

## JUDICIAL ACTIVISM IN PAKISTAN IN COMMERCIAL AND CONSTITUTIONAL MATTERS: LET JUSTICE BE DONE THOUGH THE HEAVENS FALL<sup>1</sup>

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### Abstract:

Pakistan has been experiencing unprecedented wave of judicial activism since 2006. The expansion within constitutional fundamental rights has broadened the scope of public interest litigation “**PIL**” in almost every sphere of life. Frequent exercise of judicial powers by the Supreme Court of Pakistan “**SCP**” more specifically “*SuoMoto*” (**action on court’s own motion**) jurisdiction<sup>2</sup> is seen to be over taking all kind of matters e.g. political, social, economic and foreign direct investment “**FDI**”. The Apex Court of the country has handed down several judgments under suo moto jurisdiction within the last one decade on matters ranging from insignificant issues such as: prices of daily commodities such as sugar, oil, gas as well as crimes’ investigation to the disqualification of Prime Minister. Moreover the SCP annulled the constitutional amendments, statutory provisions and commercial deals involving billions of dollars FDI. Proceedings and verdicts in such cases would have their long-lasting implications within certain areas of law for which these judgments are handed down. This paper’s prime focus examines the likely outcomes of judicial activism in the political and constitutional arena of Pakistan.

Exercise of *Suo Moto* as a routine matter raises serious questions regarding its constitutionality, effectiveness, desirability as well as sanctity of treaties and agreements executed by successive Pakistani governments. In addressing these issues this paper examines the philosophy of judicial activism; its origin, scope of PIL in expansion of fundamental rights, *Suo Moto* and other constitutional powers of the SCP. As well as the impacts of judicial activism on FDI, Bilateral investment treaties “**BIT**” and commercial

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<sup>1</sup>The phrase *Fiat Justitia Ruat Caelum* translates to “may justice be done though the heavens fall.” This maxim on the urgent necessity of justice has been used in different ways since its origin, which is dated back to the late first century B.C. The Latin phrase is more of a general philosophical statement than a technical legal term < <http://www.wisegeek.com/what-does-fiat-justitia-ruat-caelum-mean.htm> > accessed on 26 April 2012

<sup>2</sup> Constitutional of Islamic Republic of Pakistan 1973, Article 184(3)

agreements signed by the Government of Pakistan “**GOP**”. The paper will further examine the likely international commercial and treaty arbitration. Finally within the paper will the argument that neither superior judiciary nor the Pakistani nation seem ready to consider the likely negative outcome of immense exercise of judicial powers and only believes on; **Let Justice Be Done though the Heavens Fall.**

**Key Words:** Suo Moto, Public Interest Litigation “PIL”, Foreign Direct Investment “FDI” Bilateral Investment Treaty “BIT”, Treaty and Commercial Arbitration

### **Philosophy of Judicial Activism:**

In the norm authority to legislate is a prerogative of the legislature where it ensures all organs of State work within the four corners of the constitution and statutory provisions<sup>3</sup> Superior Courts are rest with the power to interpret the constitutional provision and statute.<sup>4</sup> However, where the legal provisions are clear, the courts are required to adhere to the literal meaning<sup>5</sup> of such provisions strictly and to act as courts of law.<sup>6</sup> Although philosophy of court of law guarantees strict and mandatory application of law, however justice does not remain as the necessary outcome in every case. Contrarily in judicial activism, courts do work as courts of Justice rather than courts of law and Judges apply vast authority to interpret the constitution and statute for dispensation of justice in the society.

Black’s Law illustrates judicial activism as “*a philosophy of law-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions.*”<sup>7</sup>

The phrase “*a philosophy of law making*” used by judges has broadened the scope of law making, as mere interpretation of law. Thus allowing judges to use their own wisdom and

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<sup>3</sup> Theory of tricotomy of powers/ powers divided and described by the constitution of Pakistan 1973 for all three pillars of the State; the legislature, the executives and the judiciary.

<sup>4</sup> Golden and mischief rules for the interpretation of statutes

<sup>5</sup> Literal rule for interpretation of statutes

<sup>6</sup> Court follows the application of strict rules of law

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

personal views, suggests that it is influenced and motivated by the Latin term “*Fiat justitia Ruatcoelum*”<sup>8</sup>, (let justice be done though the Heavens fall). Meaning that, justice should be done at any cost regardless of consequences. Consequently judicial activism may be termed as a process of decision making and laying down the judicial precedents by preferring judicial wisdom over the strict application of law regarding public policy. Deviation from the standard practice of law making, by the parliament towards “*philosophy of law making*” by the judges has never been out of disadvantage. Allowing judges to apply their own opinion and views gave rise to several controversies accompanied with uncertainty on enforceability of existing laws and resulted in conflict of role and authority between judiciary and legislature/parliament.

Undoubtedly several arguments in the favour of judicial activism and its benefits can too be brought forward. It can be argued that, in complicated matters simple application of law under its literal meaning would not serve the purpose to ensure the justice. To address the legal complications and to find the truth within the bunch of several dubious documents and evidences, judges are required to apply their judicial wisdom. The judges carry out the subjective and objective tests from the sequence of events happening around hence why the application of judges’ own mind cannot be considered as deviation from the common practice. Moreover considering specific circumstances of certain societies, vigilant, authoritative and influential judiciary seems essential. Due to illiteracy, poverty and lack of awareness about the citizens’ rights, privileged class attempts to stretch the laws in its favour. It fetches all the benefits through corrupt practices and mal-functioning which requires judiciary to assert by playing a pro-active role filling the vacuum for enforcement of fundamental rights of citizens and curb the mal-practices.

In the larger international perspective judicial activism is not a new phenomenon; its history is spread over centuries. In several jurisdictions, various aspects played vital roles in its growth contributors of judicial activism which include the State organs; the executives and the legislatures. Judicial activism finds and strengthens its roots in numerous events such as, violation of constitution and statutes, arbitrary and capricious acts or omissions, malfunctioning,

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<sup>8</sup>The phrase *fiat justitiaruatcaelum* translates to “may justice be done though the heavens fall.” This maxim on the urgent necessity of justice has been used in different ways since its origin, which is dated back to the late first century B.C. The Latin phrase is more of a general philosophical statement than a technical legal term <  
<http://www.wisegeek.com/what-does-fiat-justitia-ruat-caelum-mean.htm> > accessed on 26 April 2012

corruption, nepotism, failure to perform. The former justice of Indian Supreme Court V.R. Krishna Lyer who is seen as one of the big supporters of judicial activism in the region, once said "*The Judicial activism gets its highest bonus when its orders wipe some tears, from some eyes.*"<sup>9</sup>

Urging the Chief Justice "CJ" of Supreme Court of India "SCI" to use "*judicial wisdom*" to rescue India from corruption and the "*mercy of high executives*" Justice Lyer addressed to CJ in the following words, "*Dear Hon'ble Chief Justice of India, act now! Every hour is late. Every moment is late... I know if everyone protests against every authority there will be chaos but you must intervene and strike a balance using your judicial wisdom...*"<sup>10</sup> Demand coming from a former justice of SCI maintains the strong assertion that, in the States of subcontinent like Pakistan and India people find the Apex courts as last resort against capricious and illegal acts of privileged and ruling elite. An elaborate discussion is required over the philosophy of judicial activism in the light of judicial precedents of Apex courts in various jurisdictions and to explore its origin reasons and outcomes as well as concerns coming from its extreme exercise. The philosophy of research in law recognises analysis of judicial precedents as a valid method of legal research, "*...establishing the law through analysis of precedent is in fact a form of qualitative research using documents as source material.*"<sup>11</sup>

### **Origins and Scope and Judicial Activism:**

Bohde traces<sup>12</sup> foundation of judicial activism in 1607-1608 where a disagreement had been seen between then King of England, King James and then CJ of England Justice Coke on assuming the authority of transferring a case to King and to decide upon. CJ Coke asserted that law is supreme, though King is not under the man but shall be under the law and God. Similarly King James could not arrogate himself the power to impose import and export tax as CJ Coke declared

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<sup>9</sup>, Khadim Hussain Qaiser, '**Public Interest Litigation**' Additional Advocate General Punjab paper presented in International Judicial Conference organised by Pakistan Law Commission at Supreme Court Building Islamabad Pakistan ( Re produced from original)

<sup>10</sup>K. Venkiteswaran , 'Krishna Iyer urges Chief Justice to intervene' *The Hindu* (KOCHI, 17 August 2011)

<sup>11</sup> Lisa Webley, Peter Cane and Herbert M. Kritzer, '*Qualitative approaches to Empirical Legal Research* (draft), The Oxford handbook of Empirical legal Research (Oxford, OUP, 2010)

[http://www.academia.edu/394211/Chapter\\_38\\_Qualitative\\_Approaches\\_to\\_Empirical\\_Legal\\_Research](http://www.academia.edu/394211/Chapter_38_Qualitative_Approaches_to_Empirical_Legal_Research)

<sup>12</sup>V.A. Bohde, 'The Rise of Judicial Power', (re produced in), 'Law and Justice: An Anthology' Delhi Universal Law Pub. Co. Soli Sorabjeeed (2004)

it unlawful and affirmed the parliament was the sole authority to impose taxes.<sup>13</sup> Whilst acting as CJ of Court of Common pleas Justice Coke declared the **College of Physician Act 1553** void on the ground that, where an Act of Parliament is found to be violative of *common rights and reasons* same should be governed and assessed under common law and *in many cases the common law will control the Act of Parliament*.<sup>14</sup> Despite long controversies over the judgment of the Bonham case, it set the principle that the statute passed by the English parliament is subordinate to the common law and can be declared void by the court of law. Relying on the Bonham case, CJ Hobart also declared an Act of Parliament void being contrary to the principles of natural equity and held that a man cannot be judge of his own cause.<sup>15</sup> The controversy over the use of authority ended with the enactment of the Act of Settlement which made the judiciary independent from Crown.<sup>16</sup>

Literature available on contemporary judicial activism by means of issuing writs of *“Prohibition,<sup>17</sup> Mandamus<sup>18</sup>, Certiorari<sup>19</sup>, Habeas Corpus<sup>20</sup> and Quo Warranto<sup>21</sup>”* and judicial review over the Act of Parliament suggests that, it dates back to **Marbury vs. Madison<sup>22</sup>** In this case CJ John Marshal of US Supreme Court held that, any act of another branch of government which is contrary to the constitution is void. The court confirmed the supremacy of constitution over all other laws of the country holding all other legal materials are subservient to the constitution. The SC emphasised on having authority to enforce the constitutional rights and issue writ of mandamus. CJ Marshal declaring the **Judiciary Act of 1789** unconstitutional<sup>23</sup>

<sup>13</sup> Coke, Sir Edward (1552-1634); the forum at the online library of liberty, A project of library fund Inc <[http://oll.libertyfund.org/index.php?option=com\\_content&task=view&id=226&Itemid=270](http://oll.libertyfund.org/index.php?option=com_content&task=view&id=226&Itemid=270)> accessed 21 April 2013

<sup>14</sup> *Dr. Bonham*, 8 Co. Rep. 114 Court of Common Pleas [1610], <http://legal-dictionary.thefreedictionary.com/Dr.+Bonham's+Case>

<sup>15</sup> *Day v. Savadge*, [1614] Hob 84 K.B

<sup>16</sup> The official website of the British Monarchy, The Act of Settlement of 1701 , <<http://www.royal.gov.uk/historyofthemonarchy/kingsandqueensoftheunitedkingdom/thestuarts/maryiwilliamiiiandtheactofsettlement/theactofsettlement.aspx>> accessed 21 April 2013

<sup>17</sup> Restraining lower courts from hearing a case for lacking jurisdiction

<sup>18</sup> Commanding to act in certain way

<sup>19</sup> Protect the fundamental rights of the citizens by calling all the records and evidence in the court and adjudicate the matter

<sup>20</sup> 'let us have the body' order to produce a detained person before the court

<sup>21</sup> Challenging the someone's right to hold an office or government privilege

<sup>22</sup> *Marbury v. Madison* [1803] 5 U.S. 137

<sup>23</sup> '*Marbury v. Madison*', U.S. Supreme Court, [1803], document no. 005-0137, reproduced in, '*Howe Electronic Data Supreme Court Reports*' CD-ROM Portland, Oregon, (1995). <http://laws.findlaw.com/us/5/137.html>

categorically stated that it is duty of the courts *"to say what the law is."*<sup>24</sup> It was the first instance when any act of the Congress had been held unconstitutional and was struck down by the SC. Dictum laid down in this judgment which provides guidelines for the countries governed under the written constitution, CJ Marshal held that, *"...principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void and that courts, as well as other departments, are bound by that instrument."*<sup>25</sup>

The former Chief Justice of US Supreme Court William Rehnquist called it top most single contribution of US in the art of government.<sup>26</sup> The Marbury case strengthened the authority of US judiciary to revisit the act of Congress and executives. The Marbury case was significant in the development of law and could not be overshadowed despite elapse of 210 years. This case is presented as judicial precedent in US and across the world equally whenever controversy over the authority of court, parliament and constitution arises. Nevertheless, this was not an end; the US SC is found to be continuously reacting adversely on the actions of Congress and executives whenever their act seemed contrary to the constitution.

**McCullough vs. Maryland**<sup>27</sup> is a further case of significance which is authorised by CJ Marshall in the unanimous decision (7-0) it was held that Federal constitution was supreme and it rejected the assertion of the State of Maryland, that States were sovereign because constitution was ratified by the State Conventions. Judgment invalidated the statute passed by the Maryland State for imposition of tax on Federal Bank. The US Supreme Court continued to re-examine and adjudicate the constitutional disputes in twentieth and twenty first century. In **Brown v. Board of Education**<sup>28</sup> the US Supreme Court abolished segregation of schools between blacks and whites. Petitioners challenged the doctrine of *"separate but equal"* adopted in **Plessy v.**

<sup>24</sup>'Marbury v. Madison' (p. 178)

<sup>25</sup>'Marbury V. Madison' (p 180): **Kermit L. Hall**, "The Oxford Guide to United States Supreme Court Decisions" edited (p.174) **Oxford University Press**(15 Feb 2001)

<sup>26</sup> Newsweek Staff, 'Why Marbury V. Madison Still Matters' (Newsweek, 20 February 2009) < <http://www.thedailybeast.com/newsweek/2009/02/20/why-marbury-v-madison-still-matters.html> > accessed 18 April 2013

<sup>27</sup>'McCulloch v. Maryland' 4 Wheat.(17 U.S.) 316, 4 L.Ed. 579 [1819] < <http://supreme.justia.com/cases/federal/us/17/316/case.html> > accessed on 23 April 2013

Cornell University law school, Legal information institute <[http://www.law.cornell.edu/supct/html/historics/USSC\\_CR\\_0017\\_0316\\_ZO.html](http://www.law.cornell.edu/supct/html/historics/USSC_CR_0017_0316_ZO.html) > accessed 26 April 2013

<sup>28</sup>*Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 [1954], Cornell University law school, Legal information institute < <http://www.law.cornell.edu/supremecourt/text/347/483> > accessed 16 February 2013

**Ferguson**<sup>29</sup> that claimed the right to admission and asserted that segregation was contrary to the “*Equal Protection Clause of the Fourteenth Amendment of the constitution.*” In its unanimous decision of (9-0) the court rejected the case of **Plessy v. Ferguson**<sup>30</sup> and held that, “*separate but equal*” schools on racial basis are contrary to the spirit of equal protection clause of the constitution. The Brown case ensured the enforcement of 14<sup>th</sup> amendment of the constitution with its full letter and spirit first time, 86 years after its enactment in 1868. The Judgment laid the foundation for the promulgation of the **Civil Rights Act of 1964** in the US in just ten years.

In the latest judgment in the case of **Citizens United v. Federal Election Commission 2010**<sup>31</sup> the US Supreme Court decision was split (5-4) this reaffirmed its authority to revisit any policy or legislation enacted by executive or Congress. The court found it illegal and contrary to the first amendment of the constitution to prohibit the corporations to finance for the political campaigns. SC held that, following the first amendment of the constitution corporations and unions own the rights equal to individuals. Therefore federal statute debarring them from utilising their general funds for election campaign of the candidate of their own choice is unconstitutional and illegal.<sup>32</sup> The judgment furthermore overruled two earlier judgments<sup>33</sup> regarding provision of election funds. US President Obama showed his displeasure on the verdict and called it victory of Wall Street.<sup>34</sup>

In the case of **National Federation of Independent Business v. Kathleen Sebelius, Secretary of Health**<sup>35</sup> twenty six Federal States along with several individuals have challenged the constitutionality of Health Care Law “*Patient Protection and Affordable Care Act 2010*” and

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<sup>29</sup>*Plessy v. Ferguson* 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 [1896], Cornell University law school, Legal information institute < <http://www.law.cornell.edu/supremecourt/text/163/537> > accessed 16 February 2013

<sup>30</sup>*Brown v. Board of Education of Topeka*, (p.347)

<sup>31</sup>*Citizens United v. Federal Election Commission* [2010] Appeal from the United States District Court for the District of Columbia No. 08–205 Decided January 21, 2010  
<<http://www.supremecourt.gov/opinions/09pdf/08-205.pdf>> accessed 18 February 2013

<sup>32</sup>*Citizens United v. Federal Election Commission*, (paragraph 913)

<sup>33</sup>*Austin v. Michigan Chamber of Commerce*, [1990] 494, U.S. 652, which held that political speech may be banned based on the speaker's corporate identity and (2) *McConnell v. Federal Election Comm'n*, [2003] 540 U.S. 93, 203–209, which upheld a facial challenge to limits on electioneering communications.

<sup>34</sup>Kristin Sullivan, ‘Citizens United v. Federal Election Commission’, ‘OLR Research Report’ (2<sup>nd</sup> March 2010)  
< <http://www.cga.ct.gov/2010/rpt/2010-R-0124.htm> > accessed 18 February 2013

<sup>35</sup>*National Federation of Independent Business Et Al. v. Sebelius, Secretary of Health and Human Services* [2012] et al. Supreme Court of the United States No. 11–393. Decided June 28, 2012 1 Certiorari to the United States Court of Appeals for the Eleventh Circuit < <http://www.supremecourt.gov/opinions/11pdf/11-393c3a2.pdf>> accessed 23 March 2013

“*individual mandate*” and sought for the writ of **certiorari**. CJ Roberts held that “*the individual mandate is not a valid exercise of Congress ...*”<sup>36</sup> and threatening the States to deprive them from their funding is violation of constitution.<sup>37</sup> By partially allowing those under question, the legislation court considered the view taken in the case of **Ayotte v. Planned Parenthood**<sup>38</sup> where it was held that, while dealing with unconstitutional legislation the interpretation of the court should attempt to save the legislation rather than destroy it.

The above confirms that, the US Apex court always exercised its judicial authority on the formal written petition of the aggrieved party and the Act of the legislature and executive is seen to be subject to the judicial review on the constitutional petition. The nature of disputes relate to the constitutionality of the legislation, acts or omission of executives and Congress. Whilst dealing with constitutionality of any act of the executive, Congress or statute the courts seemed endeavour to save the legislation even in parts rather destroying the whole.<sup>39</sup> SC of US played a significant role to define constitutional limits between Federal government and Federal States.<sup>40</sup> It enforced fundamental rights provided in the constitution by declaring acts of the Congress unconstitutional,<sup>41</sup> and avoided interfering in the authority of other State organs. It played a supportive role to rescue the government and Congress from the acts which were otherwise impossible due to political, social and commercial reasons.<sup>42</sup> Acts which had political implications were left for political decision and wisdom of the people, however wherever clear

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<sup>36</sup>*National Federation of Independent Business Et Al. v. Sebelius, Secretary of Health and Human Services* [2012] Part III–A pp. 16–30.

The Framers knew the difference between doing something and doing nothing. They gave Congress the power to regulate commerce, not to compel it. Ignoring that distinction would undermine the principle that the Federal Government is a government of limited and enumerated powers. The individual mandate thus cannot be sustained under Congress’s power to “regulate Commerce.” **Pp. 16–27.**

<sup>37</sup>*National Federation of Independent Business Et Al. v. Sebelius, Secretary of Health and Human Services* [2012] (pp.45-58)

<sup>38</sup>**Ayotte v. Planned Parenthood of Northern New Eng’ 546 U. S. 320–330. pp. 60–61.**

<sup>39</sup>*National Federation of Independent Business Et Al. v. Sebelius, Secretary of Health and Human Services* [2012] et al. Supreme Court of the United States No. 11–393. Decided June 28, 2012 1 Certiorari to the United States Court of Appeals for the Eleventh Circuit <<http://www.supremecourt.gov/opinions/11pdf/11-393c3a2.pdf>> accessed 23 March 2013

<sup>40</sup>*McCulloch v. Maryland*, [1819] 4 Wheat.(17 U.S.)316, 4 L.Ed. 579

<sup>41</sup>*Citizens United v. Federal Election Commission*, Appeal from the United States District Court for the District of Columbia No. 08–205. (Decided 21 January 2010) <<http://www.supremecourt.gov/opinions/09pdf/08-205.pdf>>accessed 18 February 2013

<sup>42</sup>*Brown v. Board of Education of Topeka*, [1954] 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873, University law school, Legal information institute <<http://www.law.cornell.edu/supremecourt/text/347/483>> accessed 16 February 2013



violation of constitution was found courts stepped forward to uphold the supremacy of the constitution.<sup>43</sup>

### **Judicial Activism in Pakistan:**

Judicial activism is quite a new phenomenon in Pakistan as compared to the USA which has its own reasons and relevance. Exercise of suo moto jurisdiction in PIL cases date back to the **Darshan Mashi v the State.**<sup>44</sup> In the previous case mentioned the CJP took notice on a telegram message about alleged forced labour and illegal detention by their employer in brick kilns. The applicant requested to then CJP getting them released considering the matter as public interest and enforcement of constitutional fundamental rights. The CJP by relaxing the standard procedural requirements heard the matter u/a 184(3) and extended the relief. Similarly the SCP exercised its suo moto jurisdiction on a letter<sup>45</sup> drawing the attention of the CJP towards construction of a power station and their apprehensions about likely negative impacts of power house on the health of the public at large. The SCP considered it a matter of the public interest and enforcement of fundamental right and extended the relief. People of Pakistan do have great deal of hope and expectation with the judiciary because of the failure of other organs of the State to deliver, and privileged discriminatory and ambiguous legislation providing shield to the corrupt practices.<sup>46</sup> Participation of lawyers, role of civil society and media in restoration of judiciary movements, firstly in 2007 and secondly in 2009,<sup>47</sup> demonstrates their confidence on

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<sup>43</sup>*Marbury v. Madison*, document no. 005-0137 (U.S. Supreme Court, 1803), reproduced in Howe Electronic Data Supreme Court Reports CD-ROM [Portland, Oregon, 1995] < <http://laws.findlaw.com/us/5/137.html> accessed/28/10/2012

<sup>44</sup> *Darshan Mashi V. the State*, PLD [1990] SC, 513

<sup>45</sup> *Shehla Zia v. Wapda and others*, PLD [1994] SC, 693

<sup>46</sup>Nasir Iqbal, 'CJ has changed course of history says Justice Javid', Dawn News, (5<sup>th</sup> March 2010)

<sup>47</sup>Azhar Masood, 'Prime Minister through executive order reinstates Chief Justice', Pakistan Times (16 March 2009)

CJP was sacked by the army chief and President of Pakistan on 9<sup>th</sup> March 2007. He was reinstated by 13 member bench of SCP through its judgment dated 20<sup>th</sup> July 2007. Thereafter following the emergency order dated 3<sup>rd</sup> November 2007 judges of superior judiciary who refused to take oath under the provisional constitutional order of Army chief were sacked again on this date. Later on as a result of the nationwide restoration of judiciary movement and long march, government reinstated the judges of superior judiciary through executive order dated 16<sup>th</sup> March 2009.

higher judiciary. Their unconditional support for Apex Courts shows significance of judicial activism in socio political milieu of Pakistan.<sup>48</sup>

After the restoration of Chief Justice of Pakistan “CJP”<sup>49</sup> and other judges of the SCP and High Courts “HCs”, Judicial activism is seen to be at its highest level than ever before. The SCP has extended the scope of PIL by establishing the Human Right Cell “HRC” in the SC which is seen to be the main essence for the exercise of suo moto and original jurisdiction. Earlier the HRC used to receive approximately 500 applications every day seeking remedy for applicants’ grievances directly from the SCP. Nevertheless, after restoration of superior judiciary in 2009 the number of applications received to HRC reached to 139906 in just two years 2009-2011. During this period of time the SCP granted relief on 85489 applications by seeking report from the relevant departments whereas the CJP entertained 87 Human Right and PIL matters directly in the SCP.<sup>50</sup>

Supporters of PIL under suo moto and original jurisdiction of SCP argue<sup>51</sup> that PIL serves the purpose of enforcement of constitutional rights and rule of law; hence, it is required to be developed further in present circumstances. It is a beneficial and effective tool not only for the dispensation of justice but also for easy access to justice for poor fraction of society justice at her doorsteps. The gap between poor citizens and elite class is very much prominent and Pakistan traditional legal system is not capable enough to fill this gap, therefore, PIL helps to fill the gap between poor and elite class in relation to knowledge and power structure. This factor amongst other supports the *gradual shift from the mechanical justice to human welfare justice*.<sup>52</sup> Furthermore it is argued that the other organs of the State have lost their credibility and trust of the people and only superior judiciary has succeeded to restore its authority by means of PIL. It

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<sup>48</sup>Barrister Ahmed Uzair, ‘Judicial Activism of The High Court Using SUO MOTU’ The Counsel Magazine (2010)

<sup>49</sup>Restoration of CJ Case Chief Justice of Pakistan, ‘ Mr. Justice Iftikhar Muhammad Chaudhry. ...Petitioner. V. The President of Pakistan’ PLD [2010] SC 61, PLD [2007] SC 578Constitution Petition No.21 of 2007 and 22 other petitions decided on 2<sup>nd</sup> July 2007In The Supreme Court Of Pakistan (Original Jurisdiction) < <http://pakistanconstitutionlaw.com/detailed-judgment-on-restoration-of-chief-justice-of-pakistan-dated-23rd-of-december-2009/> > accessed 26 April 2013

<sup>50</sup> Justice Abdus Sattar Asghar, ‘Public Interest Litigation’ paper presented in International Judicial Conference organised by Pakistan Law Commission at Supreme Court Building Islamabad Pakistan on 12, April 2011

<sup>51</sup> Khadim Hussain Qaiser, ‘Public Interest Litigation’ Additional Advocate General Punjab paper presented in International Judicial Conference organised by Pakistan Law Commission at Supreme Court Building Islamabad Pakistan on 12, April 2011

<sup>52</sup> Justice Abdus Sattar Asghar, ‘Public Interest Litigation’ paper presented in International Judicial Conference organised by Pakistan Law Commission at Supreme Court Building Islamabad Pakistan on 12, April 2011

also helps to control the persistent tradition of misuse of authority by the government and its officials to violate the constitution, law, rules and invade upon the fundamental rights of the weak class of citizens. In the given circumstances, the only remedy available to people is to draw the attention of the courts by means of PIL.<sup>53</sup>

The previous above discussed cases from other jurisdictions reveal that, generally the courts seize their jurisdiction on the petition of the party feeling aggrieved on certain act or omission of the defendant. However in Pakistan this differs, under suo moto jurisdiction the courts<sup>54</sup> take notice and cognizance of a specific matter involving public interest or fundamental rights on their own motion. The courts convert a simple application into the petition by ignoring procedural requirement and may summon the State functionaries' requiring them to appear before the court and to respond to the said application. The SCP frequently invokes its suo moto and its original jurisdiction to hear political, social, economic, human rights and constitutional issues.<sup>55</sup> There is an exhaustive list of the cases heard by the SCP in just few years indicating the extreme use of the original and suo moto jurisdiction. The SCP is seemed to be exercising its authority over those matters which in normal course of procedure fall under the prerogative of executives and legislative organs of the State. This included; the SCP who took notice<sup>56</sup> on import of poultry feed containing pig meat and ordered to destroy the entire consignment, and to take stern action against those who were responsible and also got undertaking from the importers and concerned authorities for being vigilant next time. The SCP also ordered to cancel the lease given to McDonald's restaurant established in F/9 public park Islamabad as well as Hot Shot bowling club.<sup>57</sup> Giving its verdict against the projects fatal for the environment such as Margala

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<sup>53</sup> Justice Mohammad Azam Khan, 'Public Interest Litigation Scope, Limitation and Reforms' Concluding address by: Chief Justice of Azad Jammu and Kashmir. At the occasion of Seminar held by Supreme Court Bar Association of Pakistan on 21.12.2012 at Aiwana-e-Iqbal, Lahore. Published in Pakistan Law Journal

<sup>54</sup> Here word "courts" represent the Supreme Court of Pakistan and Subordinate High Courts.

<sup>55</sup> Rental power projects, Reko Diq mining project in Baluchistan, NRO Case and NICL are few names among hundreds of the cases

<sup>56</sup> *Suo Moto case No. 15 of 2007*, [2011] SCMR 255

<sup>57</sup> *Human Rights Cases Nos. 4668 of (2006), 1111 of (2007) and 15283-GOF (2010)* [P L D 2010] Supreme Court of Pakistan

housing society, Islamabad chalets and Pir Sohawa valley villas,<sup>58</sup> developing the New Muree City project by cutting the trees in the vast area<sup>59</sup> the SCP banned the said schemes.

The SCP seemed to be exercising its authority more rigorously since restoration of judiciary in 2009,<sup>60</sup> suggesting that the second phase of restored judiciary is enjoying height of judicial activism. Distinct from the first phase of judicial activism, at this occasion, the SCP and High Courts<sup>61</sup> have furthered the scope of PIL and enforcement of fundamental rights. It heard a variety of cases consisting of corruption such as arrangements of pilgrimage called Hajj scam,<sup>62</sup> the Bank of Punjab scam<sup>63</sup> and NICL scam.<sup>64</sup> Appointments,<sup>65</sup> promotion of police officers,<sup>66</sup> senior bureaucrats,<sup>67</sup> transfer and appointments of investigation officers of important cases,<sup>68</sup>

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<sup>58</sup> *Suo Moto case No. 13* [2005] Environmental Threats caused by the Housing schemes

<sup>59</sup> *Suo Moto Case No. 10* of [2005] (Environmental Hazard posed by the New Muree Project): Quarterly Pakistan Forest Digest Vol. 01, No. 02 ISSN: 2218-8045 July – September, (2010)

<sup>60</sup> The Judges of the Supreme Court and High Courts were sacked on refusal to take oath on Emergency Order of 3<sup>rd</sup> November 2007 passed by than Army Chief of Pakistan. These Judges resumed their office in March 2009 after successful long march of the lawyers, civil society and opposition parties in Pakistan.

<sup>61</sup> Lahore High Court heard number of cases by exercising *Suo Moto* authority such as, PLD [2010] Lahore 23 Zarco Exchange fraud case: '*Court takes suo moto on Zarco Exchange fraud*' The Nation August 22, (2009) <http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/lahore/22-Aug-2009/Court-takes-suo-moto-on-Zarco-Exchange-fraud> accessed on 22 March 2012: "*Court takes action on bar on women voters*" Gulf Time 22 August (2013) <http://www.gulf-times.com/pakistan/186/details/363497/court-takes-action-on-bar-on-women-voters/accessed/26/8/2013>

<sup>62</sup> *Suo Motu case No 24 of 2010* PLD [2011] SC 963

<sup>63</sup> *Suo Motu Case No. 24 OF 2010* [P L D 2011] Supreme Court 277

<sup>64</sup> *Suo Moto Case 18 of 2010* PLD [2011] SC 821. National Insurance Company scam

<sup>65</sup> '*Shahid Orakzai v Pakistan*' PLD [2011] SC 365 Appointment of Chairman National Accountability Bureau by the President of Pakistan was declared illegal: *P L D [2011] Supreme Court 213* (appointment of President of National Bank of Pakistan The SCP declared the amendment in S 11(3)(d) in the Banks' Nationalisation Act 1974 through Finance Act 2007 as void and unconstitutional hence directed the President National Bank to leave the post immediately): '*Adnan A. Khawaja versus The State*' *Suo Moto* Case No. 4 of [2010] and Civil Miscellaneous Applications In The Supreme Court of Pakistan January [2012]; Appointments of Mr. Adnan Khawaja as Managing Director of the (OGDCL) against merit and appointment/promotion of Mr. Ahmed Riaz Sheikh as Additional Director, (FIA) at a time when both of them were convicted persons were declared illegal and order to proceed against all those who were responsible for such appointments/promotion

<sup>66</sup> *Suo moto case No 03 of [2012] Supreme Court (SC) of Pakistan*; The promotions of some 4,676 police constables elevated to higher ranks on the basis of favoritism were repealed

<sup>67</sup> '*Tariq Azzizudin and other*' [2010] SCMR 1301, The SCP exercised its judicial review authority

<sup>68</sup> OGRA scam more than Rs. 83 billion: Rs.54 billion in ISAF containers scam: Rental power scam of Rs.16.6 billion and additional liabilities \$ 1.7 billion against GOP: Hajj scam Rs. 36 million: Ephedrine scandal Rs.7 billion: The Bank of Punjab scam more than Rs.10 billion: NICL scam Rs1.6 billion: Money laundering case \$6 million against then President of Pakistan before Swiss authorities: , (citations are given in foot note above)

levy of carbon and general sales tax,<sup>69</sup> fixing the price of sugar,<sup>70</sup> fuel, gas, and electricity<sup>71</sup> on several occasions<sup>72</sup> and contracts awarded by government bodies such as Capital Development Authority “CDA”.<sup>73</sup> Furthermore it took cognisance on law and order situation in the city of Karachi<sup>74</sup> and the province of Baluchistan.<sup>75</sup> The SCP also exercised its original and suo moto jurisdiction over several constitutional matters such as, National Reconciliation Ordinance “NRO” case,<sup>76</sup> proclamation of Emergency order “PCO” of 3<sup>rd</sup> November 2007 declaring them ‘void ab initio’ and violative of the constitution. Removal of judges of Apex Courts case,<sup>77</sup> 18<sup>th</sup>

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<sup>69</sup> ‘SC declares 1% increase in GST null and void’ the Express Tribune with the international Herald Tribune 21 June 2013 <http://tribune.com.pk/story/566330/sc-declares-1-increase-in-gst-null-and-void/> accessed on 1<sup>st</sup> October 2013

<sup>70</sup> ‘LHC takes suo moto notice of raised sugar prices’ Daily times 14 August 2009: Sugar cartel case where Chief Justice of Lahore High Court took Suo Moto notice

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

<sup>71</sup> All news channels reported Suo Moto Notice on increase of petroleum and electricity prices on 1<sup>st</sup> October 2013: ‘SC summons electricity tariff hike notification’, Dunya News TV <http://dunyanews.tv/index.php/en/Pakistan/194535SC-summons-electricity-tariff-hike-notification> accessed on 1st October 2013: ‘SC summons electricity tariff hike notification’ Business Recorder Tuesday, 01 October 2013 <http://www.brecorder.com/pakistan.html> accessed on 1st October 2013

<sup>72</sup> ‘CJP takes suomoto notice on price hike of petroleum products’, the Express Tribune with the international Herald Tribune June 14, 2013 <http://tribune.com.pk/story/563079/cjp-takes-suo-moto-notice-on-price-hike-of-petroleum-products/> accessed on 1<sup>st</sup> October 2013

<sup>73</sup> *Suo Motu Case No 13 of 2009 PLD [2011] SC 619*  
<[http://www.supremecourt.gov.pk/web/user\\_files/File/SMC.13-2009.pdf](http://www.supremecourt.gov.pk/web/user_files/File/SMC.13-2009.pdf) >

<sup>74</sup> *Suo Moto case No. 14/2009 before Supreme Court of Pakistan* : Qaiser Zulfiqar, ‘Karachi suo motu: Verdict out’ the Express Tribune with the international Herald Tribune, October 6, 2011 <http://tribune.com.pk/story/267671/law-and-order-supreme-courts-verdict-in-suo-motu-karachi-violence-case-today/> accessed on 24 June 2013

<sup>75</sup> ‘CJ takes suo motu notice of mayhem in Balochistan’, the Express Tribune with the international Herald Tribune August 11, 2013 <http://tribune.com.pk/story/588755/supreme-court-takes-suo-motu-notice-of-mayhem-in-balochistan/> accessed/20 August 2013 ‘Chief Justice takes suomotu notice of law & order’ The Nation August 12, 2013 <http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/national/12-Aug-2013/chief-justice-takes-suo-motu-notice-of-law-order/> accessed/20 August 2013

<sup>76</sup> *Dr. Mobashir Hassan and others V. Federation of Pakistan, etc* In the Supreme Court of Pakistan (Original Jurisdiction) Constitution Petition Nos. 76 To 80 Of 2007 & 59/2009 and HRC Nos.14328-P To 14331-P & 15082-P of 2009 [http://www.supremecourt.gov.pk/web/user\\_files/File/NRO\\_Judgment.pdf](http://www.supremecourt.gov.pk/web/user_files/File/NRO_Judgment.pdf) accessed on 14/02/2013

<sup>77</sup> *Nadeem Ahmed Advocate V. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad and others*’ the Supreme Court of Pakistan (original jurisdiction) short order dated 31st July, [2009] in Constitutional Petitions Nos.8 and 9 of 2009

constitutional amendment case,<sup>78</sup> revisiting the **Contempt of Court Act 2012**<sup>79</sup> and more recently proceedings of hi-treason against former President and Army Chief of Pakistan<sup>80</sup> have much significance in recent constitutional and judicial history of Pakistan. Exercise of extreme authority can further be observed in implementation of NRO judgment case. To get the judgment implemented the SCP during miscellaneous proceedings and taking suo moto<sup>81</sup> sentenced and sacked the elected Prime Minister of the country holding him guilty of contempt of court.<sup>82</sup> Similarly judgments in steel mills privatisation, Rental Power case and miscellaneous proceedings for implementation of this judgment<sup>83</sup>, and Reko Diq gold and Copper Mines' case are also significant judgments of the SCP in the context of international relations, treaty obligations and attraction and protection of FDI.

Privatisation of Pakistan Steel Mill "**PSM**" was the first major and important case<sup>84</sup> coming into the limelight in 2006 since then high profile cases against executives were taken up by the SCP more frequently.<sup>85</sup> PSM case was the beginning of the era of judicial activism in Pakistan, the larger bench of SCP annulled the \$362 million bid for the privatisation of PSM. In its unanimous verdict SCP exposed the number of legal violations, lapses, omissions and commissions by the

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<sup>78</sup> *Supreme Court Bar Association v. Federation of Pakistan and others* PLD [2011] SC 269 constitutional petition No. 14/2010

<sup>79</sup> Act gave immunity to the President, Prime Minister, governors and chief ministers on contempt of court. This act was abolished by the SCP

<sup>80</sup> who was also army chief and dictator (case is under proceedings at the movement)

<sup>81</sup> *Suo Moto Case No 4 of 2010*. PLD [2012] SC 553

<sup>82</sup> To get this judgment implemented SCP ordered the government to write a letter to Swiss authorities requesting to reopen corruption cases against sitting President of Pakistan. On non compliance SCP charged and sentenced the Prime Minister for contempt of court and sacked him from his office and disqualified him to contest future election. As a result to this order cabinet was also dissolved and parliament elected new prime minister, new PM was also called in the SCP for implementation and charged with contempt of court at last he wrote the letter to Swiss authority as desired by the SCP

<sup>83</sup> *Human Rights Case No. 7734-G/2009 & 1003-G/2010* (Alleged Corruption in Rental Power Plants) and other connected Human Rights Case No. 56712/2010 (Fraud in payment of Rental Power Plants detected by NEPRA). Supreme Court of Pakistan (original jurisdiction) [2012 SCMR 773] **30.3.2012** and C.M.As.NOs.3685-3686 of 2012 in HRC No.7734-G of 2009

<sup>84</sup> *Wattan Party and others v Federation of Pakistan and others* [2006] SC, SCP Constitution Petition No. 9 of 2006 & Civil Petition Nos. 345 & 394 Of 2006

<sup>85</sup> Some important cases were, Privatisation of steel mill case: construction of McDonald's restaurant in F/9 public park Islamabad case: case against leasing the public parks to commercial ventures such as restaurant and mini golf clubs: New Muree City project closing the substandard private educational institutes and medical colleges. In coming years SCP continued with more high profile and important cases

Privatisation Commission and the Cabinet Committee on Privatisation. It was believed<sup>86</sup> that SCP's judgment saved Rs.18 billions loss and Rs. 33.67 billions extra benefit to the bidder.

However, the temporary saving in PSM's privatisation case has proven to be a shallow saving when succeeding government announced the loss of Rs 23 billion in **PSM** during its first financial year of new government.<sup>87</sup> According to a report published in daily Dawn Pakistan, until 31<sup>st</sup> October 2012 despite 14.6 billion bailout package given by federal government the liability of payable debt of the "**PSM**" has exceeded 82 billion rupees and has crossed the barrier of 100 billion in December 2013.<sup>88</sup> It is worth noting that during 2007-08, PSM earned Rs. 2.3 billion profit despite having Rs7 billion debt liability.<sup>89</sup> Referring to the papers on the performance of Pakistan steel, it reported claims that production of Pakistan steel dropped down to 6%<sup>90</sup> conversely it was 92% in April 2008 when the new democratic government was sworn in. The report further suggests that the PSM has suffered Rs. 79 billion loss until October 2012 since annulment of its privatisation by the SCP. The SCP has taken suo moto notice<sup>91</sup> on such reports of massive corruption and mismanagement in PSM. The figures clearly show that following the annulment of privatisation deal by SCP the PSM project is still suffering losses which is proven to be increased than the alleged savings. Judgment as well discouraged \$362 million inward FDI supposed to be paid as winning bid and added \$250 million that investor pledged to invest in the project.

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<sup>86</sup>Mohammad Kamran, 'Judicial activism SC's hallmark in 2006' Daily Time, 1/1/2007  
[http://www.dailytimes.com.pk/default.asp?page=2007\01\01\story\\_1-1-2007\\_pg7\\_8](http://www.dailytimes.com.pk/default.asp?page=2007\01\01\story_1-1-2007_pg7_8) accessed/23/2/2012

<sup>87</sup>Faisal H. Naqvi in 'The economics of Judicial Intervention', The Friday Times dated 19.03.2010 <http://www.thefridaytimes.com/beta3/tft/index.php> accessed on 22/02/2013

<sup>88</sup> Report telecasted on Major Pakistani TV channels on 19<sup>th</sup> December 2013

<sup>89</sup>Khaleeq Kiani, 'Steel Mills debt liability exceeds Rs82bn' Daily Dawn & DawnPakistan.com 10th November, 2012 <http://dawn.com/2012/11/10/steel-mills-debt-liability-exceeds-rs82bn/> accessed on 22/02/2013

<sup>90</sup> Now 3% according to the Report telecasted on Major Pakistani TV channels on 19<sup>th</sup> December 2013

<sup>91</sup> *Suo Moto Case No 15 of 2009* PLD [2012] SC 610  
[http://www.supremecourt.gov.pk/web/user\\_files/File/SMC15OF2009.pdf](http://www.supremecourt.gov.pk/web/user_files/File/SMC15OF2009.pdf) >

The “**Rental Power**” “**RPP**” case<sup>92</sup> is another significant case which would have long lasting impacts on Pakistan’s political, commercial and international spheres. In its most awaiting judgment in RPP case, the SCP invalidated the rental power projects in Pakistan by pointing out massive corruption allegedly \$5 billion, bribe and kickbacks. Consequently the SCP held all the rental power agreements illegal and *void ab initio*.<sup>93</sup> The SCP passed an order for initiating immediate criminal action and recovery of entire amount already paid for these projects with interest.<sup>94</sup> The SCP found that increase in advance payment from 7% to 14% runs to billions which is unacceptable without calling fresh bids to ensure fair competition amongst bidders<sup>95</sup> and was not free of illegalities on behalf of the government. The SCP found the RPPs as a complete failure and contrary to the Arts 9 & 24 of the constitution and held to be in collusion with the S.7 of the **Transmission and Distribution of Power Act 1997 “TDPA 1997”** which categorically obligates National Electric Regulatory Authority “**NEPRA**” to protect interests of its customers.<sup>96</sup> Agreed tariff with RPPs for electricity generated by them was very high which varied from Rs.35/- to Rs.50 per unit extremely higher than per unit tariff set by the Independent Power Plants “**IPPS**”. Consequently, it found this as a violation of direction of Economic Coordination Committee “**ECC**” given on 10<sup>th</sup> September 2008 which required ensuring the RPPs to generate electricity cheaper than the “**IPPs**” in first ten years.<sup>97</sup> All the relevant governmental authorities along with Ministers of Water and Power during the period (2006 to 2008) RPPs agreements were signed and were held responsible for the violation of principles of transparency. Their involvement in corrupt practices as well as corruption and deriving financial benefits from the RPPs was very likely, hence why the National Accountability Bearu “**NAB**” was directed to take action against said responsible under National Accountability Ordinance, 1999 “**NAO 1999**”. Due to prima facie involvement in corruption and corrupt practices all the

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<sup>92</sup>*Human Rights Case No. 7734-G/2009 & 1003-G/2010 (Alleged Corruption in Rental Power Plants) and other connected Human Rights Case No. 56712/2010 (Fraud in payment of Rental Power Plants detected by NEPRA). Supreme Court of Pakistan (original jurisdiction) [2012] SCMR 773, 30.3.2012*  
[http://www.supremecourt.gov.pk/web/user\\_files/File/HRC7734-G\\_1003 GOF2009](http://www.supremecourt.gov.pk/web/user_files/File/HRC7734-G_1003_GOF2009) [Alleged Corruption in Rental Power Plants]. pdf

<sup>93</sup> [2012] SCMR 773, Paragraph 83(3)

<sup>94</sup> ‘The Supreme Court on Friday Declared Rental Power Projects (Rpps) As Illegal and also Ordered them to be Shut Down’ Dawn news Report 30<sup>th</sup> March 2012.<http://dawn.com/2012/03/30/rpps-declared-illegal-by-supreme-court/>

<sup>95</sup>[2012] SCMR 773 Paragraphs 78 and 79

<sup>96</sup> [2012] SCMR 773 Paragraph 80 & 83 vii

<sup>97</sup>[2012] SCMR 773 Paragraph 82



officials of PEPCO<sup>98</sup>, GENCO,<sup>99</sup>NEPRA<sup>100</sup> and their sponsors who were involved in deriving financial benefits from the RPPs were held accountable for civil and criminal actions simultaneously.<sup>101</sup> Subsequently regarding implementation of paragraph (iii), (ix) and (x) of judgment in the RPPs case, the SCP noticed wilful reluctance on part of NAB authorities. The SCP held reluctance in obeying this order, due to it being a clear violation therefore it was liable to proceed under **Contempt of Court Ordinance 2003** and **Art 204** of the Constitution of Pakistan. The SCP issued contempt of the court notices to the Chairman NAB and others.<sup>102</sup> The SCP also passed an order on 8/11/2012 against one of the RPPs namely “**Barage Mounted Karkay**” a Turkish company, restraining it from sailing out of Pakistan waters without clearing the outstanding dues against it. It is worth also mentioning that **Karkay** had been allowed by the NAB authority to sail out of Pakistan without effecting recovery of outstanding amount. Perceiving the situation the SCP held that responsibility will lie with the Chairman NAB if Karkay’s ship sails out of Pakistan without recovery.<sup>103</sup> During the course of the hearing in the implementation case on 15<sup>th</sup> January 2012, the SCP ordered the NAB authorities to arrest all those responsible of RPPs scam, disregarding their ranks and authority. Some notable names to mention who were responsible include the then incumbent Prime Minister of Pakistan and twenty seven others. The order further provides that if anyone leaves the country the Chairman of NAB will have to take full responsibility in respect of this.

The RPPs judgment will have a long lasting economic, international, constitutional and political outcome. The instant judgment highlighted RPPs as a symbol of corruption and abuse of powers by executives and saved billions of dollars which was very likely to be looted through this deal. It has also effected recovery of advance payment and interest amounting to Rs.8 billion 689 million 224 thousand from the power companies. In addition in compliance of the judgment recovery of Rs. 445 million 496 thousand from m/s Young Gen and the interest from m/s

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<sup>98</sup> Pakistan Electronic Power Company

<sup>99</sup> Central Power Generation company Ltd

<sup>100</sup> National Electric Power Regulatory Authority

<sup>101</sup> Paragraph 81 and paragraph (iii), (ix) and (x) of judgment

<sup>102</sup> Order dated 15/09/2012 in implementation of RPPs case CMA No.4649 of 2012

<sup>103</sup> Summary of the order dated 18/11/2012 in Paragraph 2 of C.M.As.NOs.3685-3686 of 2012 in HRC No.7734-G of 2009 (Implementation of judgment of this Court, dated 30.3.2012 passed in HRC No.7734-G of 2009 regarding alleged corruption in Rental Power Plants) Date of Hearing: 31.01.2013

Reshma, will also be effected.<sup>104</sup> The judgment further saved huge foreign exchange and money which was likely to be milked from the poor people in the head of unprecedented high tariff.<sup>105</sup> Such a high electricity tariff would increase production cost as a result all type of domestic industries and export of growing economy were prone to negative impacts.

Whilst on the other hand the judgment within the case of RPP has several negative outcomes. The senior judicial officer objected the authority of the SCP to interfere within the investigation whereas the senior government officer highlighting its draw backs has questioned the SCP's suo moto authority.<sup>106</sup> Thus showing the reservation and resentment over the SCP's authority in writing, the senior officer alleged that unnecessary interference of the SCP may hamper the free and transparent investigation. Proactive role of the SCP has become a matter of interest for the national and international researchers and organisations equally. Reacting on order of SCP to arrest the PM and twenty seven others in the RPPs scam, The Asian Human Rights Commission "AHRC" showed its reservation on the authority of the SCP to supervise the investigation. AHRC called it contentious particularly in relation with due process of law and Right to Fair Trial under article 10-A of the constitution,<sup>107</sup> violates the Art 9 of the constitution<sup>108</sup> and is contrary to the dictum laid down in Jogindar Kumar's case.<sup>109</sup> AHRC indicated that extreme exercise of the judicial authority would generate political fraction in the country which will cause harm to Pakistan and its citizens bigger than the benefit derived from such actions.

Reko Diq gold and copper mines project case is another case which SCP decided in its original<sup>110</sup> and appellate jurisdiction<sup>111</sup> simultaneously. Initially gold and copper resources were discovered

<sup>104</sup> [2012] SCMR 773 Paragraph 83

<sup>105</sup> *"Per unit cost of electricity produced by the RPPs is on very high side, e.g., Karkey is ranging from Rs.35/- to Rs.50/-; Gulf from Rs.18/- to Rs.19/-..."* [2012] SCMR 773 paragraph 82 of the RPPs judgment

<sup>106</sup> Contents of letter was reproduced in paragraph 4,5,6 of the order dated 31/01/2013 in the C.M.As.NOs.3685-3686 of 2012 in HRC No.7734-G of 2009 (Implementation of judgment of this Court, dated 30.3.2012 passed in HRC No.7734-G of 2009 regarding alleged corruption in Rental Power Plants)

<sup>107</sup> 'Right to Fair Trial, Judicial System' Statement document AHRC-025-2013 dated 18/01/2013 <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-025-2013> accessed on 24/04/2013

<sup>108</sup> No person shall be deprived of life or liberty, *save in accordance* with law

<sup>109</sup> *Jogindar Kumar versus the State of UP* [1994 ] (4) SCC 260

<sup>110</sup> *Watan Party and another V. Federation of Pakistan and others Constitution Petition No.69 of 2010; Qazi Siraj-ud-Din Sanjrani and another .V Federation of Pakistan & others Constitution Petition No.1 of 2011; Senator Mohammad Azam Khan Swati, etc. V. Federal Government etc. Constitution Petition No.4 of 2011 & CMA No.295*

by BHP Billiton after signing joint venture “JV” with Baluchistan Development Authority “BDA” for exploration of minerals at Chaghi Hills in 1993. Not different from other projects involving FDI, accusation of shady deals, alleged corruption, getting bribes and receiving kickbacks from foreign investors clouded the future of Reko Diq project. Questioning on legality and binding force of the deal TV debates and news articles pointed out several irregularities in the entire process. It has been alleged that \$260 billion assets (at current price)<sup>112</sup> at Reko Diq are sold for nothing. Such irregularities included signing of Reko Diq accord by the governor of the province without cabinet approval, buying of project files by Antofagasta and Barrick Gold in \$200 million,<sup>113</sup> approval of 30 years lease to TCCP on 23<sup>rd</sup> May 2008 without considering the expiry of exploration license 5 “EL 5” in 2011, relaxation in the mining rules 1970, mysterious transfer of entire<sup>114</sup> share of Baluchistan government in EL6, EL8 and RL7<sup>115</sup> without any compensation/consideration, conducting 270000 meters drilling in violation of Baluchistan Mineral Rules 2002, to hamper the Baluchistan’s share misstatement about the quantity/value of discovered resources<sup>116</sup>/disclosing less than originally discovered resources and many more.<sup>117</sup>

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*Of 2011: Human Rights Case No.5377-P of 2010 Application by Kh. Ahmed Tariq Rahim, Sr. ASC*  
[http://www.supremecourt.gov.pk/web/user\\_files/File/CPLA\\_796\\_2007\\_ETC\\_SHORT\\_ORDER\\_REKO\\_DIQ\\_CASE.pdf](http://www.supremecourt.gov.pk/web/user_files/File/CPLA_796_2007_ETC_SHORT_ORDER_REKO_DIQ_CASE.pdf) accessed/20/4/2013

<sup>111</sup> *Maulana Abdul Haque Baloch and others V. Government of Balochistan through Secretary Industries and Mineral and others* on appeal from the judgment of the High Court of Balochistan, Quetta dated 26.06.2007 passed in Constitution Petition No. 892/2006)  
[/http://www.supremecourt.gov.pk/web/user\\_files/File/CPLA\\_796\\_2007\\_ETC\\_SHORT\\_ORDER\\_REKO\\_DIQ\\_CASE.pdf](http://www.supremecourt.gov.pk/web/user_files/File/CPLA_796_2007_ETC_SHORT_ORDER_REKO_DIQ_CASE.pdf) accessed/20/04/2013

<sup>112</sup> The Reko Diq mine is expected to yield 10 billion kilograms of copper and 368 million grams of gold over the 50-60 year lifespan of the project. Since Reko Diq project is likely to compete in 60 years hence following the increase of gold and copper price worth of the project is estimated \$1000 billion with future prospect to reach up to one trillion dollar. Pakistan Today 23/11/2010 <http://www.pakistantoday.com.pk/2010/11/23/news/national/the-reko-diq-scandal/?printType=article>

<sup>113</sup> Statement of Advocate General of the province of Baluchistan before Supreme Court of Pakistan in Reko Diq case hearing on 9<sup>th</sup> December 2012

<sup>114</sup> which was 25% of the project

<sup>115</sup> Exploration licence

<sup>116</sup> Reko Diq is \$260 billion as per records of the Canadian company (at today’s gold/copper international market rates), the government and former Finance Minister Shaukat Tarin said its value was \$500 billion but in July the President of Barrick Gold came to PM Gilani and said the value was only \$50 billion. Pakistan Today 23/11/2010 <http://www.pakistantoday.com.pk/2010/11/23/news/national/the-reko-diq-scandal/?printType=article>

<sup>117</sup> ‘Governor signed Reko Diq accord without cabinet’s approval, says AG Kanrani’, Dawn.Com 10<sup>th</sup> December 2012 <http://beta.dawn.com/news/770294/reko-diq-case-sc-resumes-hearing-2> accessed on/08/10/2013

International mining circles contended that, ***“It would be the mother of all the deals and grandfather of all the corruption cases in Pakistan, put together,”***<sup>118</sup>

SCP has to invoke its original jurisdiction on several petitions filed directly before the SCP and Appellate jurisdiction<sup>119</sup> on appeal arising out of the judgment of the Baluchistan High Court.<sup>120</sup> An interesting aspect of the deal was that Baluchistan’s provincial government was indebted to contribute in the expenditures following the ratio of its 25% share. This therefore meant that, other parties to JV acquired 75% rights in the project without paying anything to the Governments of Pakistan and Baluchistan. Besides this the TCCP in mysterious and strange circumstances managed to get 100% share in two deposits called EL6 and EL8 notwithstanding the Pakistan’s 25% share.

During the course of proceedings the mining committee of provincial mining department dismissed TCCP’s application and did not allow conversion of exploration license into mining license, in the meantime GOB decided to mine some pockets by itself. Feeling aggrieved the TCC Australia filed the claim for specific performance of the JVA along with application for grant of provisional measures in the International Centre for Settlement of Investment Disputes **“ICSID”** under Pak Australia Bilateral investment treaty **“BIT”** 1998. Following the terms of JVA<sup>121</sup>, TCC also filed a petition for specific performance before international Chamber of Commerce **“ICC”**. Invoking the ICC jurisdiction the TCC seeks for a direction for issuance of mining lease of 14 deposits of Riko Diq located in 99 kilometres area.

Within its short order the SCP declared the JVA 1993<sup>122</sup> ***illegal, void and non est*** being executed in violation and contrary to the various statutory provisions.<sup>123</sup> Several agreements<sup>124</sup> originated

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<sup>118</sup> Pakistan Today 23/11/2010

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

<sup>119</sup> Article 185(3) of the Constitution of Pakistan 1973 deals with leave to appeal before SCP

<sup>120</sup> *Constitutional Petition No. 892 of 2006* Baluchistan High Court decided on 26<sup>th</sup> June[ 2007]

<sup>121</sup> Article 15.4.8 of Chagai Hill Exploration Joint Venture Agreement **“CHEJVA”**

<sup>122</sup> Chagai Hill Exploration Joint Venture Agreement **“CHEJVA”** 1993

<sup>123</sup> *Mineral Development Act, 1948, the Mining Concession Rules, 1970, the Contract Act, 1872, the Transfer of Property Act, 1882, etc*

from the JVA that have also been declared illegal and void. The SCP through a unanimous judgment held that, none of the said instrument created or granted any rights mentioned in those instruments to the BHP, MINCOR, TCC, TCCP, Antofagasta or Barrick Gold. It was held that EL-5 is deemed to be exploration in violation of the rules and regulations as JVA is itself an illegal document which therefore confirms to be non est. Incorporating the GOB as party to the JVA, it is held to be contrary to the **Baluchistan Mining Rules 2002 Rule 7** and the other rules of business of GOB. The court observed that the said changes raise serious questions over the approval granted to the addendum.<sup>125</sup> Likewise without stating any plausible reason relaxation in the BMR 2002 approved by the GOB too violates the **Rule 98**.<sup>126</sup> The SCP further noted that apart from these deficiencies by invoking appellate and original jurisdiction the TCC has submitted to the forum/ jurisdiction of the SCP.<sup>127</sup> The detailed judgment describing its reasons will be authored later on<sup>128</sup> which will further unfold the reasons and legal arguments for declaring the entire deal illegal and void from the first day. Reko Diq judgment will also have a long lasting effect on the inward flow of FDI within Pakistan.

The Reko Diq mining project has been expected to attract the largest ever FDI in Pakistan's mining history with approximately US\$ 3.3 billion.<sup>129</sup> In addition to this, the most up-to-date

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<sup>124</sup> The Addendum No. 1 dated 04.03.2000, Option Agreement dated 28.04.2000, Alliance Agreement dated 03.04.2002 and Novation Agreement dated 01.04.2006

<sup>125</sup> Para 7 of Reko Diq judgment of the SCP in C.P.796 OF 2007 ETC. (SHORT ORDER) dated 7/01/2013  
[http://www.supremecourt.gov.pk/web/user\\_files/File/CPLA\\_796\\_2007\\_ETC\\_SHORT\\_ORDER\\_REKO\\_DIQ\\_CASE.pdf](http://www.supremecourt.gov.pk/web/user_files/File/CPLA_796_2007_ETC_SHORT_ORDER_REKO_DIQ_CASE.pdf) accessed/20/4/2013

<sup>126</sup> Para 9 Reko Diq judgment of the SCP in C.P.796 OF 2007 ETC. (SHORT ORDER) dated 7/01/2013  
[http://www.supremecourt.gov.pk/web/user\\_files/File/CPLA\\_796\\_2007\\_ETC\\_SHORT\\_ORDER\\_REKO\\_DIQ\\_CASE.pdf](http://www.supremecourt.gov.pk/web/user_files/File/CPLA_796_2007_ETC_SHORT_ORDER_REKO_DIQ_CASE.pdf) accessed/20/4/2013

<sup>127</sup> Para 10 Reko Diq judgment of the SCP in C.P.796 OF 2007 ETC. (SHORT ORDER) dated 7/01/2013  
[http://www.supremecourt.gov.pk/web/user\\_files/File/CPLA\\_796\\_2007\\_ETC\\_SHORT\\_ORDER\\_REKO\\_DIQ\\_CASE.pdf](http://www.supremecourt.gov.pk/web/user_files/File/CPLA_796_2007_ETC_SHORT_ORDER_REKO_DIQ_CASE.pdf) accessed/20/4/2013

<sup>128</sup> Para 12 of Reko Diq judgment of the SCP in C.P.796 OF 2007 ETC. (SHORT ORDER) dated 7/01/2013  
[http://www.supremecourt.gov.pk/web/user\\_files/File/CPLA\\_796\\_2007\\_ETC\\_SHORT\\_ORDER\\_REKO\\_DIQ\\_CASE.pdf](http://www.supremecourt.gov.pk/web/user_files/File/CPLA_796_2007_ETC_SHORT_ORDER_REKO_DIQ_CASE.pdf) accessed/20/4/2013

<sup>129</sup> 'Pakistan's top court rules Reko Diq mine deal invalid' Reuters Toronto Canada Jan 7, 2013  
<http://ca.reuters.com/article/businessNews/idCABRE9060TZ20130107> accessed 08/09/2013

technology and time proven expertise of Tethyan Copper Company “TCC” and its parent companies Barrick Gold and Antofagasta Minerals would be introduced in Pakistan’s mining field. The project was expected to create 2500 job opportunities on permanent basis in addition to the 11500 jobs during construction period of the project.<sup>130</sup> Undoubtedly resources discovered in Reko Diq are deemed as a jackpot for the poorest regions in the country. By processing 110000 tons of ore daily the treasure is expected to yield 200000 ton copper and 250000 ounces of gold annually for next 60 years.<sup>131</sup> According to TCC despite spending billions of dollars and decades in exploration field it discovered nothing really comparable and compatible with Reko Diq. TCC claims treasure discovered in Reko diq is an “*irreparable asset*” which is most likely to produce more mineral in the future.<sup>132</sup> However non serious and questionable attitude of both the parties<sup>133</sup> towards concluding commercial agreements once again opened the space for judicial intervention which ended with the annulment of Reko Diq deal and arbitration on international forums as a result. It also gives rise to several important questions regarding Pakistan’s treaty obligations, undermining international treaty and commercial arbitration. Notwithstanding to the international concerns and reactions over expansion of PIL and fundamental rights popularity of suo moto it has also encouraged the HCs to exercise this authority.

Lahore High Court “LHC” heard a number of cases under Suo Moto authority such as Zarco Exchange fraud case<sup>134</sup>, Medical negligence case, sugar prices case and increase in the fare of

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<sup>130</sup> At para 81 *Tethyan Copper Company Limited V. The Islamic Republic of Pakistan* ICSID Case No. ARB/12/1 [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2752\\_En&caseId=C1980](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2752_En&caseId=C1980) accessed on 11/10/2013

<sup>131</sup> Reko Diq first phase of two deposits on **H14 and H15** has been estimated to have between \$150bn and \$260bn of deposits by many international experts. So why a treasure so big is still being considered for \$52 billion (only 8 billion to GOP and GoB) and that too receivable in 56 years? There are reported to be 48 deposits in Chaghi as per research of Antofagasta-related geologists. Dawn.Com 10<sup>th</sup> December 2012  
<http://beta.dawn.com/news/770294/reko-diq-case-sc-resumes-hearing-2accessedon/08/10/2013>:

<sup>132</sup> At para 77 *Tethyan Copper Company Limited V. The Islamic Republic of Pakistan, ICSID Case No. ARB/12/1* [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2752\\_En&caseId=C1980](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2752_En&caseId=C1980) accessed on 11/10/2013

<sup>133</sup> State organs and foreign investors

<sup>134</sup> PLD [2010] Lahore 23: Court takes suo moto on Zarco Exchange fraud The Nation August 22, 2009  
<http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/lahore/22-Aug-2009/Court-takes-suo-moto-on-Zarco-Exchange-fraud> accessed on 22 March 2012

public transport. Justice Tasaddaq Hussain Jilani<sup>135</sup> whilst sitting as a judge of LHC took *Suo Moto* notice on a news clipping about the death of a child who died by falling in uncovered main hole. Justice Jilani issued direction for registration of criminal case against responsible officers of concerned department of provincial government.<sup>136</sup> It is important to see that the learned judge did not explain any reason “*Ratio Decidendi*” from departing the settled judicial precedents<sup>137</sup> on *suo moto* jurisdiction of HCs. The State was represented by the Khawaja Muhammad Sharif who later proved to be a big believer and adherent of *Suo Moto* jurisdiction by HCs. Although the principle of “*Stare Decisis*” is acknowledged by the constitution of Pakistan, Justice Sharif continued to take *suo moto* notices as CJ of LHC on several occasions as discussed above.

The popularity of *suo moto* also encouraged HCs of other provinces to exercise this authority on even pettier issues as discussed above. Justice Dost Muhammad Khan CJ of Peshawar High Court “**PHC**” took *suo moto* notice on a news report regarding the selling of poor and substandard meat and chapli kababs.<sup>138</sup> To enquire about the failure of the government officials and to observe their duty on the matters of chapli kababs, he summoned several senior officers of the province namely; the director general health, director food, capital city police officer “**CCPO**” and director general of live stock. The Division Bench of the PHC also issued show cause notice to the Chief Secretary of the province. The CJ also noticed that despite his numerous clear instructions to amend the out of date and ineffective **Food Ordinance of 1965** none of successive government have amended the said law. The same court taking another *suo moto* matter this time being illegal car parking and bus stops, in this matter it summoned the senior provincial officers to explain their position, officers included secretary of transport, commissioner and deputy commissioner, CCPO, additional inspector general of traffic police.<sup>139</sup>

Recently CJ of “**PHC**” took another *suo moto* notice on a television report on disallowing women to poll/cast their vote during by-elections in Pakistan. The CJ of PHC directed the

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<sup>135</sup> Justice Jilani has succeeded the Chief Justice Iftikhar Ch on his retirement on 12<sup>th</sup> December 2013

<sup>136</sup> [2000] MLD 1055 Lahore

<sup>137</sup> PLD [1958] Supreme Court (Pak) 437; PLD [1961] Supreme Court 192; PLD [1971] Supreme Court 677; [1990] PcrLJ 1231; [2001] YLR 2403 Karachi

<sup>138</sup> An Asian dish prepared with meat

<sup>139</sup> Akhtar Amin, ‘PHC orders re-polling in 54 women’s polling stations’ The News international, 27<sup>th</sup> August 2013 <http://www.thenews.com.pk/Todays-News-7-201395-PHC-takes-suo-moto-notice-of-substandard-chapli-kababaccessed/on/25/09/2013>

election authorities for withholding the results in two constituencies. He also directed to arrest the responsible people who barred the women to poll their vote in the election.<sup>140</sup> On the next hearing the PHC being dissatisfied with the turnout of ladies at polling stations directed the Election Commission of Pakistan “**ECP**” to conduct the re-election at more than 54 polling stations. The PHC further suspended the election held in two constituencies namely NA.5 and NA 27. The court directed the ECP to forward an immediate summary to the GOP suggesting the drastic changes in the **Representation of the People Act 1976**. It has been directed that such changes should introduce strict punishment for the people preventing females to cast their vote and as well ensure a certain minimum percentage of female voters in the general and by-elections. The PHC also issued direction of a similar nature to the GOP to table a bill in the parliament and amend above mentioned Act to ensure female participation in the election.<sup>141</sup>

Instant order of the PHC has been reviewed by three member bench of the SCP<sup>142</sup> by order dated 1<sup>st</sup> October 2013. However, the SCP reviewed the impugned order on entirely different ground, the SCP held that, oath of the judges requires them to abide and adhere to the law and constitution; and they cannot act like a king to do whatever appeases their mind. It has been held that, following the spirit of **Art 218(3)** of the constitution this instant matter falls within the ambit of the ECP and not the PHC. Consequently HC neither has the power to encroach upon the authority of ECP nor can it arrogate itself such authority which is not delegated to it by the constitution. Regarding extraordinary writ jurisdiction the SCP held that it should be exercised where no alternative adequate remedy is available in the law.<sup>143</sup>

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<sup>140</sup> ‘Pakistan court takes action on bar on women voters’, Published August 22, 2013 reported by AFP, <http://www.foxnews.com/world/2013/08/22/pakistan-court-takes-action-on-bar-on-women-voters/accessed/on/26/08/2013>: “**Court takes action on bar on women voters**” Gulf Time 22 August

2013 <http://www.gulf-times.com/pakistan/186/details/363497/court-takes-action-on-bar-on-women-voters/accessed/26/8/2013>

<sup>141</sup> Akhtar Amin, ‘PHC takes suo moto notice of substandard ‘chapli kabab’ The News international, 11<sup>th</sup> September 2013 <http://www.thenews.com.pk/Todays-News-7-201395-PHC-takes-suo-moto-notice-of-substandard-chapli-kababaccessed/on/25/09/2013>

<sup>142</sup> Justice Anwar Zaheer Jamali, Justice Ejaz Afzal Khan and Justice Iqbal Hameedur Rehman

<sup>143</sup> Malik Asad, ‘Senior Judges cannot act whimsical: SC’, Dawn News 2<sup>nd</sup> October 2013 <http://dawn.com/news/1046873/senior-judges-cannot-act-whimsical-sc/accessed/on/10/10/2013>



The Ratio Decidendi of setting aside the impugned judgment was that, a power to suspend the election is clearly vested to the ECP by constitution subject to certain conditions. Moreover the law also provides satisfactory alternative remedy to the aggrieved party in such cases consequently PHC lacked the jurisdiction to entertain such matters. Regardless of observation of the SCP that judges are not free to behave like a king and are bound by their oath to follow the constitution and law, the judgment is silent about the constitutionality of Suo Moto power by the HCs. Furthermore the judgment did not articulate the position of the SCP on the constitutionality of PHC's direction to the GOP and ECP to amend the law and bring drastic changes in election laws. However, considering the main concern of this research paper debate therefore this will remain confined to the extent of impacts and desirability and constitutionality of suo moto authority of the SCP.

### **Desirability of Judicial Activism and Constitutionality of Suo Moto and Original Jurisdiction of the SCP:**

The SCP is established and derives its powers from the constitution of Pakistan 1973.<sup>144</sup> The constitution provides rules on appointment, retirement<sup>145</sup> and removal<sup>146</sup> of judges from their office. It confers upon the SCP the role of custodian of the constitution<sup>147</sup> and guardian of human rights.<sup>148</sup> To discharge its constitutional obligations the SCP is endowed with original,<sup>149</sup> **“Suo Moto”** (actions taken in own motion),<sup>150</sup> appellate,<sup>151</sup> advisory<sup>152</sup>, and review<sup>153</sup> jurisdictions.

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<sup>144</sup> Art 175 Constitution of Pakistan 1973, Chapter 1 the Courts Part VII the Judicature  
<http://www.mohr.gov.pk/constitution.pdf> Accessed on 27/04/2013

<sup>145</sup> Arts 176- 182 Constitution of Pakistan 1973 Part VII chapter 2

<sup>146</sup> Art 209 Constitution of Pakistan 1973, PART VII Chapter 4: General Provisions Relating to the Judicature

<sup>147</sup> Oath of the office of Chief Justice of Pakistan or of a High Court or Judge of the Supreme Court or a High Court **“That I will preserve, protect and defend the Constitution of the Islamic Republic of Pakistan”** Third Schedule, Constitution of Islamic Republic of Pakistan 1973: <http://www.mohr.gov.pk/constitution.pdf> Accessed on 27/04/2013

<sup>148</sup> Chapter I of Part II of the constitution of Pakistan 1973

<sup>149</sup> Art 184 Constitution of Pakistan 1973 Part VII chapter 2 <http://www.mohr.gov.pk/constitution.pdf> Accessed on 27/04/2013

<sup>150</sup> Art 184(3) Constitution of Pakistan 1973 Part VII chapter 2

Chapter 1 of Part VII of the constitution deals with the establishment and jurisdiction of the courts in Pakistan. Art 175(2) provides that, (2) ***“No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.”***

To enforce fundamental rights<sup>154</sup> the SCP derives its “suo moto” jurisdiction u/a 184(3), which provides; ***“Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II is involved have the power to make an order of the nature mentioned in the said Article”.***

The SCP reserves the authority to take judicial notice, to pass an appropriate order and direction on violation of the any fundamental right guaranteed in the constitution or where question of public interest arises. It can issue direction to the respondent to act or refrain in the manner in which court deems fit and proper for the enforcement of such rights.<sup>155</sup> To ensure the administration of justice and implementation of its orders, constitution delegates several powers to the SCP and strengthens its authority further. The constitution empowers the SCP to call any person, document, executive or/and judicial authority for its support and issue all such directions, orders etc which it deems necessary.<sup>156</sup> All the State functionaries in the country are either executive or judicial those are obligated by the constitution to act in the support of SCP.<sup>157</sup> The constitution bestows upon the SCP’s power to issue direction to any authority such as police and armed forces to act in its support.

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<sup>151</sup> Art 185 Constitution of Pakistan 1973 Part VII chapter 2

<sup>152</sup> Art 186 Constitution of Pakistan 1973 Part VII chapter 2

<sup>153</sup> Art 188 Constitution of Pakistan 1973 Part VII chapter 2

<sup>154</sup> Chapter I of the part II of constitution deals with the Fundamental rights

<sup>155</sup> Mr. Justice Khilji Arif Hussain, *Prime Minister’s disqualification case dated 19/06/12 (Additional note)*, Describing the scope and limits of art 184(3) of the constitution, Fundamental rights and locus standi to invoke jurisdiction of SCP. Paragraphs 12 to 15 dated 04/07/2012

<sup>156</sup> Art 187 Part VII chapter 2

<sup>157</sup> Art 190 Part VII chapter 2

Chapter 2 of the constitution exclusively describes the affairs of the SCP thus Article 184(3) solely to empower the SCP to take judicial notice on violation of any fundamental rights guaranteed in chapter I of the part II of the constitution. The SCP can issue an appropriate order or direction to the respondent to perform or refrain them from a certain act which appears to the SCP just and proper for the enforcement of rights under question.<sup>158</sup> To take cognisance the SCP refers and relies on two phrases provided in 184 (3) of the constitution “*a question of public importance*” and “*enforcement of any of the Fundamental Rights conferred by Chapter I of Part II of the constitution is involved*”

The legislature of constitution of 1973 seems to introduce the phrase, *a question of public importance* intentionally for specific reasons. They obligated the SCP to exercise the authority subject namely two prerequisites. The phrase is not interpreted by the legislature either in the constitution, or in any statute or else in the **Supreme Court rules 1984**. Interpretation of the phrase can only be found in judgments of the superior courts that have examined the phrases from several angles and have set binding principles for taking cognisance on PIL.

To invoke the powers of the SCP u/a 184(3) the petitioner is required to establish that the matter raised by him meets the two said prerequisites.<sup>159</sup> Construction of Art 184(3) *entails to claim the violation of public nature and breach of fundamental rights* enshrined in the constitution. Phrases are construed as invading individual’s liberty, independence, fundamental rights as well as efficacy and safeguard for their execution. Consequently construction of phrase “*public importance*” is required to be determined on case to case basis.<sup>160</sup> It cannot be attracted where outcome of the case benefits to an individual or a group of individuals only and can only be applied if outcome relates to the right and liberty of the public as a whole. The word “*public*” denotes use something owned by the nation, large fragment of the society or the State. Case of public importance cannot be made out where the controversy relates to the interests of only a

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<sup>158</sup>Mr. Justice Khilji Arif Hussain, **Prime Minister’s disqualification case dated 19/06/12 (Additional note)**, Describing the scope and limits of art 184(3) of the constitution, Fundamental rights and locus standi to invoke jurisdiction of SCP. Paragraphs 12 to 15 dated 04/072012

<sup>159</sup> ‘Malik Asad Ali v. The Federation of Pakistan’ P L D [1998] SC 161 paragraph (d) constitution of Pakistan Arts 184(3), 199 & 187

<sup>160</sup> ‘Mian Muhammad Shahbaz Sharif v Federation of Pakistan’ P L D [2004] SC 583 p 595&596 head note D

group of people.<sup>161</sup> Remedy under this Art is only available to address the infringement of constitutional rights of large segment of the society and question of public importance. Lacking to any of these prerequisites the SCP would not be in a position to seize the original or suo moto jurisdiction. However, to ensure implementation of its judgments and orders, during current phase of judicial activism, the SCP has broadened the scope of constitutional fundamental rights<sup>162</sup> and public interest litigation. By doing so it was held that ***“Any case which raises a matter of constitutional interpretation and enforcement regarding the composition, processes and powers of the legislatures is thus by its very nature a case of public importance, as it affects the rights of the public at large, and also affects the Fundamental Rights of the citizens.”***<sup>163</sup>

In the context of exercising writ jurisdiction the courts are advised not to be influenced from sensational reports of media and to open their decisions for criticism.<sup>164</sup> The current tradition where courts are taking notices on almost each and every sensational report of media is appeared to be completely in contrast and conflicting with said precedent. It is also a long standing view of the SCP that following the rules on tripartite and separation of powers provided in the constitution, legislature cannot be compelled to enact the law even if constitution clearly commands the legislature to pass such legislation. Constitution draws the clear line between functions of the legislature, executive and judiciary.<sup>165</sup> Courts are required to interpret the constitutional provisions dealing with writ jurisdiction in the context of whole constitution.<sup>166</sup>

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<sup>161</sup> *Syed Zulfiqar Mehdi v. PIA* [1998] SCMR p 801

<sup>162</sup>Chapter I of Part II of constitution of Pakistan 1973; Art 9, Security of person - Art 10, Safeguards as to arrest and detention - Art 11(4), Slavery, Forced labour etc. - Art 14, Dignity of man - Art 15, Freedom of movement - Art 16, Freedom of assembly - Art 17, Freedom of association - Art 18, Freedom of trade - Art 19, Freedom of speech - Art 19A, Right to information - Art 20, Freedom of religion - Art 22 (3), Safeguards as to religious institutions - Art 23, Provision as to property - Art 24, Protection of property rights - Art 25, Equality of citizens - Art 25A, Right to education - Art 27, Safeguards against discrimination in services - Art 28, Preservation of language, script and culture.

<sup>163</sup> Additional note by His Lordship Mr. Justice Khilji Arif Hussain dated 04/07/2012 in Prime Minister's disqualification case dated 19/06/12

<sup>164</sup> PLD [1971] SC 677 p 694

<sup>165</sup> PLD [1961] Supreme Court 192 P 193

<sup>166</sup> PLD [1958]SC (Pak) 437 at p. 441

The SCP cannot take into account the validity of any law in exercise of its original jurisdiction which has already attained finality unless that is enacted in clear and direct breach of constitutional fundamental rights.<sup>167</sup> The presumption will go in favour of constitutionality of the enacted law and same should not be struck down on technical grounds. The SCP may only consider the question of the competence of the legislator on the enactment of certain Act under its original jurisdiction subject to the conditions that legislator was not competent to pass the said law and the same invades the constitutional fundamental rights. The SCP is required to refuse seizing the original jurisdiction to any challenge and constitutional provision or statute, if such law does not amount to invade the fundamental right, though otherwise it is in breach of the constitutional provisions. Almost similar approach can be traced in USA jurisdiction where its SC handed down its verdict on policy judgment of the government under PIL. It has been observed that, the court is delegated with the authority to interpret the constitution and law. Judges do not have the requisite authority or expertise to deliver policy judgment, such powers rest with the peoples' elected representatives. Courts are not supposed to protect the people from the outcomes of their wrong political decisions. People can throw their leaders out of office if they do not like their policies.<sup>168</sup> Consequently governments are empowered to take policy decisions and all the State organs are needed to perform their obligations in accordance with the constitution. The present trend of the SCP and even in some cases, HCs to expand the scope of PIL is ignorant to aforementioned judicial precedents and clear provision of the constitution. The current approach of the SCP whereby it compels the legislature to legislate in certain way<sup>169</sup> is also conflicting with the settled principles of law.

### **Conclusion:**

Every authority and power should have some binding limitations and norms otherwise such authority will be a curse rather than a blessing. Binding force of such restrictions can play a vital

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<sup>167</sup> *'Jamat-e-Islami through Amir and others versus Federation of Pakistan and others'*, P L D [2009] SC 549

<sup>168</sup> *'National Federation of Independent Business Et Al. v. Sebelius, Secretary of Health and Human' Services'*, [2012] et al. Supreme Court of the United States No. 11–393. Decided June 28, 2012 1 **Certiorari to the United States Court of Appeals for the Eleventh Circuit** <http://www.supremecourt.gov/opinions/11pdf/11-393c3a2.pdf> accessed on 23/03/2013

<sup>169</sup> 18<sup>th</sup> amendment in the constitution and enactment of contempt of court law Act are classic examples

role to avoid institutional authoritarianism. Suo Moto is a constitutional authority which should be employed in accordance with the true spirit of the constitution coupled with other constitutional provisions. Undoubtedly verdicts of the SCP in the current era of judicial activism would have long lasting impacts on all State organs regarding limits and scope of parliament, executives and judiciary. Notably whenever other State organs attempted to cross their constitutional limits the judiciary did not seem reluctant to encroach upon their authority by extending and broadening its constitutional authority. Majority of civil society, media and legal fraternity neither bothered about the constitutionality of these judgments nor took into account the consideration of international and economic repercussions which can be observed from the outcome of some judgments from commercial arena.

The aftermaths of striking down the privatisation deal by SCP suggests that PSM earned nothing other than loss. By putting international relations at stake the PSM judgment also resulted in the sacrifice of millions of dollars, FDI on one hand left a question mark on the credibility and reputation of a sovereign government to execute foreign deals and contracts. It is pertinent to mention here that no improvement is seen yet in respect to the affairs of PSM despite SCP continuously hearing the case on subsequent corruption matters in the PSM. It therefore seems correct to suggest that following the striking down the privatisation of PSM the SCP has sacrificed plenty of time on PSM matters. SCP would have used its precious time, wisdom and energy on regular constitutional and statutory matters for better dispensation of justice in the society if it had not been involved in pure commercial matters.

There is a lot to come and further points to discuss on RPPs scam, but it does not end here our policy makers are likely to face some bitter lessons from the instant case, perhaps at the cost of poor people of Pakistan. In compliance of SCP judgment The Turkish firm Karkay Karadeniz Elektrik Uretim “**KKEU**” initially signed an agreement with NAB to settle its accounts. However later on it refused to accept the SCP’s ruling in RPPs case intending to seek international arbitration against Pakistan. Through legal notice issued to Pakistan government on 19/05/2012, KKEU demanded for damages for loss it had suffered due to the alleged violation of

**Rental Service Contract (RSC)**<sup>170</sup> and to stop the inquiry initiated by the NAB authorities'. The firm further asserted that Pakistan has violated **Pakistan and Turkey BIT** obligations.

Finally, it appears from the judgment in Reko Diq that the SCP has saved Pakistan's billions of dollar assets from being looted by the foreign investors with the convenience of local authorities. However, aftermaths of Reko Diq case clearly suggest costly international arbitration as well as delay in valuable and vital projects at risk and the cost of Pakistan's poor nation. This will also cause further unwanted delay in execution of the project having severe financial implications on poor Pakistan nation and in developing the Pakistan economy. Despite the fact the SCP has saved billions of dollars there is still more to come on RPPS and Reko Diq issues from international jurisdictions in the near future.

Finally, this research could not find any judicial precedent prior to the current episode of judicial activism which justifies the expansion of PIL and fundamental rights and to bring a variety of matters including commercial and FDI within their ambit. The matters that have been discussed are happening within the grab of **PIL** and enforcement of constitutional fundamental rights. Therefore, to avoid negative impacts on inward flow of FDI and any likely treaty or commercial arbitration it appears that it is absolutely imperil to redefine the scope of PIL, suo moto and original jurisdiction regarding both FDI and BIT matters. Last but not least, in specific political, social, economical and bureaucratic environment of Pakistan judicial activism is the most desirable phenomenon. It requires that all organs of the State should work within the line drawn by the constitution of Pakistan to uphold the *sovereignty, integrity, solidarity; well being and prosperity of Pakistan* and to preserve it against any likely threat.<sup>171</sup> The aforementioned investigation reveals the working of the Pakistan courts as court of justice, rather than courts of law therefore any violation of constitutional authority or misuse of power would allow the SCP to interfere in their domain. Foreign investors are also required to be vigilant while executing commercial deals as the SCP has proven to be not hesitating to exercise its extended judicial authority blatantly on shady commercial deals. Notwithstanding to any international reaction or

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<sup>170</sup>Zafar Bhutta, "**Ruling on rental power plants: Turkish firm takes dispute to international court**" The Express Tribune with the International Herald Tribune Published on : May 27, 2012  
<http://tribune.com.pk/story/384768/ruling-on-rental-power-plants-turkish-firm-takes-dispute-to-international-court/>

<sup>171</sup>Paragraphs 78 and 79 of Rental power case

likely repercussion the SCP has established that it believes in, *Fiat Justitia Ruat Caelum: Let Justice Be Done Though the Heavens Fall.*

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