

Superior Judiciary and the Changing Concept of Human Rights in Pakistan: A Historical Analysis

Najeeb ur Rehman,¹ A. Wadood,² & Mohammad Dilshad Mohabbat³

Abstract:

The universality of human rights always had a cultural, philosophical, and moral aspect, but now it has also political, economic, and developmental dimensions, so, extensive powers are granted to the judiciary. In Pakistan, fundamental human rights are protected in the constitution of 1973, and Supreme Court of Pakistan (SCP) under articles 199(2) and 184(4) is responsible to safeguard them. The past two-three decades were characterized by the rise of a liberal economy in Pakistan which promoted foreign investment and sold the unprofitable government enterprisers to foreign investors. This phenomenon increased the responsibility of the superior judiciary to enforce the economic, social, and cultural rights of the people. This article describes the positive and negative aspects of this debate and endeavours to investigate the new role of the judiciary in Pakistan's political and social structure and also evaluates the consequences of judicial activism on foreign investment besides the reaction of investors, civil society, politicians and economists towards it.

Key words: Human rights, judiciary, executive, legislature, chief justice, supreme court.

Abbreviations: SCP(Supreme Court of Pakistan) CJP(Chief Justice of Pakistan)PSM(Pakistan Steel Mill)

INTRODUCTION

In modern democracies, constitution gives powers to the judiciary which is of cardinal importance in both systems (the Westminster and the US system) for the protection of individual rights, to prevent one branch of government from accumulating excessive powers, and to decide constitutional disputes (Barendt, 2004; Naazer, Kundi, & Farooq, 2018). Now the responsibility of the judiciary has increased to check whether the actions of the executive are according to law or not because some individuals or pressure groups can gain authoritative positions to persuade members of parliament or government to amend laws to suit their interests. The executive is also able to control members of legislative through the device of party discipline. Even in the United States (US), the two-party system has increased the powers of the president to pressurize legislators who are, by law, supposed to act as a check on his powers and political play. In other words, many private actors and organizations have gained such positions of importance that they can influence any

¹ Assistan Professor, Department of History and Pakistan Studies, GC University, Faisalabad.

Email: najeebalvi2004@yahoo.com

² Assistant Professor, Department of International Relations, Balochistan University of Information Technology, Engineering and Management Sciences (BUITEMS), Quetta-Pakistan. Email: abdul.wadood16@yahoo.com

³ Assistant Professor, Department of History & Pakistan Studies, GC University, Faisalbad. Email: mdilshadmohabbat@gmail.com

policy matter and, in these circumstances, Judiciary stands as a protector of citizen's rights. Judiciary has the right to look into those acts of different organs of state and persons which can affect individual rights negatively and in ways that are not authorized by the constitution. The American Supreme Court's decisions on the seizure of steel mills and in the case of the Pentagon papers are examples in this regard (Barendt, 2004; Habib 2017).

Most of the democratic regimes which emerged after the dissolution of the British Empire adopted a mixture of the Westminster and the US models concerning the separation of powers. Bruce Ackerman called this "Constrained 'Parliamentarianism'" (2004, p.402). In this regard, the successful experience can be seen in Pakistan, India, South Africa and Canada where special powers are given to the respective supreme court, to check the abuses of other branches of government and to save the rights of citizens.

The balance of power between the three institutions and branches of the government is a basic characteristic of modern democracy and, without judicial umpiring, this institutional design cannot succeed. Judiciary is a watchdog in democratic systems and keeps the country's constitution alive by reinterpreting it according to new socioeconomic and political conditions (Oxford, Browning, Huggins, & Rosamond, 1997; Naazer, Kundi, & Farooq, 2018). Justice means fairness, and judiciary acts to enforce this according to historical conditions, traditions, social forces, and particular circumstances of every country (Rawl, 1999).

In a country like Pakistan, the role of the Judiciary is very crucial to protect and preserve the constitution and the fundamental rights of the people and the federating units. The fundamental human rights are protected in the (1973) Constitution (presently enforced in the country). Supreme Court of Pakistan SCP under articles 199(2) and 184(4) is responsible to provide remedies to those citizens whose rights have been encroached by the state or its functionaries. In 1998, the SCP held that all government authorities, civil, military, or paramilitary, are bound by the constitution to enforce or protect such rights and do not have the authority, power, or right to destroy it, trample it or make a mockery of such rights. All persons who are found responsible for such actions should be brought to book according to the law. SCP also held in 2007 that fundamental rights are immune from the pale of legislative enactment and executive action. The court expressed that fundamental rights are protected by Article 8(2) of the constitution, which prohibits the state, including the legislature, from making any law by which any fundamental right may be curtailed or taken away; such law shall be void. Fundamental rights and rights-based on public policy cannot be waived. SCP has come forward to take corrective measures and provide necessary direction to legislature and executive in this respect. However, one cannot forget that, very often, these judicial pronouncements with regard to human rights have created tussles between executive, judiciary, and legislature.

Literature Review

Human rights are a serious issue in third world countries, especially in Pakistan. The superior and higher judiciary has been dealing with this issue since the creation of Pakistan. There is a dearth of material available on this critical issue based on different reports published by national and

international human rights organizations and articles published in newspapers and journals. The writings chosen for a review of the literature contain some details about this issue.

Ahmed (2012) describes the role of the judiciary in Pakistan's political arena and provides details about various judgments of SCP on different constitutional and political issues, but it does not divulge proper details about the crucial era of Judiciary from 2007-2013, which overturned the whole prior concept of scholars about judiciary of Pakistan.

Khan (2012) describes the constitutional history of Pakistan since 1947 to 2008 and provides valuable details about constitutional issues and the attitudes and behavior of superior judiciary when these issues were brought before it. But he does not pronounce the causes and effects of the Lawyers' Movement and does not mention the revolution in the judiciary after its restoration in 2009. He neither describes the relationship among three branches of the government nor defines the socio-political reasoning behind strain relations among the state institutions.

Mian (2004) covers some key events in the judicial history of Pakistan, significantly the development of the conflict between Chief Justice Sajjad Ali Shah and Prime Minister Nawaz Sharif, followed by the storming of the SCP. He gives only one side of the picture in describing these events and also discusses some of his landmark judgments, including those on the separation of judiciary from executive, the Eighth Constitutional Amendment, and the Judges' Case, etc. Mian presented his personal views about the constitutional issues related to the judiciary but his expression does not reflect historical context.

Newberg (1995) demonstrates how the courts have influenced the structure of the state, the practice of politics, and Pakistan's democratic prospects. She explores the relationship between the state and civil society through the medium of the judiciary. She shows how courts have influenced the development of the constitution and structure of the state of Pakistan. She examines judicial decisions, particularly at the time of political crises, and their consequences on the political process. It also points out that tensions between judiciary and other state institutions have affected the political society in Pakistan. Newberg describes judicial politics till 1993 but one cannot get an answer of when why and how it became subservient to the establishment? Was this the weakness of the judiciary as an institution or due to the sociopolitical realities of Pakistani society?

Shah N. (1999) gives important information about different legal, constitutional, and political issues of Pakistani history. He provides details about the constitutional battles fought in SCP during 1988-1999. He provides valuable information for anyone who wishes to understand the judicial activism in 1990s. Shah also gives the legal opinions of the SCP on different judgments delivered on political/constitutional petitions.

Shah, A. (2008) examines the independence of superior judiciary in Pakistan and points out that judiciary always remained under the pressure of executive and government. The role of the Judiciary in times of constitutional and legal crises is also described in this study. His study does not provide detail about the events of 2007 which changed the concept of the judiciary. He does not mention how people supported the cause of the judiciary and how the lawyer movement started in Pakistan and influenced the judiciary, politics, society, and legal fraternity.

Shah, S. A. (2001) provides his version of the bizarre episode of an attack on SCP by leaders and workers of Pakistan Muslim League-Nawaz (PML-N) in 1998. He sheds light on Pakistan's history, law and politics. The legal battle between the former Prime Minister Nawaz Sharif and Chief Justice of Pakistan (CJP) has been documented in detail and makes this book interesting reading. Shah does not provide details about the interrelationship among government institutions and why and how the judiciary delivered judgments in favor of establishment during constitutional crises.

Rabbani (2003) presented a scornful critique of the Legal Framework Order (LFO) enacted by General Pervez Musharraf in 2002 and describes how LFO changes the basic structure of the 1973 Constitution from a federal and a parliamentary one to a quasi-presidential form of government. It also gives details about Musharraf's referendum, its consequences and basic political rights effected by the LFO.

Zafar (2015) gives detailed government version of the tussle between judiciary and military government. This book, however, does not deal with judicial activism after 2009 and its impact on the politics of Pakistan. Habib (2017) highlights the importance of security of tenure of judges for ensuring independence of judiciary.

Halliday, Karpik, and Feeley (2011) present a theory of political liberalism in the post-colonial era and discuss political development and the politics of the legal complexities in the counties of the Commonwealth. Their main focus is to observe how inherent contradictions within British colonial rule were resolved after independence in contrasting liberal-legal, despotic and volatile political orders. They describe the scope of lawyers' engagement with politics, termed as a political lawyer—the capacity and willingness of legal professions to mobilize on behalf of political liberalism. Their main focus was on lawyers and judges to mobilize new norms in politics. They do not shed light on the interrelationship of state organs that affected the society at large. Their research does not deal with the judiciary as an institution and its role in the state structure. However, they provide some details about the judicial crisis in Pakistan from 2007 to 2008.

Cheema and Gilani (2015) analyse the jurisprudence of the SCP during CJP Iftikhar Chaudhary's tenure. The work criticized the court to cross the limits of separation of power theory. It has discussed Chaudhary's court only, but left out the historic evolution of the relationship of the judiciary with other state institutions and to see the development of the period of CJP Chaudhary in the light of historical perspective. This book also highlights the behaviour of superior judiciary about human rights issues but it does not portray the balanced picture that why judiciary at specific time played its role to correct the governance in Pakistan.

The above-mentioned review of the literature shows that there is a research gap in the historiography on the judicial history of Pakistan, which needs to be filled. This study aims to fill this gap.

Theoretical framework

Most democracies empowered their judiciary through their constitution to enforce human rights norms that principally limit the powers of the government. The most significant trend in the modern constitutions that thrived in 20th and 21st centuries is the expansion of judicial powers,

which is criticized as “judicialization of politics” or “the government by Judiciary.” In all forms of the government, the human rights issue is considered as a low-profile issue (Perry, 2003). The political governments are involved in high profile issues and want to make decisions that please their political constituencies. So, without an independent judiciary, which takes up such cases, human rights cannot be protected.

It is generally accepted that the executive and the legislature are incapable of dealing with the claims that the government violates human rights. The judiciary is the only institution that can protect the rights of the people in all liberal democracies; human rights are both constitutionally entrenched and judicially protected (Naazer Mahmood, & Ashfaq, 2017; Naazer, Mahmood, & Shehzad, 2019).

In the post- War era, American judiciary emerged as a protector of human rights especially the rights of marginalized people. Even before the World War-II, the role of the judiciary in the context of human rights was very positive (Brennan, 2000). In the United Kingdom (UK), the Human Rights Act 1998 empowered the courts to protect human rights articulated in the European Convention for the Protection of Human Rights and Fundamental Rights (ECPHRFR). It is pointed out in this respect that judicial review has carried the day over parliamentary supremacy.

In South Asian countries, the superior judiciary adopted a creative and purposeful approach in the interpretation of fundamental rights. In the Indian Constitution, Articles 32 and 226 provide remedies that the persons whose rights have been violated can approach high courts and the Supreme Court of India (SCI). The apex courts are empowered to issue orders like Habeas Corpus, Mandamus, Prohibition, Quowarranto, and Certiorari. In 1982, SCI in the case, SP Gupta vs. Union of India, extended the scope of Article 32 of the Indian constitution to permit public interest litigation. In another case, Peoples Union for Democratic Rights vs. Union of India, SCI extended public interest litigation to social, economic, constitutional, and legal rights. In yet another case, the SCI held that the court (SCI) had the power to appoint commissions for enquiring into facts related to violation of fundamental rights.

In Pakistan, fundamental human rights are protected in the 1973 Constitution (presently enforced), and SCP under Articles 199(2) and 184(4) is responsible to provide remedies to the citizens whose rights have been encroached by the state or its functionaries. SCP in several cases held that fundamental rights and rights-based on public policy cannot be waived. However, one cannot forget that, very often, these judicial pronouncements in favour of human rights have created tussles between executive, judiciary and legislature, especially the former two.

It is a common phenomenon in almost all modern democratic countries that the judiciary uses the powers of judicial review in a more powerful way to interpret the fundamental laws. In the new millennium, on the one hand, the war on terrorism created human rights issues, and on the other, a liberal economy infringed upon the economic rights of the people. So, the judiciary in almost all democracies came forward to safeguard the fundamental rights of the peoples, and it also used its special powers to defend the economic rights of the peoples. The impact of this phenomenon also influenced the Pakistani judiciary.

Pakistani political and social culture could not escape this ongoing trend of the 21st century. It became more liberal than ever before. The forces of liberalization ultimately affected the judiciary and it tried to revolutionize itself according to emerging realities. The revolutionizing role of electronic and social media became another factor of transformation in the outlook of the Pakistani judiciary. The expansion of the liberal economy created many social, economic, and fundamental rights issues that were ultimately dealt with by the judiciary.

HUMAN RIGHTS AND JUDICIAL ACTIVISM DURING 2005-2013

In Pakistan, there was an impression that the superior judiciary including SCP had co-operated with the military government to suppress constitutional rights. In 2005, to dispel this impression, SCP set up new targets to restore its respect, legitimacy and revive public confidence about it. This was the time when the government was involved in liberal economic policies, foreign investment, and the war on terror (Khan, 2014). These issues seriously affected the fundamental rights of Pakistanis. In these circumstances, the SCP used its power of *suo motu* under Article of 184(3) on several matters which in its view affected the general public's interest. SCP under CJP Iftikhar Chaudary institutionalized the efforts for the protection of human rights by establishing a separate "Human Rights Cell" that received thousands of human rights complaints from poor victims across the country (Supreme Court of Pakistan [SCP], 2010). Its main objective was to check the abuse of power or misuse of authority or arbitrary or mala-fide acts and decisions of authorities (SCP, 2006). SCP's annual report 2005-2006 pointed out that the human rights cell in its first year registered over 3600 human rights applications and 450 were disposed of on merit. It was pointed out that between 2005 and March 2007, SCP received 10,000 petitions about human rights and in many cases court granted remedies directly or punished those responsible for offenses. In this respect, SCP went off the government line and issued direction for the authorities to benefit the common man. SCP investigated more than 6000 cases of human rights abuse during one year (Khan, 2013).

It is noteworthy that an interesting collaboration developed between the SCP and the media. Media reported on important policy failure matters or human rights issues in response to which SCP took notice of it and summoned various stakeholders based on its inherent jurisdiction under Article 184/3. The media publicized the court's action. The court promoted this publicity and in the response to this media coverage, ordinary citizens and civil society members approached SCP through letters on different issues that were not published in print media. SCP started to use the power of *suo motu* frequently in this regard. According to a British weekly "indeed, wherever Mr. Chaudhry heard so much as a rumor of injustices.....he summoned official and demanded investigation" ("Briefing Pakistan," 2007).

SCP adopted the following style to investigate epistolary petitions: (a) summoning important officials for information and accountability; (b) setting up judicial commissions for stakeholders coordination and input; (c) galvanizing police action; (d) arrest and trial where required, and, (e) initiating contempt proceedings against those who violated the court's directives (Khan, 2014).

Control on Commercial Irregularities

The one outcome of the liberal economy is the hike of prices in general commodities. SCP also interfered with the deregulation of price control, especially on oil and sugar. In August 2005, Oil Companies Advisory Committee (OCAC) increased the prices of petroleum products due to the rise in their prices in the international market. When their prices decreased in the international market, the OCAC did not reduce the oil prices in Pakistan, SCP directed NAB to investigate the matter and also formed a larger bench to probe any collaboration between corrupt officials and OCAC (Goraya, 2006). The price of Sugar increased unreasonably between Feb. 2005 and January 2006 from RS. 21 to Rs.45per kg., when SCP *took suo motu* notice in this regard and directed NAB to investigate. The report submitted in the court indicated that eight ministers of Musharraf's regime, besides Asif Ali Zardari and Nawaz Sharif, were involved in the sugar price hike. It also pointed out that the soft policy of the government was responsible for Sugar Crisis in 2005-2006 in Pakistan ("Uncovering the sugar scandal," 2007). It is important to point out that these cases wherein corruption of massive scale was uncovered in government machinery, were not decided before March 2007. Ghias highlighted this important fact, "Instead of helping the regime to deflect blame for the unpopular deregulation measure, the price controls cases exposed the regime and targeted high level corruption. The space for judicial intervention in price controls, welcomed and encouraged by the media, was opened by the discontent of economic liberalization" (2011, p.348).

A segment of political parties and analysts criticized SCP on the plea that it was involved in such petty matters which could easily be solved at a lower level. The opposite view is that ordinary people faced such problems and no one provided them justice at a lower level. The daily Nation acclaimed the efforts of the SCP to protect human rights and termed the first year - Jun. 2005-Jun. 2006 - of CJP Iftikhar as a "year of actual progress." It maintained, SCP "has given a great sense of security to the people" ("A year of actual progress," 2006).

Privatization Process and Foreign Investment Projects

The one important feature of economic liberalization policy was to privatize those projects which were in a loss but the process adopted for these sales was not transparent. So the SCP intervened to save the economic rights of the people. The important case in this regard was the invalidation of the privatization of Pakistan Steel Mill (PSM) in August 2006 (Wattan Party Vs Federation of Pakistan, 2006). The SCP judgment in this regard painted a picture of economic mismanagement, failure to abide by rules, and patronage of businessmen in securities fraud. This judgment was a big blow to Musharraf's liberalization plans.

The full bench of SCP criticized the government officials and also Prime Minister Shaukat Aziz, for corruption, irregularities, and kickbacks in the process of privatization of PSM. The media started this as a charge sheet against the government and the government showed its serious concerns about the remarks and judicial review of the court (Zafar, 2015; Ahmed, 2007). Indeed, PSM case was the major reason for hostility between the executive and the judiciary.

After the invalidation of the privatization of PSM, SCP accepted petitions against the privatization of Pakistan Telecommunication Company Ltd. (PTCL) and Pakistan State Oil (PSO). In this way, the

Judiciary expanded its judicial review powers to the economic liberalization policy of the government and created space for its intervention in foreign investment policies of the government in case of corruption. Before this, SCP attempted to check low-level corruption practices but at that time it boldly pointed out a high-level corruption scandal in which Prime Minister Aziz was involved as he was behind this process. Despite apprehensions, the government announced that it would honour the SCP's directives ("CDA gets time," 2011; Waseem & Hussain, 2019).

SCP again intervened in the privatization process as the privatization of PSO with the help of J.P. Morgan was challenged in July 2017. SCP issued a stay order and a bench headed by the CJP Chaudhary extended this stay to investigate the matter (Federation of Pakistan and others vs Attock Petroleum Ltd., 2007.) CJP also opened the privatization of PTCL for review which was completed with the assistance of Goldman Sachs and J.P. Morgan.

In the Reko Diq case where Balochistan's gold mines were being thrown before multi-national corporations (MNCs) for peanuts, SCP canceled the illegal lease of the gold mines. In this regard, the most important development was that the court applied local laws to foreign investors. On January 7, 2013, SCP announced its judgment in the Reko Diq mining lease case and declared the Chaghi Hills Exploration Joint Venture Agreement (CHEJVA) as illegal ("Supreme court declares," 2013).

In another case related to contract of liquefied natural gas (LNG), SCP took *suo motu* notice on news story published in daily The News. Reportedly, a contract with a foreign company was approved although a domestic company had presented a better offer. There was a suspicion of corruption in this deal. SCP annulled the contract on the basis of the violation of principles of transparency and equal opportunity. It ordered the Ministry of Petroleum to proceed in a specific way.

On August 21, 2013, declaring the coal-fired Lakhra Power Plant (LPP) lease agreement as non-transparent, SCP directed the federal government to conduct an inquiry to fix the civil and criminal liability upon the persons/beneficiaries, following the law in this matter (Sigamony, 2013).

Judicial Activism on Environmental Issues

Investment in construction and development projects created environmental problems where SCP became a torchbearer and took notices of environmental issues and matters of spaces reserved for public parks being used for/converted into commercial enterprises. On the report of daily Dawn on Oct.12, 2007, SCP used its *suo motu* jurisdiction to inquire into the matter that Capital Development Authority(CDA) Islamabad had leased out urban lands in Islamabad and its vicinity to influential persons under the guise of leases for agricultural purposes. SCP ordered the CDA to conduct a survey to determine the facts that land was being used for agricultural purposes or had been converted into country estates and to take appropriate action in case of violation (Hussain 2013). The court also paid its attention to urban planning, and in this connection the court prohibited the authorities to lease the public parks for the construction of a golf course and held that it was against the fundamental rights of people under Article 26 of the constitution of Pakistan. On basis of this, several commercial projects in public spaces in Lahore and Karachi were frozen under *suo motu* action taken by SCP that exposed the corruption and administrative mismanagement in the executive.

SCP also took *suo motu* notice of alteration in Murree gas-pipeline project which was to benefit Hamza Shahbaz Sharif, son of then Punjab Chief Minister, Shahbaz Sharif, who had constructed a bungalow at Dunga Gali. This alteration was going to cost Rs.750 million along with the destruction of thousands of trees (Iqbal, 2010). Another *suo motu* action was taken on extension of Canal Road Lahore where hundreds of trees were being cut to widen roads ("Verdict in Canal," 2011).

Efforts to Eradicate Corruption

Corruption was pervasive in politics and government during the period under study, while there was a strong governance crisis in Pakistan which affected every institution of the country. In 2010, Pakistan was ranked 143 out of 178 in the Corruption Perception Index (CPI). Amnesty International in its report claimed that Pakistan's national exchequer had faced a loss of Rs..5 thousand billion due to corruption. On the other hand, the US ambassador Kemron Mintor stated that American investors were reluctant to invest due to corruption and security problems. SCP led by CJP Chaudhary used its powers to curb the corruption from the government and took actions against evil-doers. SCP again used its powers under article 184(3) of the constitution and brought many influential personalities to book in corruption cases. SCP took notices of financial irregularities in the rental power projects (RPPs), National Insurance Company Limited (NICL), the Employees' Old-Age Benefits Institution (EOBI), and corruption in the Hajj arrangements. CJP Chaudhary set a precedent that the judiciary would be one of the most difficult barriers to cross to loot the public wealth. From 2009 to 2013, SCP took up many corruption cases involving billions of rupees. SCP's stand against corruption saved billions for the national exchequer, which had almost gone to the pockets of the powerful and the mighty (Jilance, 2014).

Superior Judiciary and the Changes in Political Landscape

Judicial activism after 2005 became the cause of many changes in the political scene. In 2007,, a power sharing deal was made between President Musharraf and Benazir Bhutto, the leader of Pakistan People's Party (PPP). Consequently, Musharraf issued National Reconciliation Ordinance (NRO) on 5 October 2007 which was challenged in SCP that suspended it after 7 days of its issuance (final judgment was given in 2009). NRO remained a major cause of the tussle between the judiciary and executive under the PPP government (2008-2013).

SCP dealt with several cases that had far-reaching impacts especially the petitions which were filed to challenge the holding of dual offices by General Pervez Musharraf before presidential election of 2007. This became the cause of the imposition of emergency on 3rd November 2007. Musharraf issued a new provisional constitutional order (PCO) and asked judges to take a fresh oath under PCO. About sixty judges of superior judiciary (supreme and high courts) including CJP Iftikhar Chaudhary refused to take fresh oath and thus were deposed from their positions. It ensued a political and legal crisis in Pakistan.

After General Elections(GE) 2008, PPP formed the government led by Prime Minister Yousaf Raza Gilani. After a few months Musharraf resigned and Asif Ali Zardari became president of Pakistan. However, the PPP government refused to restore the deposed judges due to which the Lawyer's movement continued and got further momentum after imposition of Governor rule in Punjab where

PML-N government led by Chief Minister Shahbaz Sharif was overthrown unconstitutionally by the federal government. The lawyers and PML-N joint their hands and launched a successful long march that paved the way for restoration of deposed judges (Khan, 2014).

The restoration of judiciary especially CJP Iftikhar Chaudhry created high hopes and expectations among people from the judiciary to uphold the rule of law, protection of public rights, and the constitution, so many legal and political issues awaited its attention. New York Times pointed out that some thorny and politically charged issues awaited the reinstated Chief justice like cases of forced missing persons, two cases directly related to the fortunes of two prominent political leaders, cases involving judges appointed by General Musharraf and President Zardari, and challenges to upholding of the law. In this atmosphere, the judiciary asserted itself more profoundly in the post-Musharraf civilian government to cope with the challenges it faced. It moved strategically to gain its institutional goal of independence, popularity, and power. It affirmed its stand to eradicate corruption from the government circles and to protect human rights. It also started to play its role proactively as an arbiter in core questions of politics. SCP on different petitions took notice of the appointments on high positions which were done without merit and any legal justification. SCP played its role to create awareness among the public about the performance of government and provided an opportunity to civil society and media to keep an eye on the misuse of public property by the government (Law, 2009).

On 26th April 2012, a seven-member bench of Supreme Court convicted Syed Yousaf Raza Gilani, then Prime Minister of Pakistan, for contempt of court. The conviction was due to his refusal to write a letter to Swiss authorities that Pakistan had the intention to become a civil party in a corruption case pending in Switzerland against President Zardari following SCP's judgment in the NRO case. SCP sentenced Gilani till the rising of the court – about 37 seconds. On 19th June 2012, SCP disqualified Gilani from holding a seat in the parliament from the date of his conviction on April 26, 2012 (“Yousaf Raza Gilani is,” 2012).

On 28th July 2017, Prime Minister Nawaz Sharif was disqualified from holding public office in the Panama Papers case (Hashim, 2017). These decisions of SCP changed the political scenario of Pakistan and created tension between the civilian government and judiciary, on one hand, and also between political parties and judiciary on the other hand.

In several cases, SCP turned down the policies and decisions of the government. It also started to play its role actively as an arbiter in core questions of pure politics. Judiciary also actively began to check the governance issues and corruption in which politicians were involved. The performance of the civil government was ineffective. Bad governance and inefficient deliverance in economic, political, and security matters created a space for the judiciary to expand its jurisdiction in these matters. SCP assumed the role of an enunciator of the national interest and custodian of political morality and integrity. It emphasized that it was its sacred duty to uproot corruption from society under extraordinary powers of Article 184(3) of the constitution of Pakistan. Thus, it took *suo motu* notices of many corruption cases which saved billions of rupees of the national exchequers.

Policy Interference in Governance

CJP Chaudhary left a powerful legacy of independence of judiciary free from executive's influence and a new approach in the use of judicial powers. Despite the positive side, the judicial populist intervention into the domain of executive and use of the *suo motu* powers brought back reaction among government and public circles. In this regard, some critics termed the SCP judges as the political judges. After CJP Chaudhary's retirement, Justice Tassadiq Hussain Jilani became new CJP who in his first address, showed his intention to roll back the policy of hyper judicial activism and use of *suo motu* powers (Trofimov & Symington 2013).

SCP under the period of four CJPs, (Justice Tassadiq Hussain Jilani, Justice Nasir ul Mulk, Justice Jawad S Khwaja, and Justice Anwer Zaheer Jamali) followed the policy of non-interference in governance. There was also a visible decrease in human rights cases and elite accountability but the judiciary showed its firm belief in judicial independence and constitutional democracy. In this period, SCP adopted the policy of judicial liberalism and abandoned the aggressive accountability and human rights litigation that helped build its non-controversial image. SCP under this period preferred "judicial vigilance" over "judicial populism" (Saddique, 2015). CJP Jilani in a *suo motu* case strived to ensure granting equal religious rights of beliefs and public worship to non-Muslim communities. He established a permanent bench for the redressal of issues of non-Muslim communities. CJP Jilani allowed the government to release funds for development projects if "it is a scheme of national or public interest" without taking parliament's approval.

After Justice Jilani's retirement, Justice Nasir ul Mulk became the CJP who continued his predecessor's policy of non-interference in government affairs. During last months of his tenure, the SCP's judicial commission report on GE- 2013 built the prestige of SCP as every party accepted the credibility and unbiased attitude of the judiciary. In his last address to full court reference, CJP Mulk affirmed the commitment of the judiciary to protect the constitution in the event of any extra-constitutional intervention and to protect, and promote democracy, and good governance in Pakistan. He declared that SC "as the guardian of the Constitution would resist every action taken by any institution threatening the Constitution and state structure formed under it" ("SC to resist," 2015).

The landmark judgment delivered during the tenure of CJP Mulk was to dismiss the petitions against the establishment of military courts with majority. SCP also upheld the 18th and 21st constitutional amendments. The next CJP Jawad S. Khawaja in his short tenure issued a landmark decision directing Government of Pakistan to adopt Urdu as an official language according to Article 251 of 1973 Constitution. The decision was read out in Urdu by the CJP (Haider, 2015). His short tenure of 24 days will be remembered for his landmark decisions and his attempt to reform key state institutions. Under CJP Khawaja, SCP exposed the failure of National Accountability Bureau (NAB) in resolving mega corruption scams. A three-member bench of SCP headed by CJP ordered NAB to probe its ex-chairman Fasih Bokhari for corruption and misuse of authority. On CJP's order, NAB presented a list of 29 mega corruption scams. SCP also directed the Auditor General of Pakistan (AGP) to audit the accounts of 13 state institutions including the Defence Housing Authority (DHA), Wah Nobel Company, and National Bank of Pakistan, Pak China Investment,

Security and Exchange Commission of Pakistan, Overseas Pakistanis Foundation Welfare Trust and OPF Welfare Funds (“CJ Jawwad Khawaja,” 2015).

All the CJPs - from Chaudhary to Justice Jawwad - used their best abilities to uphold the constitution, promote concept of the welfare state and strengthen democracy. CJP Anwer Zaheer Jamali during his tenure, from time to time, pointed out the bad governance in government institutions. In his address to the Senate of Pakistan, he categorically stated that the judiciary intrudes only when rules of business are violated for personal gains. He further stated that if all government institutions work in accordance with law there is no need for judicial intervention in administrative matters (“Top judge tells,” 2015). After concluding the Panama paper case, the trend of taking *sou motu* actions by SCP increased. several federal and provincial public departments came under judicial scrutiny due to bad governance and nonresponsive attitude towards public interests. The SCP again corrected irregularities and inefficiencies in the police, health and food departments, etc. This is a new kind of activism in which CJP and other judges visited certain public places and enquired about the provision of facilities especially in public hospitals to evaluate the performance of the healthcare system. However, it also led to strong criticism from various quarters, especially political parties and lawyers community.

Many political leaders faced contempt of court proceedings and the future of some politicians was been decided through the interpretation of the provisions of the constitution. Nawaz Sharif and Jahangir Tareen's permanent disqualification from election politics is an example of this phenomenon (Bhatti, 2018). It really changed the political history of Pakistan.

The policy of Non-interference in Financial Agreements

In the past, SCP intervened in financial agreements that badly affected the country's position before international courts. Pakistan has been penalized billions of rupees in damages in different cases where SCP had intervened in financial deals with foreign companies. Now, SCP has not only shown restraint in such matters but also ready to cooperate in resolving disputes which may arise in the wake of the development of the China Pakistan Economic Corridor (CPEC). The best example in this regard is the rejection of a petition against the award of a liquefied natural gas (LNG) import contract. During the hearing of this case, CJP gave observation that the SCP did not want to repeat the episodes of Reko Diq or PSM, where the country suffered huge financial losses due to the court's intervention. He also pointed out the Karkey Rental Power project case, where Pakistan bore Rs.80 billion in damages and the arbitrators raised serious questions on the conduct of SCP (“LNG deal, 2018,”).

CONCLUSION

After the success of the lawyers' movement in 2009, SCP was able to take meaningful steps to establish the rule of law because it had developed an independent identity of its own. The problems of governance and unsatisfactory performance of parliament and executive to address the people's problems and corruption and non-observance of transparency in administrative and economic matter created a space for judiciary to intrude in matters which were in the domain of executive and parliament. In this period, military did not interfere in political matters so the judiciary stepped

forward to check the executive excess. Another important thing was that the judiciary understood the expectations of the masses. In a new phase, the judiciary set its fundamental responsibility to protect the right to life and security of the people of Pakistan. SCP felt that its responsibility was not only to enforce the freedom of life of people but also to ensure quality of life to the citizens of Pakistan. Now, the judiciary also concerned itself with fixing prices of commodities, health care, education, corruption in development projects, limiting the delimitation process of constituencies to specific cities, and appointment of various office-bearers. In this regard court extensively exercised the powers of judicial review in legislative and administrative enactments and actions. Thus, SCP declared many laws or actions of executive contrary to the constitution and declared them as null and void. It was pointed out that judiciary discharged its responsibility independently with constitutional spirit and without any fear, favour, or ill-will. Now, it can be said that in the presence of a strong judiciary, there is no fear of assault on the fundamental rights of people.

References:

- A year of actual progress - The SC has given a great sense of security to the people. (2006, Jul. 1). *Daily Nation*.
- Ackerman, B. (2016). The new separation of powers democracy. In R. Bellamy (Ed.), *The rule of law and separation of power*. New York: Routledge.
- Ahmed, D. N. (2007). *Chief justice ki muatali* (Urdu). Lahore: Sabeeh Publisher.
- Ahmed, Syed Sami. (2012). *The judiciary of Pakistan and its role in political crisis*. Karachi: Royal Book.
- Barendt, E. (2004). Separation of powers and constitutional government. In R. Bellamy (Ed.), *The rule of law and separation of Powers*. (395-489). New York: Routledge.
- Bhatti, H. (2018, Jan. 30). Imran Khan not out, Jahangir Tareen disqualified for being 'dishonest': Supreme Court. *Dawn*.
- Brennan, G. (2000). Principle and Independence: The Guardians of Freedom. *New Castle Review*, 4(2), 1-16.
- Briefing Pakistan. (2007, May 19-25). *The Economist*.
- CDA gets time to act against agro-farm violators. (2011, Jun. 21). *Dawn*.
- Cheema, M. H., & Gilani, I. S. Editors. (2015). *The politics and jurisprudence of the Chaudhary's court 2005-2013*. Karachi: Oxford University Press.
- CJ Jawwad Khawaja made landmark decisions in 24-day tenure. (2015, Sep. 10). *The News*.
- Federation of Pakistan and others vs Attock Petroleum Ltd, 1095. (2007).
- Ghias, S. A. (2011). Miscarriage of chief justice judicial power and the legal complex in Pakistan under Musharraf. In T., C. Halliday, L. Karpick, & M. M. Feeley, (Eds.), *Fates of political liberalism in the British post colony: The politics of the legal complex*. (340-376). Cambridge: Cambridge University Press.
- Goraya, M. R. (2006, May 24). Supreme court calls NAB report in oil price hike petitions. *Business Recorder*.
- Habib, R. I. (2017). Merit based criteria, diversity and security of tenure: A critical appraisal of judicial appointments in Pakistan. *Asian Journal of International Peace & Security*, 33-42.

- Haider, I. (2015, Sep. 8). Supreme Court orders govt to adopt Urdu as official language. *Dawn*.
- Halliday, T. C., Karpick, L., & Feeley, M. M. (Eds.). (2011). *Fates of political liberalism in the British post colony: The politics of the legal complex*. Cambridge: Cambridge University Press.
- Hashim, A. (2017, Jul 28). Pakistan Supreme Court disqualifies Nawaz Sharif. *Aljazeera*.
- Hussain, D. (2013, Apr. 19). Misuse of agro-farms: SC scuttles move to legalise violations. *Express Tribune*.
- Iqbal, N. (2020, Jan 01). Cuttee of Muree trees to supply gas: SC asked to close case as Punjab scraps project. *Dawn*.
- Jilance, S.G. (2014, Jan.). A Proud Legacy. *South Asia Magazine*.
- Khan, A. (2013, Dec. 11). Making activism tricks: SC's human rights cell. *Express Tribune*.
- Khan, H. (2012). *The constitutional and political history of Pakistan*. Karachi:Oxfor University Press.
- Khan, M. A. (2008) *Kataee aur akhari mauqa (FINAL AND THE LAST APPORTUNITY)*. Lahore: Rehman ji Publisher.
- Khan, M. S. (2014). Genesis and evolution of public interest litigation in the Supreme court of Pakistan: Towards a dynamic theory of judicialization. *Temple International and Comparative Law Journal*, 28, 285-359.
- Law, D. S. (2009). A theory of judicial power and judicial review. *Georgetown Law Journal*, 97(3), 723-801.
- LNG deal: SC dismisses Sheikh Rashid's petition against PM Abbasi. (2018, Feb. 12). *The New*.
- Mian, A. (2004). *A judge speaks out*. Karachi: Oxford University Press.
- Naazer, M. A., Kundi, M. A., & Farooq, S. (2018). Assault on independence of judiciary in s federal state: A study of Musharraf era (1999-2004). *Dialogue*, 13(1), 71-84.
- Naazer, M. A., Mahmood, A. & Ashfaq, S. (2017). An analysis of political rights situation during Musharraf regime (1999-2004). *Liberal Arts and Social Sciences International Journal*, 1(1), 20-31.
- Naazer, M. A., Mahmood, A. & Shehzad, H. (2019). Civil and political rights situation during Musharraf era (1999-2004). *Journal of Political Science*, 37, 167-86.
- Newberg, P. R. (1995). *Judging the state-courts and constitutional politics in Pakistan*. Cambridge: Cambridge University Press.
- Oxford, B., Browning, K. G., Huggins, R., & Rosamond, B. (1997). *Politics: An introduction*. New York: Routledge.
- Perry, M. J. (2003). Protecting human rights in a democracy: What role for the courts? *Wake Forest Law Review*, 38(2), 635-95.
- Rabbani, M. R. (2003). *LFO: A fraud on the constitution*. Karachi: Q. A. Publishers.
- Rawl, J. (1999). *A Theory of Justice Revised*. Cambridge: Harvard University Press.
- Saddique, F. (2015, Aug. 25). Rainbow Supreme Court. *Dawn*.
- SC to resist any action against democracy, says CJP. (2015, Aug. 14), *The News*.
- Shah, A. (2008). *Critical study of the factors undermining independence of the superior judiciary (Unpublished doctoral dissertation)*. Department of Public Administration, Gomal University, D. I. Khan, KP.
- Shah, N. H. (1999). *Essays and address on constitution, law and Pakistan legal system*. Lahore:

- Research Society of Pakistan.
- Shah, S. A. (2001). *Law courts in a glass house. An autobiography*. Karachi: Oxford University Press.
- Sigamony, T. J. (2013, Aug. 22). SC nullifies Lakhra Power Plant lease. *The Nation*.
- Supreme court declares Reco Diq agreement void. (2013, Jan. 7). *Dawn*.
- Supreme Court of Pakistan. (2006). *Annual Report*. Islamabad: author.
- Supreme Court of Pakistan. (2010). *Annual Report*. Islamabad: author.
- Top judge tells Senate no one is above the law. (2015, Nov. 3). *Pakistan Today*.
- Trofimov, Y., & Symington, A. (2013, Dec. 12). Judge swap signals a shift in Pakistan. *The Wal Street Journal*.
- Uncovering the sugar scandal. [Editorial]. (2007, Aug. 19). *Business Recorder*.
- Verdict in Canal Bank Road case reserved. (2011, Aug. 15). *Dawn*.
- Waseem, M. A., & Hussain, S. (2019, Jun.). Importance of judicial activism to ensure transparency in Pakistan: A case study on privation of Pakistan Steel Mills case 2006. *Journa of History Culture and Art Research*, 8(2), 62-84.
- Wattan Party Vs Federation of Pakistan, PLD SC.697. (2006).
- Yousaf Raza Gilani is sent packing. (2012 Jun. 19). *Dawn*. Retrieved from <https://www.dawn.com/news/727782/speaker-ruling-case-sc-resumes-hearing-2>
- Zafar, S. M. (2015). *Senator S. M. Zafar ki kahani un ki apni zubani*. Lahore: Sagar Publisher.

Date of Publication	September 15, 2020
---------------------	--------------------