

***Suo Motu* Action: The Search for an Elusive Criteria**

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Abstract

Suo motu is used as a device by the Supreme Court of Pakistan to intervene in matters of public importance that include a violation of fundamental human rights. However, the wording of Article 184(3) enables the Supreme Court to meddle in matters which may not reflect the intent for which the power of suo motu was created. The article expounds on the criteria laid out by the Supreme Court regarding suo motu in light of various case laws. It is argued that the restraint put on suo motu actions is insufficient to ensure that the actions taken are pertinent to the issues concerning public importance and fundamental human rights and do not invade the constitutional domain of the Executive and the Legislature. It seems as if there is no restriction on what may fall within these two limbs of suo motu. The third limb introduced by the Dharna judgment is also discussed, and it is argued that the judgement does little to restrict the apex Court's discretion in the use of suo motu powers. This is shown in the Supreme Court's recent failure to exercise moderation. The latter part explores the external factors which affect the application of Article 184(3) and how the Constitution itself authorises the Supreme Court to fill the power vacuum created due to administrative inefficiencies and unceasing political crises that handicap the system. The article also notes the role the media play in the functioning of suo motu.

Introduction

The Constitution of Pakistan¹ contains a provision, Article 184(3), which confers upon the Supreme Court of Pakistan the power to take actions of its own initiative on matters which it considers to be a question of public importance with relevance to the enforcement of the fundamental rights enshrined in the Constitution. This is known as the *suo motu* action.² It is a frequently used tool by the Supreme Court.³ The tool comes with its fair share of controversy, as it seems that the unbridled power provided by *suo motu* to protect the public interest enables the Supreme Court to do away with the need for a rigorous criterion for taking *suo motu* actions. Maryam Khan, in her study on public interest litigations (PIL) in Pakistan,⁴ has highlighted how, over the years, the apex Court has used the provision to justify taking actions in matters which would otherwise belong to the province of ‘policy’ and ‘politics’.⁵ There seem to be no clear limits with regards to taking *suo motu* actions in the highest echelons of Pakistan’s judiciary.⁶ Such unfettered discretion appears to threaten

¹ Constitution of the Islamic Republic of Pakistan 1973 (hereinafter referred to as ‘the Constitution’),

² See US Legal, *Suo Moto Definition*, <<https://definitions.uslegal.com/s/suo-moto/>> accessed on 12 Dec 2019 (*Suo motu* is Latin for ‘on its own motion’. It is used in situations where a government or court official acts of its own initiative, without being moved by a party to a case).

³ See Reema Omer et. al., ‘Authority Without Comparison: The Search for Justice in Pakistan’, International Commission of Jurists (2013) <<https://www.refworld.org/pdfid/530f088d4.pdf>> accessed on 12 Dec 2019.

⁴ Maryam S. Khan, ‘Genesis and Evolution of Public Interest Litigation in the Supreme Court of Pakistan: Towards a Dynamic Theory of Judicialization’ (2014) 28(2) Temple International and Comparative Law Journal 284.

⁵ *Ibid.*, at 285-287.

⁶ See Hasnaat Malik, ‘CJP designate Khosa to sparingly use *suo motu* powers’ *Express Tribune* (17 Jan 2019) <<https://tribune.com.pk/story/1890391/1-will-rarely-use-suo-motu-notice-cjp-designate-khosa/>> accessed 13 Dec 2019; see also Salman Masood, ‘Court Takes an Activist Role

the institutional structure of Pakistan which is based on the separation of power among the three pillars of the state: the legislature, the executive and the judiciary. This article intends to provide an account of *suo motu* in Pakistan in light of the actions that have been taken by invoking Article 184(3) to show that the criteria laid out by the Supreme Court is insufficient and confer on the judiciary too wide a discretion in the use of *suo motu*.

The research is divided into three parts: The first part will consider how the use of *suo motu* is legally justified in the jurisprudence of the Supreme Court. It will first explain how the Court excluded the need for any *locus standi* requirement for actions under Article 184(3). After that, the wording of Article 184(3) and the recent *Dharna* judgement will be analysed to show that the discretion of the Court is far reaching. The wording of Article 184(3) provides a wide scope for invoking the *suo motu* action and, over the years, little has been done by the Apex Court to restrict its ambit. In line with previous research on the topic,⁷ it is argued that this unlimited discretion of the Supreme Court is a direct result of institutional inefficiency and how

in Pakistan. Not Everyone Sees It as Just, *New York Times* (11 Feb 2018) <<https://www.nytimes.com/2018/02/11/world/asia/pakistan-military-supreme-court-mian-saqib-nisar.html>> accessed on 13 Dec 2018 (For the stark contrast between the restraint in the use of *suo motu* shown by former Chief Justice of Pakistan, Asif Saeed Khan Khosa compared to the activist stance of his predecessor, former Chief Justice of Pakistan, Mian Saqib Nisar).

⁷ See Tasneem Kausar, 'Judicialization of Politics and Governance in Pakistan: Constitutional and Political Challenges and the Role of the Chaudhry Court' in Ashutosh Misra & Michael E. Clarke (eds) *Pakistan's Stability Paradox: Domestic, Regional and International Dimensions* (1st edn, Routledge 2011) 28; Moeen H. Cheema, 'Two Steps Forward One Step Back: The Non-Linear Expansion of Judicial Power in Pakistan (2018) *International Journal of Constitutional Law* 503; Maryam Khan (n 4).

this power vacuum has allowed the Court to extend its influence onto domains that are more political than purely judicial.⁸

The second part will discuss the factors which influence *suo motu* that go beyond the wording of Article 184(3). It will be shown that, in a complex modern society, there is no limit to what can affect the ‘public interest’ or become a source of violation of fundamental rights. This creates new opportunities for the Court to expand its reach. Also, it is not just the wording itself or the power vacuum created by the other institutions of the State but also the ever-increasing influence of media reports which augment the scope of Article 184(3). The third part will offer a possible explanation on the confines of power awarded to the Supreme Court’s power by the Constitution, while suggesting that further research is needed to ascertain whether unfettered judicial discretion does more harm than the good it is meant to achieve.

A. Defining the Constitutional Ambit of *Suo Motu*

The Supreme Court of Pakistan has both original⁹ as well as appellate¹⁰ jurisdiction. Under its original jurisdiction, the Court can take cognisance ‘on its own motion’ of matters coming within the ambit of Article 184(3) which reads as follows:

The Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any fundamental rights conferred by Chapter-1 of Part-II is involved, have the power to

⁸ Ibid., at 43.

⁹ Constitution of Pakistan, Article 184.

¹⁰ Ibid., Article 185.

make an order of the nature mentioned in the said Article(199).¹¹

This provision allows the Supreme Court to take cognisance of matters involving questions of ‘public interest with reference to the enforcement of fundamental rights’, as enshrined in the Constitution. In addition to a petition by an aggrieved party, or by someone with ‘sufficient interest’, the Supreme Court of Pakistan may also take actions *suo motu*, i.e. on its own initiative.

Therefore, *suo motu* is a legal instrument that does away with the requirement of a formal application being made by an aggrieved party. This development was grounded in a relaxation of the requirement of *locus standi*, which entailed that only a party with a sufficient interest in the matter may petition the Court. Pursuant to this, now an application may be made to the Supreme Court even if the applicant itself has not suffered a direct harm.¹²

Suo motu is essentially a device that allows the Court to intervene in matters which include violations of fundamental rights and possibly where the injured party would not be able to get a remedy through the normal process of law due to various factors.¹³ For example, in the *Mukhtaran Mai case*, the Supreme Court took an action based on its observations of the accused’s political influences.¹⁴ In *Benazir Bhutto v Federation of Pakistan*¹⁵, the Court ruled that:

¹¹ Ibid., Article 184(3).

¹² Ibid.

¹³ See Basil Nabi Malik, ‘A *Suo motu* Court’, Daily Times <<https://dailytimes.com.pk/176952/suo-motu-court/>>

¹⁴ Ibid.

¹⁵ *Benazir Bhutto v Federation of Pakistan* PLD 1988 SC 416, at 491.

If the framers of the Constitution had intended the proceedings for the enforcement of the Fundamental Rights to be in a strait jacket, then they would have said so, but not having done that, I would not read any constraint in it. Article 184(3) therefore, provides abundant scope for the enforcement of the Fundamental Rights of an individual or a group or class of persons in the event of their infraction. It would be for the Supreme Court to lay down the contours generally in order to regulate the proceedings of group or class of actions from case to case.

The words ‘if it [the Supreme Court of Pakistan] considers’ and ‘have the power to make an order of the nature mentioned in the article’, signify an almost unbridled discretion that the Court has to decide if and when to take *suo motu* action on a matter of ‘public importance with reference to the enforcement of ...fundamental rights’. As a result of that discretion, the jurisdiction of Article 184(3) is undefined and prone to multiple interpretations and use. This is clearly shown in the path of progressive self-legitimation the Supreme Court has followed in construing the limitations on the use of the power granted by Article 184(3), discussed next

1. Self-Legitimation

Before discussing the criteria laid out by the Supreme Court it would be pertinent to discuss the case which led to the self-legitimation of the Apex Court, thereby ruling out any possibility of the requirement of a *locus standi* in such cases. *Locus standi* is a principle of common law jurisdictions according to which a personal stake of the applicant is required for the Court to be allowed to hear a case.¹⁶ However, in Pakistan the relaxation of the requirement of

¹⁶ See *Baker v Carr* 369 US 186, 204 (1962).

locus standi allowed the Supreme Court to take cognisance of any matter it deems to fall under Article 184(3). This relaxation first happened in the case of *Benazir Bhutto v Federation of Pakistan*,¹⁷ where the Court considered the question of whether Benazir Bhutto was an ‘aggrieved party’, with the necessary *locus standi*. The court laboured upon the question of whether Article 184(3) requires the petitioner to be an ‘aggrieved party’ in the first place. The Court argued that ‘[w]hile construing Article 184(3), the interpretative approach should not be ceremonious observance of the rules or usages of interpretation’ and that ‘access to justice to all...is pivotal in advancing the national hopes and aspirations of the people...’¹⁸ It further held that:

This approach is in tune with the era of progress and is meant to establish that the Constitution is not merely an imprisonment of the past, but is also alive to the unfolding of the future. It would thus, be futile to insist on ceremonious interpretative approach to constitutional interpretations as hitherto undertaken which only served to limit the controversies between the State and the individual without extending the benefits of the liberties and the Principles of Policy to all the segments of the population.

Resultantly, this marked the beginning of the self-legitimation of the Apex Court, as it sought to rid itself of the requirement of *locus standi*. This paved the way for the court to expand its powers. Now, the Court was no longer an unbiased adjudicator of the facts brought forward in the proceedings before it. Instead, it took upon itself a more inquisitive role. This expanded role allowed the courts to intervene in issues which would otherwise be

¹⁷ PLD 1988 SC 416.

¹⁸ *Ibid.*, at 419.

considered as ‘policy’ matters, in the garb of protecting constitutionally guaranteed fundamental rights.¹⁹

This process of self-legitimation continued in successive cases. It was held in *Ch Manzoor Elahi vs Federation of Pakistan*²⁰ that the Supreme Court itself has the authority to determine its own jurisdiction in matters involving fundamental rights. Even in situations where the Parliament provides an ‘ouster clause’, expressed in clear terms, the Court will have the ultimate jurisdiction to interpret the law as it deems fit. Consequently, a situation involving a violation of fundamental rights will likely become the subject of the Supreme Court’s *suo motu* action. This is because the *suo motu* action has become an essential part of the Court’s larger jurisdiction under Article 184(3). This is so notwithstanding the lack of a coherent, rigorous criterion for invoking the original jurisdiction through *suo motu*. Indeed, one would venture to say that the Court itself is the criterion.

In the same case, the power of the Court was extended, not only subject matter wise, but also territorially. The state had resisted the Court’s jurisdiction on the ground that Article 247 (7) of the Constitution barred the exercise of the Supreme Court’s jurisdiction with respect to Tribal Areas. Salahuddin J. held that:

The words ‘in relation to a Tribal Area’ under Article 247(7) of the present Constitution are not comprehensive enough to include the contravention of a Fundamental Rights in respect of a person residing outside a Tribal Area, arrested outside the area and not subject to tribal usage or custom.²¹

¹⁹ Maryam Khan (n 4)

²⁰ PLD 1975 SC 66.

²¹ *Ibid.*, at 78.

Hence, the Supreme Court used its inherent powers provided by Article 184(3), to bypass the legal technicalities and cater for the needs of justice, which otherwise would have legitimised an abrasive abuse of state authority that would have resulted in violation of the fundamental rights of a Pakistani Citizen.²²

The next section shall explore the jurisprudence of the Supreme Court to search for a definite criterion on the use of the *suo motu* powers under Article 184(3).

2. *Suo motu* Criteria as Interpreted by the Supreme Court

This section shall expound on the two-limb test provided by Article 184(3) of the Constitution. The recent advancement under *Dharna* Judgment will also be discussed to show that despite the claims of it being a significant development regarding the criteria of *suo motu*, the judgment does little to restrict the ambit of the discretion that Article 184(3) confers on the Supreme Court.

2.1 Public Importance

Attempts to define the threshold of public importance can be traced back to *Manzoor Elahi v Federation of Pakistan*,²³ where Justice Anwar ul Haq held that:

In order to acquire public importance, the case must obviously raise a question which is of interest to, or effects, the whole body of people or an entire community. In other words, the case must be such as gives rise to questions affecting the legal rights or liabilities of the public or the community at large, even

²² S.R Rizvi, *Constitutional Law of Pakistan: Texts, Case Law and Analytical Commentary*, Volume 1 (Vanguard, 2002) 785-861.

²³ PLD 1975 SC 66.

though the individual, who is the subject matter of the case, may be of no particular consequences.

In *Benazir Bhutto vs. Federation of Pakistan*, the Supreme Court also held that:²⁴

Having regard to the connotation of the word ‘public importance’ it will be for the Supreme Court to consider in each case whether the element of ‘public importance’ is involved in the enforcement of the Fundamental Rights irrespective of the individual’s violation or the infractions of a group or a class of persons.²⁵

The definition of public importance in both these cases seems arbitrary. The *Manzoor Elahi* case only states that public importance means that the matter must affect the community at large. Questions as to what extent, or how, it must be affecting the community still remain unanswered. The latter case leaves the matter to the discretion of the Court to be decided on a case to case basis.

2.2 Fundamental Human Rights

Since the fundamental rights of Pakistani Citizens recognised by Chapter 1, Part II of the Constitution embrace almost all dimensions of human life, there are no theoretical limits to what can be a source of violation of these fundamental rights. This implies that the criteria upon which *suo motu* actions are taken may be defined by whatever the Chief Justice of the Supreme Court considers as a question of public importance, involving issues of fundamental rights. The era of the Chaudhry Court²⁶ is a perfect example of this. Maryam

²⁴ PLD 1988 SC 416.

²⁵ *Ibid.*, at 492

²⁶ M. H. Cheema & I. S. Gilani, *The Politics and Jurisprudence of the Chaudhry Court* 2005-13 (OUP 2015)

S. Khan has helpfully categorised the PIL cases of the Chaudhry Court's era into four categories: human rights, policy reform, environmental and land regulation and legislative override.²⁷ With regard to the first category, the Court mobilised *suo motu* action. The 'Human Rights Cell' was set up to take special notice of newsworthy violations of human rights.²⁸

The human rights cases primarily involved the issue of 'missing persons'. Following media reports and articles published in newspapers, the Supreme Court ordered the Government to either produce the detainees or provide information about their whereabouts. The *suo motu* intervention invited a flood of petitions, and in less than a year about 186 persons were traced from the list of 458 missing persons cases pending before the court at the time. These persons were either released or transported to known detention centres.²⁹

In the 'policy reform' cases the Court sought to articulate a regulatory framework in situations where the problem would persist due to systematic policy failure.³⁰

While dealing with issues pertaining to land use and environmental regulation, the Court invoked various fundamental rights to restrain the government from taking on development projects that were hazardous for the environment. In *Suo motu Case No. 10 of 2005*,³¹ the potential threat to large areas of a reserve forest, resulting

²⁷ Maryam Khan (n 4).

²⁸ Zeeshan Zafar Hashmi, 'Unconstitutional Constitutional Amendments or Amending the Unamendable? A Critique of the District Bar Association Rawalpindi v Federation of Pakistan' (2018) Pakistan Law Review 1, 37.

²⁹ Maryam Khan (n 4) at 324.

³⁰ Ibid.

³¹ (2010) SCMR 361.

from a government-sponsored tourist development project, were considered by the Court.³²

The fourth category sought to impose bans on social activities that were a threat to citizens' wellbeing and violated the exiting law. In *Suo motu Case No. 11 of 2005*,³³ the Court took cognisance of the lack of regulation of kite-flying activities allegedly resulting in deaths and damage to property.³⁴

However, given the development in fundamental rights jurisprudence and the effective check that the superior judiciary's intervention has placed upon the abuse of executive power, the Supreme Court does not seem to require a specific criterion when it comes to *suo motu* action.

These are only some of the prime examples that allow us to comprehend the nature of the evolution of judicial power in the constitutional structure of Pakistan. These cases form the groundwork for 'judicial activism' in later years and increased use of *suo motu* action. The threshold for summoning the Court's original jurisdiction under Article 184(3) was ambiguously defined in the aforementioned cases. It allowed the Supreme Court to use Article 184(3) with very wide discretion.

2.3 The *Dharna* Judgement

The situation of the *suo motu* criteria seemed to have changed with the *Dharna case*³⁵ where Justice Qazi Faez Isa held that: '[e]very possible care should be taken before making an order under Article

³² *Ibid.*, at 363.

³³ PLD 2006 SC 1

³⁴ *Ibid.*, at 4-5.

³⁵ *Suo motu* action regarding Islamabad Rawalipindi Sit-in/Dharna PLD 2019 Court 318.

184(3) since there is no right to appeal in such an order.³⁶ The words ‘every possible cares should be taken before making an order’ are suggestive of a restriction in the ambit of *suo motu* by adding a third criterion to the test. It has been interpreted that, along with ensuring that the matter is of public importance with relevance to the enforcement of fundamental rights, the Court might now need to establish that the organ of the state which is supposed to deal with the issue is either unable reluctant to act.³⁷ This interpretation does not seem to be the most plausible one of the words of the Court, since the words ‘every possible care’ provide a wide ambit for what may or may not satisfy this limb. While they may sound as a generic appeal to judicial self-restraint, the words of the *Dharna* judgement still leave the court with ample freedom of choice, making the *Dharna* judgement a mere step in the direction of limiting *suo motu*, rather than a significant change. There seems to be an implicit acceptance of the Court’s unlimited latent discretion provided by the Constitution itself.

To conclude, it seems that the Supreme Court has been faithful to the two main limbs of Article 184(3) i.e. public importance and fundamental human rights. However, it has failed to add any additional requirement to the criteria which may suggest when the Court must intervene to exercise an intrusive power like *suo motu*.

³⁶ Ibid., at paragraph 10

³⁷ Muhammad Nauman Khan, ‘Judicial Use of *Suo motu* Powers after the Dharna Judgement: The Thin Line between Activism and Overreach’ (2019) PCL Student Journal of Law Vol. 3 Issue 1, 1, 3.

B. Beyond the Basic Threshold Requirement

This section shall explore the various factors which affect the scope and jurisdiction of Article 184(3) that go beyond the wording of the Article. This includes the various circumstances in which the Supreme Court finds itself while taking a *suo motu* action.

1. Legal Systems Abhor Power Vacuum

The unceasing political crisis in Pakistan has led to a serious ‘credibility deficit’³⁸ in the system. This situation worsens when government wishes to sidestep these issues.³⁹ This creates a power vacuum due to be filled. It has always been easier for non-political forces in the country to fill this power vacuum. The ‘non-political force’ which did this has traditionally been the military, but it now also includes the upper echelon of the judiciary. Zaki Rehman, in his article on Saqib Nisar’s era⁴⁰ put it as follows:

If the executive branch of the government was too incompetent or short sighted or corrupt to make and implement policies for the uplift of the people, the Supreme Court would fill the vacuum. Similarly, if the legislature was indifferent or too caught up in other matters to effectively legislate to protect the

³⁸ Tasneem Kausar, ‘Judicialisation of Politics and Governance: Constitutional and Political Challenges and the role of the Chaudary Court’ in Ashutosh Misra & Michael E. Clarke, eds., *Pakistan’s Stability Paradox: Domestic, Regional and International Dimensions* (1st edn, Routledge 2011) 41.

³⁹ *Ibid.*, at 43.

⁴⁰ Zaki Rehman, ‘Saqib Nisar: Between protecting fundamental rights and unwarranted interventions’, *Dawn* <<https://www.dawn.com/news/1460569/saqib-nisar-between-protecting-fundamental-rights-and-unwarranted-interventions>> accessed 13 Dec 2019.

fundamental rights of citizens, the Supreme Court would be more than happy to step in.

However, given that the Supreme Court must inevitably choose when to intervene, it exposes itself to all sort of influences, not least the influence of the media.

2. Power Beyond Traditional Powers: Media Influence

The apex Courts of Pakistan has been known to act upon news reports, articles, and letters from aggrieved or concerned citizens. Fifteen major *suo motu* petitions that arose during 2005-2007, under the Supreme Court's original jurisdiction, were a result of the Court's response to media reports.⁴¹ The media reports regarding human rights violations and abuse of public authority were taken up *suo motu* by the Court, and in turn the Court's actions were reported by the media. Occasionally, a member of the civil society would approach the Court with a letter containing complaints and incidents of illegality and abuse, and in the process would invoke the Court's 'epistolary jurisdiction'.⁴²

This increased the possibility of access to courts for victims who were otherwise reluctant to approach the legal system, generating a public perception of the Court as a 'paternalistic figure', rather than an apolitical legal authority. This risks undermining the general operation of the law. Marc Galanter argues that the *suo motu* is not only a deviance from the established norm, but also dramatises the role of the apex Court and the remedy it provides through such means.⁴³ He terms it as the 'Cinderella law', whereby the Court

⁴¹ Maryam Khan (n 4).

⁴² Cheema (n 7).

⁴³ Marc Galanter, & Vasujith Ram 'Suo motu Intervention and the Indian Judiciary' in G. Rosenberg, et al (eds.) *Qualified Hope: The Indian Supreme Court and Progressive Social Change* (CUP, 2019) 92.

appears as a magical fairy to right all the wrongs in this world.⁴⁴ He further argues that there are limitations on how much the Supreme Court can be cognisant of what actually happened on the ground in the relevant case, as opposed to the awareness that a local court would have regarding the situation.⁴⁵

C. Is the Supreme Court the Legal Sovereign?

The Supreme Court, in its various judgments has recognised the Constitution as the ultimate authority in Pakistan since 'it manifests the will of the people.'⁴⁶ In *The State vs. Zia ur Rehman and others*,⁴⁷ it was held that:

The Supreme Court has never claimed to be above the Constitution, nor to have the right to strike down any provision of the Constitution. It has accepted the position that it is a creature of the Constitution; that it derives its powers and jurisdictions from the Constitution; and that it will even confine itself within the limits set by the Constitution

However it seems that the Constitution itself wanted the judiciary to be the most powerful institution of the State.⁴⁸ A. K. Brohi in his book *The Fundamental Law of Pakistan*, states the following:

⁴⁴ Ibid., at 113.

⁴⁵ Ibid., at 117.

⁴⁶ *Muhammad Azhar Siddiqui v Federation of Pakistan* PLD 2012 SC 774, 834, at paragraph 2 (Justice Jawwad S. Khawaja)

⁴⁷ *The State v Zia Ur Rehman and Others* PLD 1973 SC 49 at paragraph 69.

⁴⁸ Hashmi (n 28) at 5.

The Government thus established by the Constitution may well be described as a Government by Judges. The powers of the executive and the legislature, as even of the judiciary, being themselves the creatures of the Constitution, must operate within the spheres of their allotted jurisdiction. The authority of the Constitution being superior to the judgment of the authorities it creates, the organ of the sovereign power which is authorised to in a qualified sense at least, becomes superior to other organs and authorities⁴⁹

Therefore, if nothing else, the words of Article 184(3) are enough to make the Supreme Court of Pakistan the 'legal sovereign', because the law is what the Court interprets it to be. As the guardian of the Constitution, the Supreme Court has been given a free hand by the Constitution itself in matters of 'public importance with reference to the enforcement of any of Fundamental Rights conferred by Chapter-1 of Part-II', and the Court will have 'the power to make an order of the nature mentioned in the said Article'. The use of *suo motu* is just a part of the wider discretion that the Court has when it comes to invoking its original jurisdiction under Article 184(3). The fact that there is no strict criterion when it comes to taking *suo motu* action, is something which is provided for by the Constitution itself. It is the Constitution itself that recognises the Court as the legal sovereign. In view of the same, the Court interprets the Constitution in a manner that renders it the ultimate legal authority in the country.

However, the concept of 'sovereignty' has a direct link to the concept of 'power'. Power cannot exist in a vacuum. As stated above the judiciary has used *suo motu* as an instrument to establish its role in the struggle for power. The Supreme Court of Pakistan has been

⁴⁹ Allah Bakhsh K. Brohi, *Fundamental Law of Pakistan* (Din Muhammadi Press 1958) 39.

hailed as the legal sovereign because the Parliament has failed to prove itself to be a capable legal-political authority in the country. Whether the Supreme Court should or should not yield this ultimate legal power is beyond the subject matter of this paper. What we can discern from this discussion of the ‘ultimate legal power’ is that the Supreme Court has an almost unfettered discretion, constitutionally sanctioned, to take *suo motu* action without being bound by a rigorous criterion.

Conclusion

On the basis of the above discussion, it can be concluded that Article 184(3) is a general statement of law, defining the original jurisdiction of the Supreme Court. It is up to the Court to decide the manner in which it will invoke its inherent authority. Perhaps, it is the Constitution itself that allowed the Court the power to take all the necessary measures to protect the fundamental rights of the citizens, as enshrined in the Constitution.⁵⁰ The problem arises when the Supreme Court of Pakistan is seen to interfere in matters that are purely political in nature. As a matter of fact, if it is up to the Court to define its jurisdiction, even though by doing so in matters of political controversy, it might end up destroying the very thing it seeks to protect.

To summarise, beyond the basic threshold requirements, i.e. question of public interest and violations of fundamental rights, the Constitution is silent as to how the apex Court is to exercise its inherent powers. As the guardian of the Constitution, the Court has the innate power to interpret the Constitution however it deems fit.

⁵⁰ Constitution of Pakistan, Part II, Chapter 1.

Therefore, the Constitution is what the Supreme Court says it is. *Suo motu* is only one of the ways through which the Court can invoke its inherent jurisdiction under Article 184(3). It provides the Court with much needed flexibility in a legal, administrative and political system which is perceived to be dysfunctional.⁵¹

Consequently, the criteria of *suo motu* is, essentially, a matter of subjective comprehension by the Chief Justice of the Supreme Court. It may not be easy to accept that something that has such far reaching implications for the politico-legal structure of the country, is based upon such fragile theoretical grounds. On the other hand, the search for certainty might prevent the apex Court from achieving the purpose of its institutional existence.

It remains to be seen if the Supreme Court of Pakistan, given the socio-political realities of the country, really requires an unhindered power to take *suo motu* cognisance of matters in order to fulfil its constitutionally determined objectives – that is, whether the reluctance to clearly define the boundaries of *suo motu* actions is justified by the flexibility the apex court needs to perform its constitutional role of ‘judicial governance’⁵² – or whether the opposite is true, that by failing to clearly limit the scope of *suo motu* the Court betrays its constitutional role. An interesting line of research, which shall form the subject of a separate article, would be to analyse whether the Constitution really endows the Supreme Court with unfettered discretion on the use of *suo motu*, since the lack of a clear criterion may be not conducive to the achievement of the very aims the drafters of the Constitution had in mind. The whimsical use of *suo motu* action witnessed in the recent past may undermine the

⁵¹ Ilhan Niaz, ‘Advising the State: Bureaucratic Leadership and the Crisis of Governance in Pakistan, 1952 – 2000’ (2011) 21(1) Journal of the Royal Asiatic Society 41-53.

⁵² Brohi (n 49).

credibility of the Supreme Court and with it, that of the entire judiciary. This decrease in the legitimacy of the judiciary is something that no legal system can afford, since courts have nothing but their own legitimacy to justify their role and function.⁵³

⁵³James May and Erin Day, 'Human Dignity and Environmental Outcomes in Pakistan' (2019) 10 Pakistan Law Review 1, 23-24.

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