify submission with the rule of law, notwithstanding of any success or public status consideration.<sup>14</sup> Article 184(3) says:

"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."<sup>15</sup>

This passage was deliberated the Court's facilitating provision for initiating appropriate action for the enactment of the very fundamental rights. In accordance with Article 199 of the Constitution, the High Courts may also practice comparable authority, The primary distinction between the authorities of the Supreme Court and the High Court is that while the jurisdiction of the apex Court is limited to matters of "public importance" the High Court does not impose such a condition. In *Benazir Bhutto v*

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<sup>12</sup> *Benazir Bhutto vs Federation of Pakistan* PLD 1988 SC 416.

<sup>13</sup> See: Faqir Hussain, "Public Interest Litigation in Pakistan," *Sustainable Development Policy Institute (SDPI), Working Paper Series*. 5 1993, p-1. Available at: <https://www.sdpi.org/publications/files/W5-Public%20Interest%20Litigation.pdf>.

<sup>14</sup> P.N. Bhagwati. "Judicial Activism and Public Interest Litigation," *Columbia Journal of Transnational Law*, 1985 Vol 23 No 3: 570.

<sup>15</sup> Art. 184(3).

*Pakistan Federation*,<sup>16</sup> the Supreme Court expanded the scope of fundamental rights and noted that those freedoms included the rights definite under Article 2-A as well as the rights accessible under the Principle of Policy Chapter. The Court said:

*"While construing Article 184(3), the interpretative approach should not be ceremonious observance of the rules or usages of interpretation, but regard should be given to the object and the purpose for which this Article is enacted i.e. this interpretative approach must receive inspiration from the triad of provisions which saturate and invigorate the entire Constitution, namely, the Objectives Resolution (Article 2-A), the Fundamental Rights and the Directive Principles of State Policy so as to achieve democracy, tolerance, equality and social justice according to Islam."*<sup>17</sup>

The superior judiciary has power to implement essential rights and thus guarantee that the rule of law is observed. Whether enforcing of an individual right or providing distributive justice to the community as a whole is mandated by the judiciary to make certain that acceptable, complete and operative relief is provided as well as applicable justice is guaranteed. The problems in instances of public interest, however, are entirely distinct from those in private litigation. Public interest litigation problems are often connected to state suppression, executive lack of control, administrative deviation, misuse and denial of their legal rights to poor and deprived groups.<sup>18</sup> The expansion of the scope of fundamental rights under Article 184(3) of the Constitution has been a significant element of litigation of public interest in Pakistan. The powers of the Supreme Court of Pakistan under 184(3) are also known as *Suo Motu* action.

### **1.5 Scope of *Suo Moto* Power under Article 184(3)**

The Scope of power on its own motion under article 184(3) has yet to be decided by the Apex Court of Pakistan.<sup>19</sup> The former Chief Justice of Pakistan (CJP) Justice Mian Saqib Nisar was willing to resolve this issue relating to the Article concerned as he had made it certain, on Friday 07 September, 2018, that he would analyze and decide the power under Article 184(3). The ex- chief justice said that the Supreme Court seek to be conversant of the

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<sup>16</sup> PLD 1992 SC 646.

<sup>17</sup> Ibid.

<sup>18</sup> Bhagwati, p 569.

<sup>19</sup> Nasir Iqbal, "CJP wants to determine scope of Supreme Court's *Suo Motu* powers," *Dawn*, 08 September 2018. Available at: <https://www.dawn.com/news/1431632>.

authority under the above mentioned Article. He further mentioned that they cannot claim that courts are infallible. A triple fellow bench of the top court led by Justice Nisar had taken up a case concerning to the range of the article 184(3) that permits the court to intervene in order to enforce fundamental rights and to initiate *suo motu* proceedings on violations of law. As the hearing session commenced, the CJP inquired the attorney general, *"The court wants to know if it is exceeding or crossing jurisdiction with respect to Article 184(3) or not and we want to know that the authority under Article 184(3) is not un-guided and to ensure that we are not making any mistakes in its use."*<sup>20</sup> CJP observed that Judges and courts are not free of making mistakes.<sup>21</sup>

Justice Nisar then appointed two senior lawyers as *amicus curie*; notices were issued to the relevant persons and departments. The *suo motu* power was often excessively used by the former CJ Iftikhar Choudhry and was vituperated by lawyers on the ground that inordinate use of the power would affect the prestige of the judiciary. *"Many lawyers believed that the excessive use of Article 184(3) of the Constitution in the context of litigation in the public interest sometimes served to cover the destiny of the aggrieved party concerned,"* particularly when a completely distinct problem arose in collateral trials and a completely distinct component was brought to the court's notice.<sup>22</sup>

High-ranking pleader Raheel Kamran Sheikh in his letter to Pakistan Bar Council's vice-chairman, Kamran Murtaza, has mentioned that he was quiet astonished that the man who was widely and excessively exercised the authority under the relevant Article has now determined to settle its ambit merely few months before his retirement. Hence, the case concerned *suo motu* should be heard by full bench. A complete court hearing, he said, would be very useful because all of the Supreme Court's judges, containing its chief justices in future, who will serve till 2030 could contribute to the debate at hand.<sup>23</sup> However, regulating a power that could mislead, paralyze or even take over other systems in the nation was not too late, the letter said. Mr. Sheik added that whereas adaptable the practice of one of the most chief jurisdictions, avoidable constraints that could make the top court of the country powerless in comparison with other state's organs

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<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.



and society should also be considered unacceptable.<sup>24</sup> Parliament suggested in November 2016 the 24th constitutional amendment bill to amend Article 184(3) in order to grant an aggrieved party the right to appeal against decisions given on a *suo motu* case. But no assistance and attention was given to the bill. The International Commission of Jurists also proposed in 2011 the same perspective with regard to taking *suo moto* situations using excellent care and curb.<sup>25</sup>

## **2. Dissenting Notes of Justice Qazi Faez Issa and Justice Mansoor Ali Shah on Suo Moto Case No HRC. 14959-K/2018**

On May 13, 2018 Justice Qazi Faez Issa published his reservations after he was removed from the bench which was hearing a *suo moto* case relating to “disposal of infectious hospital wastes case” in the province of Khyber Pakhtunkhwa at Supreme Court’s (SC) Peshawar Registry.<sup>26</sup> In the course of hearing of a *suo moto* notice case, Justice Isa asked the advocate general of the province concerned for reading out Article 184(3) of the Constitution. But before he does the same, Ex- chief Justice Nisar intervened left the place by saying that another bench would be made. Later on, Qazi Issa was removed from the three member bench which he termed unjustified. According to Justice Isa, CJP had obstructed the proceedings. SC judge said that such actions only damaged and obstructed the system of transparency which will bring forth severe ramifications. Justice Isa maintained the view that, by writing a note on this outburst of CJP, was not only his responsibility as a judge but an issue to be highlighted. He further added that not writing on such matters would only leave a burden on one’s conscience.

Justice Faez Isa held that under the constitution two basic conditions, namely; “public importance and Fundamental Rights are to be involved in an issue before a notice under article 184(3) can be taken on it and the decision to take such a notice is the constitutional power of the Supreme Court.”<sup>27</sup> Justice Shah agreed with the perspective voiced by Justice Isa, who had objected to the reconstitution of the lower panel while reviewing the case in March 2018. The bench comprising Justice Isa, Justice Shah and CJP Nisar was reconstituted following the questioning of the

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<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> HRC. 14959-K/2018.

<sup>27</sup> Ibid.

legality of the hospital waste proceedings by Justice Isa. The reconstituted bench comprised of Justice Shah and the CJP and excluded Justice Isa.<sup>28</sup> Now Justice Shah confessed in a clear note that his sitting on the rebuilt two member bench was a fault and realized that he did not sign the orders passed by the reconstituted bench after investigative the legal position, “but as a junior bench member waited for the CJP to pass an appropriate order in response to the reaction of Justice Isa. He was waiting for the CJP's order to react to Justice Isa's note by describing the reasons for the smaller bench's reconstitution on that day, Justice Shah noted. But no such order was passed to date and as an adjourned case, Justice Shah recalled, the case had been mistakenly embodied in the bench disposal statement.”<sup>29</sup> The then chief justice was supposed to be retiring on January 17, 2019 so as a member of the bench, I feel constitutionally obliged to convey my opinions on the order of the brother [Justice Isa] and pass my order in this situation on May 19, 2018 when it gets to hearing before the tribunal in this scenario.<sup>30</sup>

## **2.1 Letter to CJP Asif Saeed Khosa by Khurshid Mahmud Kasuri Former Pakistan’s Foreign Minister Regarding Article 184(3)**

In instances where lawmakers and executives fail to implement fundamental rights in issues of government significance, the Supreme Court may practice its *suo motu* authority as a last resort, as provided for in Article 184(3) of the Constitution. But its abuse cannot be ignored which can weaken the work of lower judiciary and addition to that it also bypass the due process and the right to fair trial and the right of appeal. It may spell out issues in the near future, but it is not able to continuously resolve them, rather it makes them worse because magistrates are not specialists in distinct areas of governance that they only have law abilities.<sup>31</sup> He kept on saying that he did not doubt the character and legal intelligence of Mian Saqib Nisar but some important actions without extreme caution results in serious consequences. CJ Saqib Nisar, replicating the playbook of CJ Iftikhar Chaudhry, “led a reign of *suo motu*-driven judicial activism and stayed in the media 24/7, often reaching top headlines. It is well established that judges should not be

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<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup>Khurshid Mahmud Kasuri, “Letter to CJP Asif Saeed Khosa,” *Daily Times*, 18<sup>th</sup> January 2019. Available at: <https://dailytimes.com.pk/345259/letter-to-cjp-asif-saeed-khosa/>.

advertising in court. They are meant to speak through their judgments.”<sup>32</sup>

Our judicial system consists of law courts whose powers and legitimacy are derived strictly from within the constitutional boundaries. Our judiciary should therefore not try to behave like the ancient 'equity' judiciary in England. In this connection, the classic maxim of British constitutional law cautions that “Equity is a roguish thing: for law we have a measure, know what to trust to; equity is according to the conscience of him that is Chancellor ('equity varies with the size of Chancellor's foot').”<sup>33</sup> He further said that by the instance of their authority, judges should not be known. Rather, their respect arises from their judgments 'excellence and perfection.

## **2.2 Remarks of Azad Jammu & Kashmir (AJK) CJ: Suo Motu Powers Should Be Within Constitutional Limits**

Chief Justice of Azad Jammu and Kashmir (AJK) Chaudhry Mohammad Ibrahim Zia has upheld that *suo motu* powers have to be used as per constitutional ambits and breach of the ambits tantamount to breach of the law and Constitution. Courts of law are bound to keep those limits. Mr. Mohammad Ibrahim Zia has said at Central Press Club Muzaffarabad, while talking informally with journalists, that it was unfortunate for Pakistan and AJK that they do not function under the constitutional ambits. He gave remarks that 80% of issues would be resolved if all the institutions determined to function in the concerned ambits. When a court of law steps down in the field of executive department, the judge then assumes the function of a deputy commissioner or that of an investigator and this very act is against the law and constitution. Judicial activism got no place in the Constitution.<sup>34</sup>

“You are yourself witnessing the fruits of whatever is happening in the name of judicial activism [in the country]. I don't think it's bearing any positive results.”<sup>35</sup>

He said if there any wrong takes place, then court of law should make it evident and issue guidelines regarding the same. I,

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<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> See: Tariq Naqash, “Suo motu powers should be within constitutional limits,” *Dawn*, 5<sup>th</sup> January 2019. Available at: <https://www.dawn.com/news/1455500>.

<sup>35</sup> Ibid.

being a Chief Justice, do not have the authority to intervene in the affairs of a head constable, if I do so it is; it is a breach of law.<sup>36</sup>

### 3. Supreme Court of Pakistan as a Final Court of Appeal

The Supreme Court of Pakistan is the largest court in many legal jurisdictions within the court hierarchy. Other descriptions for such courts include last resort court, apex court, and largest (or final) appeal court. Generally talking, no other court is subject to further review of a supreme court's decisions. Top courts normally serve mainly as appeal courts, to hear appeals from reduced court choices, or appeal courts at intermediate level. All the courts of law of the country are legal courts, while the apex court is not only a court of law, but also the court of complete justice. It is clear that, when it comes to exercising this Court's said jurisdiction, full justice must be done.

#### 3.1 Article: 185 Appellate Jurisdiction of Supreme Court

The Supreme Court of Pakistan hears direct appeals under article 185 of the Constitution of Pakistan 1973 from the orders, decrees and judgments of the High Courts if that is relevant to the matter of right. But if the case is not relevant to the matter of right, then firstly leave to appeal is sought out. If leave to appeal is granted, the Supreme Court of Pakistan hears the appeal.<sup>37</sup>

#### 3.2 Total Pendency in the Supreme Court of Pakistan

Nearly 8,000 cases were added to the litigation pending before the Supreme Court during Mian Saqib Nisar's period of 20 months as Pakistan's chief justice.<sup>38</sup> When the Apex court's judicial performance is checked over the past five years –from 2013 to 2018– it turns out that the case pendency has literally increased. An entire amount of 20,480 cases were pending in 2013, but the figure rose to 40,540 cases until August 15, demonstrating an increase of nearly 100 percent<sup>39</sup>. In 2001, there were 13,070 cases pending before the Supreme Court. Several times since then, this figure has increased. Historical

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<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> Hasnaat Malik, "In five years, number of pending cases in SC have doubled," *The Express Tribune*, 26 August 2018. Available at: <http://tribune.com.pk/story/1788035/1-five-years-number-pending-cases-sc-doubled/>.

<sup>39</sup> Ibid.

developments indicate that since 2001, the amount has grown annually.<sup>40</sup> In 2002, seventeen thousand three hundreds seventy (17,370) cases were pending. The pending cases were 20,031, 27,614, 14,984, 13,724, 15,186, 17,754, 18,359, 20,234, 20,228, 20,314, 20,480, 22,979, 27,639 and 32,744 in the coming 14 years from 2003 to 2016.<sup>41</sup>

A noticeable rise in the pendency occurred in 2016. The number of pending cases reached 36,344 in November 2017. About 4,000 cases have been added to the already huge stack of pending cases over the past nine months.<sup>42</sup> In August 2016 there were Thirty thousand, four hundred and four (30,404) cases incomplete, whereas there are now 40,540 pending cases. This indicates that in two years more than 10,000 cases have been added.<sup>43</sup> It was observed that the figure is rising by the day as there were 39,525 pending cases as on May 31, which on August 15 has now reached 40,540. In the first 15 days of August, six hundred and eighty-two (682) cases were instituted, while 526 cases were decided by the SC.<sup>44</sup>

The Supreme Court published its 2016-17 annual report, which states that the trend of the case institution's rise and consequential backlog piling remains. A full court session was held on July 7, during which the apex Court considered on the problem of establishment and the disposal of cases. The apex court observed that the court decided 16,897 cases against the institution of 19,098 cases during the period from September 6, 2017 to June 30, 2018. The complete court noted a growing trend in case institution that demonstrates people's confidence in the courts.<sup>45</sup> CJP Nisar was observed to be active in pursuing issues linked to mal-administration as well as public interest. He has admitted, however, that he cannot put in order his house, the judiciary. The problem of pendency in the SC is growing day by day, but no efficient policy to clear the backlog has been implemented. Legal specialists indicate that Alternative Dispute Resolutions is the alternative of reducing the trend of petition

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<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

filing. They suggest the time has come for a cost-and-fine scheme to be implemented.<sup>46</sup>

### 3.3 Generations of Litigants Suffer Amid Backlog of Cases

When, at an auction on November 11, 1956, Sheik Abdul Waheed bought a business plot in Lahore, he did not understand that he will certainly not acquire the property. The Supreme Court has trapped conflicts over the plot six eras later. Waheed is one of approximately twenty lacs petitioners whose cases are undecided at all stages, from the session court, Top Court and high court.<sup>47</sup> His rivals are in Mr. Waheed's position. Land occupants pass to the law enforcement tribunal on the grounds that the plot was an evacuee land and could not be purchased. However, the implementing tribunal confirmed the purchase of the buyer on July 7, 1960. The issue reached the SC on February 6, 1966, before returning to the Lahore High Court (LHC), it had decided in Mr. Waheed's favor.<sup>48</sup>

Once again, the usurper filed an application before the top tribunal in 1982, wherever the problem was introduced again to the Custodian Evacuee Property and the subsequently thought that the property had ended up being an evacuee estate after it had been restored. However, 2/3 of the suit property re-acquired the evacuee property status.<sup>49</sup> On June 18, 1986, this decision was challenged before the LHC. The LHC rejected the case on March 26, 2001, agreeing to the custodian's results. However, the issue had undecided in front of the top court of the country since 2007.<sup>50</sup> Likewise, litigation is facing the second generation of 1,000 allottees of the 267 houses remaining behind by Hindu and Sikh people in Rawalpindi after the partition of 1947. Asif Bashir Chaudhry notified Dawn that Mr. Chaudhry had been pursuing the case in trial for the last twenty years since his death, the original claimant being his father, the late Chaudhry Bashir.<sup>51</sup> According to him, after more than four decades of litigation, the LHC has chosen the issue in their favor, but Rawalpindi's Cantonment Board has challenged the judgment and for the last

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<sup>46</sup> Ibid.

<sup>47</sup> Malik Asad, "Over 1.8 million cases are pending in Pakistan's Courts," *Dawn*, 21 January 2018. Available at: <https://www.dawn.com/news/1384319>.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

few years the issue has been undecided with the highest tribunal. Ultimately, I will hand this case document over to my child and our third generation will follow it, he said.<sup>52</sup>

### 3.4 Justice Delayed is Justice Denied

Holy Qur'an says, "When you decide among people, decide with justice".<sup>53</sup> In the late 19th century, William Ewart Gladstone, UK Prime Minister, once said, "Justice postponed is denied justice."<sup>54</sup> Unfortunately, Pakistan today provides a typical illustration of this maxim because Pakistan's judicial system is so slow and lethargic that his grandson would be able to get the verdict for a case initiated by a grandpa. It requires nearly two decades for a civil suit in Pakistan to be decided by the civil court and the proceedings of Pakistan's Sessions Courts, it also takes almost the same time for the Supreme Court and High Courts. Quaid-e-Azam Muhammad Ali Jinnah fought for a Pakistan where people's rights would not be breached and without excessive delay every person would be brought to justice in due. But in Pakistan, the image of the justice structure is precisely the reverse of the vision and ambitions of Quaid. Although on 1 July 2009 National Judicial Policy was implemented to guarantee rapid justice, the situation has not enhanced significantly. Recent study indicates that 1.8 million cases are still pending before the judiciary of the country, which indicates that more than one in 100 people in the 180 million populations is engaged in some kind of litigation.<sup>55</sup>

Delayed justice is denied justice. This is one of the judicial system's fundamental and most significant values. The significance of prompt delivery of justice is evident and it has beneficial and powerful impacts on society. If justice is postponed, it encourages wrongdoing and ruins humanity. "A UK representative and judicial officer said; It is acknowledged that if a case is delayed, memories fade out of documents and witness may be lost".<sup>56</sup> When an individual discovers and fails to find the lamp of justice, living his existence in a self-governing and well-designed state, he becomes angry. The non-availability of justice

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<sup>52</sup> Ibid.

<sup>53</sup> Ayaz Ahmed Shar, "Justice delayed is Justice denied" *The Nation*, 13 September 2017. Available at: <https://nation.com.pk/19-Sep-2017/justice-delayed-is-justice-denied>.

<sup>54</sup> Ibid.

<sup>55</sup> Asad.

<sup>56</sup> Ibid.

leads to an increase in levels of crime as a whole begins to commit sins and offenses. Fairness can also be seen as a faith obligation. In a straightforward instance, the significance of justice can be summarized. Suppose you're walking outdoors when there's a heavy rainfall and you're taking time to open your umbrella. Eventually, the umbrella is on your head and open, but you're already wet. A paraglide was unable to do what intended for you. Impartiality is like a parasol that has to be closed before it becomes too late to do what has been suggested.<sup>57</sup>

Quotes related to "Justice delayed is justice denied:"

*"Without Justice, life would not be possible and even if it were it would not be worth living" ... Giorgio Del Vecchio (Justice)<sup>58</sup>*

*Francis Bacon noted that when he became England's Lord Chancellor in March 1617.*

*"Fresh justice is the sweetest" .<sup>59</sup>*

*In Mr. Justice John Owen Wilson's ordinary and simple words (1898-1986) of Canada:*

*"A month's delay is normal. Two months delay is long. And three months is too long."*

#### 4. The Specialized Constitutional Court

Pakistan judicial system lacks specialized constitutional court with respect to appellate jurisdiction and original jurisdiction. The Supreme Court of Pakistan has been empowered for all types of jurisdictions. When original jurisdiction is exercised, the appellate jurisdiction is affected. Neither the original jurisdiction nor the appellate jurisdiction has a specialized format and court to be heard. The lack of specialized constitutional court has a negative

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<sup>57</sup> Salauddin Ahmed, "Justice delayed is justice denied," *Dawn*, 19 December 2016. Available at: <http://www.dawn.com/news/1303235>.

<sup>58</sup>[http://www.standardtimespress.org/artman/publish/article\\_2716.shtml](http://www.standardtimespress.org/artman/publish/article_2716.shtml); The saying of Justice Giorgio Del Vecchio of the India Supreme Court states that "Without Justice, life would not be possible and even if it were; it would not be worth living" The notion, theory of law can be defined as a study based on presupposition or ideal which man seeks for his realization through law. This is most time referred to as the Theory of Justice. The word justice has been derived from the actual concept of justness which acts as the primordial factor for any state to provide for its populace.

<sup>59</sup> Lloyd Duhaime, "Delay in Reasons for Judgment: Justice Delayed is Justice Denied", *Ernst v. EnCana Corporation*, 05 April 2011. <http://www.duhaime.org/LegalResources/CivilLitigation/LawArticle1270/Delay-in-Reasons-for-Judgment-Justice-Delayed-is-Justice-Denied.aspx>



impact on right to fair trial and as well as the pendency of cases in the Apex court of Pakistan has been increasing day by day. Because *suo motu* cases are heard on priority basis while the appealed case are delayed in certain way. That is the clear violation of Article 10-A of the constitution of Pakistan which is the right to fair trial.

## 5. Effects of Excessive use of Original Jurisdiction on the Right to Fair Trial with Case Laws

Chief Justice of Pakistan Mian Saqib Nisar is active to have proceeded with matters related to mal-administration as well as public interests. He takes too much *suo moto* actions and left to decide the already blockade of the appeals in Supreme Court of Pakistan.<sup>60</sup> He also established a unique account in the SC for collecting dam building donations. Similarly, next month there will be a global conference on the water problem. In order to enhance the health system, the chief justice also took measures. The CJP also admits, however, that he cannot bring the (judicial) house in order. The problem of pendency in the SC is growing day by day, but no efficient policy to clear the backlog has been implemented.<sup>61</sup>

### 5.1 Trichotomy of Powers

The word "*trias politica*"<sup>62</sup> or "separation of powers" was created by Montesquieu<sup>63</sup> the French jurist, who lived in England from 1729 until 1731. His book, 'De l'esprit des Lois,' is regarded greatest work of political theory and jurisprudence in the history of politics. "He pronounced that, in order to escape the abuse of powers, it means the split of governmental powers and functions into different branches, so that to avoid concentration of authority in one person or institution. He went further and divided the power of government into three major functions. These were: law

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<sup>60</sup> Hasnaat Malik.

<sup>61</sup> Ibid.

<sup>62</sup> The word *trias politica* "is the philosophy that in every country there must be a rigid division between three autonomous forces: law, administration, and judiciary.

<sup>63</sup> Charles-Louis de Secondat, Baron de La Brède ET de Montesquieu, "generally referred to as simply Montesquieu, was a French lawyer, born on 18 January 1689, La Brède, a letterman from France and a political philosopher. He is renowned for his articulation of the concept of power segregation, which is being enforced throughout the globe in many constitutions."

making function (the legislation), Law applying function (the executive) and Law interpreting function (the judiciary)."<sup>64</sup> Therefore, separation of powers communicates to the division of duties of the government into separate branches to restrict each branch from the exercise of another's key tasks. The intention is to avoid power concentration and provide for checks and balances.

In addition, the persons who make up these three government agencies should be kept distinct and separate, so that no individual can be a member of more than one branch at the same time. Thus each branch will be a check for the other branches and no single group of individuals will be able to regulate the state machinery.<sup>65</sup> The principle of division of powers is also enumerated in the Pakistan's constitution 1973. The three pillars of the government; legislation, executive and the judiciary are the creation of the constitution and no one is allowed to interfere in the other pillar of the government. There are some cases in which Honorable Supreme Court of Pakistan interfered in the Executive pillar of the government; which are as under.

The Supreme Court opened trials on Friday, August 31, 2018 in a situation concerning the abrupt relocation of Pakpattan District Police Officer (DPO) under contentious conditions. "Chief Justice of Pakistan Mian Saqib Nisar had on Thursday taken *suo moto* notice of the transfer of former Pakpattan DPO Rizwan Gondal, allegedly over an altercation with citizen Khawar Fareed Maneka, ex-husband of First Lady Bushra Imran. The chief justice had ordered Punjab Inspector General (IG) Kaleem Imam, Additional Inspector General (AIG) Abu Bakar Khuda Buksh, Sahiwal's regional police officer (RPO) and the Pakpattan DPO to appear before the Supreme Court along with the inquiry report."<sup>66</sup>

This Matter was purely concern with Executive pillar of the government. It does not come in the jurisdiction of the judiciary to take action on the transfer of a public servant but CJ Saqib Nisar interfered and took *suo moto* action and hence it is the violation of the Constitution because transfer of a public officer is not a fundamental right and it is not the matter of public importance.

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<sup>64</sup> Ibid.

<sup>65</sup> M.J.C. Vile, *Constitutionalism and the Separation of Powers* [1967] 2<sup>nd</sup> edn," A Project Of Liberty Fund, Inc. 8335 Allison Pointe Trail, Suite 300 Indianapolis, Indiana 46250-1684, p-14.

<sup>66</sup> Haseeb Bhatti, "Pakpattan DPO was transferred on someone's instructions, there will be trouble: CJP," *Dawn*, 31 August 2018. Available at: <http://www.dawn.com/news/1430133>.

Similarly in another case Pakistan's top court has suspended the transfer orders of Islamabad police Chief Jan Muhammad. The chief justice has taken notice of the case on Monday and summoned the interior secretary to the Supreme Court. "The transfer was not according to the law," said Chief Justice Saqib Nisar. "Does the government transfer such officers? The Punjab Chief Minister Usman Buzdar case is being repeated."

The issue is about a minister's son, said the top judge. He asked whether a senior police officer would be transferred on this matter. He said the IG was transferred due to a political matter. The establishment secretary told the court that the transfer case has been going on since some time. PM Office was not satisfied with the performance of IG, he remarked. The spokesman clarified that the report was sent to Prime Minister Imran Khan 20 days earlier for the abolition of the IGP; and that it encountered delays in authorization owing to the busy timeframe of the PM and its transport.<sup>67</sup> The case is still pending in Supreme Court.

## 5.2 Right of Appeal is missing in Original Jurisdiction

"Clearness, correctness and dignity anchor a fair trial."<sup>68</sup>

The main fault lies in the fact that when a *suo moto* action is initiated pursuant to Article 184(3), then the right of appeal has no place and is divergent to the fundamental right of a fair trial as laid down in Article 10-A. A trial cannot be said a fair trial in which a party has no right of appeal.<sup>69</sup>

The right of appeal in all domestic and international laws is a major part of fair trial. The fair trial right covers the right of appeal as acknowledged by 1966 UN ICCPR and the 1948 UDHR and as a consequence, holding the right to a fair trial without offering a right of appeal is not acceptable. Article 184(3) of the Constitution does not comply with the criteria of a fair trial as put down in Article 10A. Not only should justice be performed but it should be seen to be done. Clearness, decency and decorum anchor a fair trial.<sup>70</sup>

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<sup>67</sup> S.M.C. 35/2018

<sup>68</sup> Parvez Hassan, "Right to fair trial," *Dawn*, 06 July 2017. Available at: <http://www.dawn.com/news/1343490>.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

The Standing Committee on Law, Justice and Human Rights of the National Assembly will take up a number of bills on Monday, July 13, 2015, including a constitutional amendment bill seeking to grant the aggrieved party the right of appeal in a *suo moto* case at the Supreme Court. PPP's Ayaz Soomro moved the proposal in March.<sup>71</sup> Clause 3 of article 184 was recommended by the motivator for subsequent adding: "Provided that an aggrieved person may, within 30 days of the judgment or date of commencement of this amendment, prefer an appeal to a larger bench of the Supreme Court where a matter has been adjudged *suo moto* or where a constitution petition has directly been taken up by the Supreme Court."<sup>72</sup> But unfortunately that bill is still pending in parliament.

### **5.3 Suffers the Appellate Jurisdiction While Taking a *Suo Motu* Action**

A supreme court is highest court in many legal jurisdictions within the court hierarchy. Other descriptions for such courts include last resort court, apex court, and largest (or final) appeal court. Broadly speaking, no other court is subject to further review of a supreme court's decisions. Supreme courts naturally serve mainly as appeal courts, to hear appeals from decision of lower court, or appeal courts at intermediate level.<sup>73</sup> All the courts of law in this motherland are court of law however this tribunal is not only a court of law, but also the court of decisive justice. It is clear that when it comes to exercising of the Court's said jurisdiction, whole justice must be done.

## **6. Conclusion and Suggestions**

The Pakistan Constitution of 1973 has given a trichotomy; Legislature, Executive and Judiciary. The Pakistan's Supreme Court, being a Constitutional Court of law, is an apex court in the hierarchy of jurisdictional system of Pakistan. It has four kinds of jurisdictions; Original, jurisdiction of Appeal, Review and Advisory jurisdiction. Similarly it has *suo moto* power in the best interest of public importance matters and that must be related to the abuse of essential rights which are numbered in the Chapter 2 of the Pakistan Constitution of 1973 under the heading of

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<sup>71</sup> Ibid.

<sup>72</sup> Amir Wasim, "Right of appeal in suo motu cases: NA body to take up bill," *Dawn*, 12 July 2015. Available at: <http://www.dawn.com/news/1193908>.

<sup>73</sup> Supreme Court "Define Supreme court at: *Dictionary.com*.

Fundamental Rights from Article 8 to 28. But Top Court of Pakistan has been using the power of its own motion frequently that has been affecting the Appellate jurisdiction. Likewise, the domain and scope of *suo moto* action have not been well-defined by the Constitution 1973, nor by Rules of Supreme Court 1980. Pakistan Bar Council has filed a case in Pakistan's Apex Court to define the scope and limit of *suo moto* intervention in this respect. Similarly, the frequent use of action taken on its own motion has also affected the Supreme Court of Pakistan already pending cases. Due to this action, the number of pending cases has been increasing day by day. Along with this, in *suo motu* case there is no right of appeal with the individual or institution which is a breach of Fair Trial Right. Similarly it is also considered as interference in the domain of Legislature and Executive that is against the spirit of the canon of partition of rules among the 3 pillar of the administration.

### **Recommendations**

It can be recommended that there should strictly be followed the doctrine of separation of power among the three pillar of the government. The above mentioned doctrine is also given in the case law PLD 2013 SC 167. It is also a need of time if the Parliament revises Article 184 and inserts clause 4 by granting the right of appeal to the aggrieved party under Article 184(3). Meaning thereby it would be 184(4). Parliament should amend Article 10-A with addition to the speedy and expeditious trial because it is one of the essential element of the right to fair trial. Parliament ought to amend Art 10-A, and make certain time frame for adjudication of cases. More precise provisions are needed, with more exact time-limits for the courts to follow. There should be complete implementation of ICCPR as well as the recognition of International law in true sense. There is no law available in Pakistan regarding to a suspect person who has been declared innocent by a court of law after spending so many years in prison. It is uncertain that what would be the remedy and who would provide it to that detainee. So parliament needs to make a law by providing relief and compensation to that accused. The Constitution of Pakistan 1973 and Statutes is the ground-work but state servants must comply with their obligations and duties. State servants must be called upon to account when they fail to comply with their duties and obligations. There is a need to establish model courts in every district for the ends of the justice and to remove the backlogs of cases according to Art 37-D of the Constitution of Islamic Republic of Pakistan 1973. The government of Pakistan needs to help the courts in their efforts,

both economically and by legislations. Economic resources needs to be directed toward the justice system as a whole, including police, prosecutors, courts and the prison and probation services, to deal with backlogs and increasing caseloads. Improved case management and new ways of communicating electronically will make the courts more effective and time of proceedings shorter.

The courts must aim to shorten the time of proceedings. The courts have a responsibility to make the proceedings advance and to come to a final decision as fast as possible. This means that the courts have to monitor its cases and proceedings more closely and also to more actively communicate with the parties when inactivity occurs. This includes contacts with the prosecution authority when delays of prosecution occurs, even though the preliminary investigations are completed, and contacts with both plaintiff and respondent when the parties are inactive. The Supreme Court should make the rules for *suo motu* actions and these actions should not to be taken in those cases where parties have legal right to appeal. The *suo motu* actions need to be well defined and determined either by the Supreme Court of Pakistan or the Parliament.

The Supreme Court (Number of Judges) Act, 1997 was passed in 1997, the strength of the judges of the Apex Court was 17 as per the act as herein above mentioned. According to the 1998 census, the population of Pakistan was 132,352,279. But according to the 2017 census the population of Pakistan is almost 207,774,520 and the number of the judges of the Apex Court is the same as it was in 1997. So it may be recommended that the strength of the Supreme Court Judges should be as per the population of Pakistan. The Supreme Court of Pakistan has four kinds of Jurisdictions according to the Constitution of Islamic Republic of Pakistan 1973. All these four sorts of jurisdictions are entertained by the same 17 judges which obstructs the administration of justice. So there is a need of specialized constitutional court for the protection of fundamental rights.

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