Judicial Use of *Suo Motu* Powers after the *Dharna* Judgement: The Thin Line between Activism and Overreach

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Abstract

This article deals with the recent use of suo motu powers by the Supreme Court of Pakistan. It is argued that the power of suo motu, although useful in some cases, is prone to abuse and may generate undue sensationalism in the administration of justice. A test for the use of suo motu powers has been recently formulated by the Supreme Court in the Dharna case, which is a welcome step towards more self-restraint in the use of suo motu. It will be argued that if the judiciary exercises this power without considering the basic ingredients of Article 184(3) and the criteria laid out in the Dharna judgement, it can lead to concentration of legislative and executive power in the hands of the superior judiciary, which is not only against the spirit of the separation of power under the Constitution but would also lead to miscarriage of justice. In order to avoid these consequences, it is recommended that the power of suo motu should be further regulated by the Supreme Court and a forum of appeal should be provided to the aggrieved party in order to meet the requirements of fair trial under Article 10A of the Constitution.

Introduction

The structure of modern democratic states stands on three pillars: the legislature, the executive and the judiciary. The function of the legislature is to enact law, the executive executes it and the judiciary interprets it. They derive their power from constitutional arrangements, and in Pakistan the distribution of functions among them is regulated by the Constitution of Pakistan approved in 1973 (hereinafter referred to as 'the Constitution'). According to Montesquieu the roles of these institutions should not overlap and they should only perform their respective tasks in order to ensure good governance, rule of law and justice.[1] This concept is known as separation of powers.

Together with this fundamental democratic arrangement, the Constitution also guarantees fundamental rights of the citizens of Pakistan. In order to ensure these rights are duly protected, the superior judiciary has been vested with special powers under Article 184 and 199 of the Constitution. These Articles empower the judiciary to intervene when any organ or functionary of the state crosses its jurisdiction to invade a particular fundamental right guaranteed under the Constitution. So the superior judiciary (Supreme Court and High Courts) is called upon to act as a guardian of fundamental rights, particularly against arbitrary abuse of power by state organs. Unfortunately, historically, the superior judiciary of Pakistan has not been bold in its stand against military coups and other acts of authoritarian regimes contrary to the rule of law.[2] Rulings such

[1] Charles-Louis de Secondat, Baron de La Brède et de Montesquieu, The Spirit of Laws, Book XI, VI (1748) 181.

[2] Hamid Khan, Constitutional and Political History of Pakistan (Karachi: Oxford University Press 1999) 214-19; Tasneem Kausar, *Judicialization of Politics and Governance in Pakistan: Constitutional and Political Challenges and the Role of the Chaudhry Court*, in Ashutosh Misra &

as the Supreme Court's validation of military takeover under the 'law of necessity' in the *Moulvi Tamizuddin* case[3] and the convenient use of the principle of 'revolutionary legality' in subsequent cases[4] have earned Pakistan's judiciary a major share of responsibility for the failure to protect fundamental rights

Keeping in mind both the requirements of the separation of powers and the constitutional and political history of Pakistan, this article will focus on the recent use of *suo motu* powers by some of the former Chief Justices of Pakistan[5] which has quickly become a controversial topic. Even some judges of the Honourable Supreme Court have recently expressed their reservations on the way the power of *suo motu* has been exercised.[6] This article will argue that the power of *suo motu* in itself is not bad, and this will be shown by giving some egregious examples where its use proved very advantageous to Pakistan.[7] At the same time it is submitted that the central issue is the manner in which *suo motu* prerogatives are exercised. To this purpose, a test for correct use of *suo motu* powers will be formulated in light of the recent judgement of the Supreme Court in the *Dharna* case.[8] It will be maintained that there is a thin border between healthy

Michael E. Clarke eds., Pakistan's Stability Paradox (London: Routledge) (2013) 28.

[3] *Federation of Pakistan v Moulvi Tamizuddin Khan,* PLD 1955 Federal Court 240.

[4] *The State v Dosso,* PLD 1958 Supreme Court 533.

[5] In particular, former Chief Justices Muhammad Iftikhar Chaudhry and Mian Saqib Nisar.

[6] Qazi Faez Isa and Mansoor Ali Shah in the case *In the matter regarding disposal of infectious wastes in the Province of KPK*, HRC No. 14959-K/2018.

[7] Qazi Faez Isa and Mansoor Ali Shah (n 6) para 4.

[8] *Suo Moto action regarding Islamabad-Rawalpindi Sit-in/Dharna* PLD 2019 Supreme Court 318.

judicial activism, and judicial adventurism or overreach[9] and that the only way to make sure the line is not crossed is by using *suo motu* only when the conditions enucleated by Article 184(3) as interpreted by the Supreme Court in *Dharna*, are fulfilled. Finally, some additional recommendations are made on how *suo motu* powers could be regulated, which include the call for a proper appeal avenue.

A. Scope of Articles 184(3) and 199 of the Constitution

Under Article 199 of the Constitution the courts proceed after an aggrieved party approaches and convinces the court that the appellant has a fundamental right which is being denied by the state authorities.[10] However under Article 184(3) of the Constitution the honourable Supreme Court of Pakistan can start proceedings in its own capacity. This is known as *suo motu* action which greatly extends the scope of judicial review in Pakistan. However, it also raises a vital and fundamental question as to what extent the judiciary can go, especially when decisions in this regard are entirely left within the discretion of the person who is at the top of the judicial hierarchy of the country.

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[9] When the judiciary oversteps the power given to it, it may interfere with the proper functioning of the legislative or executive organs of the government. *See*: Indian Polity Notes, Judicial Review vs Judicial Activism vs Judicial Overreach, ClearIAS <*https://www.clearias.com/judicial-review-vs-judicial-activism-vs-judicial-overreach/*> accessed on April 13, 2019.

[10] They can issue Writs of Certiorari, Mandamus, Prohibition and Habeas Corpus.

Art. 184(3) of the Constitution, while regulating the original jurisdiction of the Supreme Court, states that:

'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 1 of Part II is involved, have the power to make an order of the nature mentioned in the said article.'[11]

A plain reading of the text shows that there are two main requirements for *suo motu* action: 1) there must exist a question of public importance, and 2) the question must involve the enforcement of any of the fundamental rights. The recently published *Dharna* judgment[12] has further clarified the matter. Having identified the fundamental rights (right to life, right to freedom, right to education, right to fair trial and due process, right to live a life of dignity and right to earning a livelihood, right to enjoy property) which were infringed by the blockade of the roads by the *Tehreek-e-Labbaik* Pakistan, the bench moved on to discuss the scope of public importance to differentiate it from a dispute of mere personal nature. The court followed its earlier decisions in *Manzoor Elahi*[13] and *Benazir Bhutto*[14] cases, where it was consistently held that a question is of public importance if it includes: 'a purpose, that is an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned'.[15]

[11] The words 'said Article' refer to Article 199 of the Constitution.
[12] *The Dharna Case* (n 8).
[13] *Manzoor Elahi v Federation of Pakistan* PLD 1975 SC 66, 144-145.
[14] *Benazir Bhutto v Federation of Pakistan* PLD 1988 SC 416.
[15] *The Dharna* case (n 8) Judgement of Justice Qazi Faez Isa, para 9.

In the following paragraph of the judgement a further requirement for the use of *suo motu* has been added by the Court, where it stated that:

'every possible care should be taken before making an order under Article 184 (3) [emphasis added] since there is no right to appeal such an order.'

It is suggested that one of the legitimate meaning of the words 'every possible care' is that the Court must be satisfied that the proper organ of the state which is competent to deal with the matter is either unable or unwilling to act. Unless this further condition is satisfied, restraint in issuing *suo motu* orders becomes the most desirable course of action. The test for the use of Article 184(3) which is proposed here is three-fold: there is a question of public importance; the question refers to one of the fundamental rights enshrined in Part II, Chapter I of the Constitution; every possible care is taken by the Court before an order is passed, which is here construed as meaning that an order under Article 184(3) is legitimate only if and when the competent state organ is either unwilling or unable to act.

B. Application of the *Dharna* judgement's test to some instances of *suo motu* proceedings

A few judgments of the Supreme Court will be analysed in the light of the above mentioned test. The first case in this regard is that of

Aleema Khan[16] (Prime Minister Imran Khan's sister). In this case the issue was the investments of Aleema Khan for purchase of property in UAE, the sources of which were not declared in the Income Tax return. Applying the test laid down in the *Dharna* case, first of all there should be an issue of public importance. However, in this case the interest of general public was not identified. In addition, the violation of fundamental rights is also hard to find. Finally, it is hard to see why the issue of not declaring assets in tax returns could not be left to the Inland Revenue to deal with. Finally, while disposing the *suo motu* case, the Supreme Court bench headed by Chief Justice Mian Saqib Nisar passed the judgment that taxpayer can avail the remedy of appeal subject to payment of full amount of tax/penalty determined by Deputy Commissioner Inland Revenue. The Supreme Court directed Aleema Khan to immediately deposit the tax of Rs. 29,415,600. The Honourable Court failed to appreciate that under S.127 of the Income Tax Ordinance, 2001[17] there is no such condition for filing an appeal. Further, the proviso of subsection 1 of S.140 of the Income Tax Ordinance 2001 prohibits the commissioner from recovering taxes from persons holding money on behalf of a taxpayer subject to payment of 10% of the tax payable. However, through this judgment the Honourable court created a new law clearly in

[16] Suo motu Case No. 2 of 2018. (*Suo motu action regarding maintaining of Foreign Currency Accounts by Pakistani Citizens without disclosing the same/paying taxes)* (22 June 2018) and Constitution Petition No. 72/2011, *Senator Muhammad Ali Durrani v Government of Pakistan and others*, (22 June 2018) Supreme Court Official Page <http://www.supremecourt. gov.pk/web/user_files/ File/S.M.C._2_ 2 018.pdf> accessed 13 April 2019.

[17] Income Tax Ordinance 2001, s. 127 states that, in order to appeal against an assessment of the Commissioner, the taxpayer must have paid 'The tax payable by a taxpayer on the taxable income of the taxpayer, including the tax payable under section 113 or 113A for a tax year [which] shall be due on the due date for furnishing the taxpayer's return of income for that year' s. 137(1). No mention is made of additional taxes due on the basis of sources other than the tax return,

contradiction to the statute, which is not within the domain of the judiciary.

In the second case, dealing with the huge profits of companies selling bottled water,[18] the Supreme Court created a charge to be collected at the rate of Rs.1/per litre. The same test is to be applied to this particular case as well. In this case the public importance to some extent could be found because usage of water affects the majority of the public. Moreover, the case involved all the water supplying companies so it was non-discriminatory. However, the second limb, protection of fundamental rights, has to be looked upon as well. It is clear that the right of life and the right of dignity protected by Articles 9 and 14 of the Constitution were at stake, because life without water is neither possible nor dignified, [19] but in the case at hand no mention was made in this regard in the decision given by the bench of the Honourable Supreme Court headed by the then Chief Justice of Pakistan, Mian Saqib Nisar. Furthermore, it is argued that the Court did not observe the utmost level of 'care' required by the Dharna test before issuing the Rs.1 charges order. The judiciary in fact doesn't have power under the Constitution to levy any tax or charge.[20] The action of judiciary in policy/tax matters has been criticized by the Honourable Supreme Court in the case of *Elahi Cotton Mills v Federation of Pakistan.*[21] Firstly the Honourable Court said that

[18] *Suo Motu* case No. 26 of 2018 *Regarding selling of Bottled Water extracted from the ground without any charge and its fitness for Human Consumption* (Unpublished) and Civil Misc. Application No. 2710-L of 2018 *For issuance of directions to Nestlé Pakistan* (Unpublished).

[19] In the case *Zafarullah Khan v Federation of Pakistan,* 2018 SCMR 2001, concerning the construction of dams and the exhaustion of water resources in Pakistan, the Supreme Court did mention the violation of Right to Life as no life is possible without water.

[20] Article 77 of The Constitution which says: 'No tax shall be levied for the purposes of the federation except by or under authority of Act of *Majlis-e-Shoora* (Parliament)'.

[21] *Elahi Cotton Mills v Federation of Pakistan* 1997 PTD 1555

Courts while interpreting laws relating to economic activities view the same with greater latitude than the laws relating to civil rights such as freedom of speech, religion etc., keeping in view the complexity of economic problems which do not admit of solution through any doctrinaire or strait jacket formula. Moreover, the court quoted the words of Frankfurter J. in *Morey v. Doud* [22] remarking that

'in the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to the legislative judgment'.[23]

Here the third condition of the *Dharna* test is not met, as orders imposing taxes are clearly better left to the legislature.

The third case is known as the *Fake Bank Accounts* case.[24] This case was of public importance as the personalities involved were the former President Asif Ali Zardari, his sister Faryal Talpur and his son Bilawal Bhutto Zardari who were public office holders. The Honourable Court while giving the judgment identified the fundamental rights of the people of Pakistan as the money looted, plundered, misappropriated or taken out of Pakistan belonged to the National resources and national wealth. Moreover, in this case the people in power were obstructing the investigation therefore the Honourable Supreme Court under Article 184(3) constituted a Joint Investigation Team (JIT) which included officers from different departments having specialized knowledge and skills. On the basis of JIT report which revealed huge money laundering and misappropriation of funds the matter was referred to National Accountability Bureau for further action in accordance with law. In this case the conditions required by the test formulated in the Dharna

[22] *Morey v. Doud* (1957) U.S. 457.
[23] *Morey v. Doud* (n 22) para 31(iii).
[24] *Slackness in the Progress of Pending Enquiries Relating to Fake Bank Accounts etc.* 2019 SCMR 332.

judgement seem to have been met and therefore the use of *suo motu* appears to be justified.

The last case considered in this section is the *Pakistan Kidney and Liver Institute (PKLI)* case.[25] *Suo motu* proceedings were initiated by the then Chief Justice of Pakistan Mian Saqib Nisar on the basis of misappropriation of funds. The Honourable Court imposed ban on the foreign travel of the Chief Executive Dr. Saeed Akhtar and interim Committee was constituted by order of the court to manage and run the affairs of PKLI. However, after the retirement of Chief Justice Mian Saqib Nisar, a review petition was filed against this judgment. The Honourable Supreme Court[26] which consisted of different judges reversed the directions given in the earlier order and the ban on foreign travelling was recalled. Furthermore, the Committee constituted by earlier order of the Supreme Court was disbanded and it was directed that PKLI shall be managed and run in accordance with the provisions of Pakistan Kidney and Liver Institute and Research Centre Act, 2014. The use of *suo motu* in this case fails to meet the criteria of the *Dharna* test: although the matter may seem of public importance and the right to life involved, the orders of the Court were not made after 'every possible care' had been taken. The stepping back of the Court as soon as the Chief Justice changed is an indication that the orders made had overstepped the functions of the competent state institutions.

[25] *Suo Motu action taken by HCJ regarding service structure of Pakistan Kidney and Liver Institute Suo Motu* Case 19 of 2018.
[26] *Suo Motu action taken by HCJ regarding service structure of Pakistan Kidney and Liver Institute* 2019 SCMR 565.

C. *Suo motu*, adversarial system and right to a fair trial

The above mentioned examples reflect a great disparity in the way Article 184(3) of the Constitution has been used. The Honourable Supreme Court in certain cases, despite absence of one of the criteria, did not refrain from initiating *suo motu* proceedings. It is submitted that in *suo motu* actions the normal rules applicable to judicial proceedings change and therefore the scenario becomes altogether different.

A few major discrepancies are that, primarily, Pakistan's judicial system is adversarial, but when *suo motu* action gets involved it turns the system to inquisitorial. In an adversarial system all matters are argued by lawyers and each institution is required to fulfil their particular duties; while on the contrary in inquisitorial proceedings, the judge plays a more active role, giving directions and deciding what evidence is to be brought.[27]

Moreover, the losing party in a *suo motu* case does not have any right of appeal which is apparently not in consonance of Article 10-A which says:

'For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process.'[28]

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[27] Anastasiya Shchepetova, 'Inquisitorial vs. Adversarial system and the Right to be Silent' (Editorial Express, May 2013) <https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=IIOC2013&paper_id=602> accessed 9 April 2019.

[28] The only possibility of redress is to apply for review of judgement according to Article 188 of the Constitution.

In addition, the combined effect of the previous two differences is that in *suo motu* cases the Supreme Court acts as the court of first instance because both matters of facts and law are being discussed. The potential problem which arises is that the Supreme Court is also the last arbiter in Pakistan's Judicial system. Therefore, if a miscarriage of justice takes place in the Supreme Court, the system is incapable of providing means to correct it. The words of Jackson J properly describe the dilemma:

'*We are not final because we are infallible, but we are infallible only because we are final.*'[29]

Finally, in a country like Pakistan where thousands of cases are pending in the Supreme Court,[30] a single case which just gains media attention is heard by the chief justice and decided on urgent basis and this creates discrimination against those who are contesting their cases through regular channels. A comparison in this regard can be drawn between the Zainab's rape/murder case[31] and the hundreds of other rape cases which are pending at different fora where aggrieved parties are still waiting for justice. Such discrimination discredits the institutions involved in this process. In addition to this, it may create a trend where direct access to Supreme Court by making complaints to its Human Rights wing become the preferred mode of obtaining justice.

[29] *Brown v Allen* 344 U.S. 443 (1952) 540 (Jackson, J., concurring in result).
[30] Almost 38,539 cases are pending only in Supreme Court, 293,947 cases pending in five high Courts and 1,869,886 cases in the subordinate judiciary: Malik Asad, Over 1.8 million cases pending in Pakistan's courts (*The Dawn,* 21 January 2018) < https://www.dawn.com/news/1384319 > Accessed on 15 April 2019.
[31] *Imran Ali v State* 2018 SCMR 1372.

D. Advantages of *suo motu*

Despite the above mentioned drawback the *suo motu* power is not an evil thing in itself. If this power is exercised sparingly and only in those cases where there is an issue of public importance which is affecting fundamental rights and the objective is improvement of institutions or restricting the interference of institutions in the jurisdiction of each other, then such decisions can have a positive impact in improvement of governance.

Examples in this regard would be the *Dharna*[32], *Asghar Khan*[33] and *Bahria Town*[34] cases in which the executive was either reluctant or unable to take action in accordance with law. This would justify the use of *suo motu* because the unwillingness or incapacity of the competent state organ to deal effectively with the situation, allowed the court to issue orders after 'every possible care' was taken. Similarly in the above mentioned case of *Fake Bank Accounts*[35] during the course of hearing embezzlement of billions of Rupees was unearthed by JIT and the Supreme Court rightly referred the case to National Accountability Bureau (NAB) for further inquiry.

[32] *The Dharna Case* (n 8).
[33] *Air Marshal (Retd.) Muhammad Asghar Khan v General (Retd.) Mirza Aslam Baig & others* PLD 2013 Supreme Court 1.
[34] *Bahria Town v Government of the Punjab* 2018 SCMR 1864.
[35] *Morey v. Doud* (n 22) para 31(iii).

E. Recommendations to improve efficacy of *suo motu* actions

Although the Dharna judgement has clarified the criteria for the use of *suo motu*, it is submitted that some further requirements could be added to ensure a more appropriate use of this powerful instrument. On the basis of the cases discussed above and the relevant provisions of the constitution it is recommended that:

To avoid excessive personification of justice, the power should be exercisable by the Supreme Court as a whole and not the Chief Justice only.[36]

The court should avoid taking the functions of Legislature and the Executive in their hands, unless, it is apparent that the other powers of the state are either incapable or unwilling to effectively act to redress the situation. Solicitor General, later Justice, Robert H. Jackson, said that:

'the rule of law is in unsafe hands when courts cease to function as courts and become organs for control of policy.'[37]

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[36] For this to be an effective remedy to arbitrary use of *suo motu*, a culture of dissenting views should also be introduced in the courts. *See*: Hassan Niazi, *The Lahore High Court of the Future*, 9 Pakistan Law Review (2018) 179-197, 189. The situation should not be such that all judges agree with the person heading the bench; rather if the judges disagree on some point it should be seen as a sign of health of the legal system. There have been several instances in different jurisdictions around the world where a dissenting view has later on been adopted as the applicable law: *e.g.*, *Abrams v United States*, 250 U.S. 616 (1919) judgement of Justice Oliver Holmes, *Scorsch Meier GMBH v A. R. Hennin*, judgement of Lord Denning MR (1975) 1 Lloyd's Rep. 1.

[37] Robert Houghwout Jackson, *The Struggle for Judicial Supremacy* (New York: Knopf 1941) 322.

This clearly indicates that the courts should not become organs for control of policy and should not interfere with the powers of other pillars of the state. When the *suo motu* power is being used to such disproportionate extents as witnessed in the recent past, it becomes legitimate to call for this power to be more regulated. This was also the opinion of Justice Qazi Faez Isa when he was removed from the panel of a case hearing which particularly concerned the issue of infectious waste disposal of hospitals in the province of Khyber Pakhtunkhwa because he directed that Art. 184(3) should be read in open court. Agreeing with the opinion of Qazi Faez Isa, Justice Mansoor Ali Shah (Ex-Chief Justice Lahore High Court) in a recent order gave a detailed background and opinion regarding the same matter.[38] These examples clearly show that the courts are allowed to work under limitations and are not allowed to overtake the roles of other two limbs of the structure of the state, the legislature and the executive. As Lord Acton stated that 'power corrupts and absolute power corrupts absolutely',[39] the same can happen with the power of initiating *suo motu* proceedings. If this power is not regulated, then any holder of such power might be tempted to misuse it and it would eventually lead to miscarriage of justice. The following quote from Montesqieu's book 'The Spirit of the Laws' is illuminating:

'Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to the arbitrary control, for the judge would then be the legislator. Were it joined with to the executive power, the judge might behave with all

[38] HRC No. 14959-K/2018 (n 6).

[39] Letter to Bishop Mandell Creighton, April 5, 1887 in John Emerich Edward Dalberg (Lord Acton), Historical Essays and Studies, edited by J. N. Figgis and R. V. Laurence (London: Macmillan, 1907) <https://oll.libertyfund.org/titles/acton-historical-essays-and-studies> accessed 12 April 2019.

the violence of an oppressor. There would be an end to everything, were the same man, or the same body, whether of nobles or of the people, to exercise those three powers, that of enacting the laws, that of executing public resolutions and that of judging the crimes and differences of individuals.'[40]

Finally, it is recommended that a right of appeal should be provided against the judgment in a *suo motu* case to fulfil the requirements of due process of law as provided under Article 10A of the Constitution.

Conclusion

On the basis of above discussion, we can conclude that excessive use of the powers under Article 184(3) of the Constitution commonly known as *suo motu* is comparatively a recent phenomenon. The power in itself has got both advantages and disadvantages, like any other power that is created by a legal system. If used sparingly, using 'every possible care' before an order is made and after deciding the jurisdiction on the basis of two ingredients i.e. public importance and fundamental rights, it can produce better results for improvement of overall governance. However, if this power is not regulated and the judiciary exercises this power without considering the basic ingredients of Article 184(3) and the sound invitation to self-restraint of the Dharna judgement, then it can lead to concentration of legislative and executive power in the hands of the superior judiciary, which is not only against the spirit of the Separation of Power under the Constitution but would also lead to miscarriage of justice. In order

[40] Montesquieu (n 1) 181.

to avoid these consequences, it is recommended that the power of *suo motu* should be regulated by the Honourable Supreme Court and a forum of appeal should be provided to the aggrieved party in order to meet the requirements of fair trial under Article 10A of the Constitution.

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