



RESEARCH PAPER

**Judicious Interpretative Paradigm for Exercising PIL Jurisdiction: A
Critical Appraisal of Jurists Foundation Case 2020**

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ABSTRACT

Public Interest Litigation (PIL) is judicial review based constitutional adjudication for the enforcement of fundamental rights. Of course such jurisdiction is not expressly provided in the Constitution of Islamic Republic of Pakistan, 1973 (Constitution, 1973). It is rather implicit and discretionary jurisdiction under Article 184 (3) of the Constitution, 1973 (Article 184 (3)). However, such jurisdiction is required to be exercised within the constitutional parameters and judicial jurisprudence as developed in *Benazir Bhutto v. Federation of Pakistan* (*Benazir Bhutto*, 1988). The decision in this case proved to be the first leading PIL judgement in judicial history of Pakistan. Subsequent to *Benazir Bhutto* (1988), Supreme Court of Pakistan (Supreme Court) has exercised PIL jurisdiction in a number of cases. Yet, exercising of PIL is alleged for certain problems which are because of judicial overreach and self-restraint. Of course, in some cases Supreme Court exercised the judicious interpretative approach while exercising PIL jurisdiction. Among others, the judgement in *Jurists Foundation v. Federal Government* (*Jurists Foundation*, 2020) has emerged as a classical paradigm of such approach. The judicial review power as exercised by the Supreme Court was neither suffering overreach nor passivism. Rather it was a balanced interpretative approach of judicious nature avoiding the problems usually arising from exercising of PIL jurisdiction.

Introduction

PIL is basically the constitutional adjudication for the enforcement of fundamental rights in the Islamic Republic of Pakistan (Pakistan) (Kang, 2009, p. 327). PIL jurisdiction, however, is not explicit in the provisions of the Constitution 1973. It is rather implicit and discretionary jurisdiction based on certain constitutional parameters including constitutionality and constitutional limitations (Ali, 2020, pp. 178, 244), and developed through judicial jurisprudence (Ali, 2020, p.

317). PIL indeed, is the judicial jurisdiction exercised by the Supreme Court in its original jurisdiction under Article 184 (3) of the Constitution, 1973.

The provisions of Article 184(3) of empower the Supreme Court to protect fundamental rights of public importance. Though these provisions are in the adversarial context of the judicial system of the country, the Supreme Court has developed its inquisitorial version through the proactive interpretative approach of the constitutional and other legal provisions. Historically, it expanded the scope of fundamental rights, and relaxed the legal procedures in *Benazir Bhutto* (1988), and thus developed the concept of PIL, and exercised the same for the enforcement of the fundamental rights in a number of cases including *Benazir Bhutto*, 1988.

PIL has rapidly emerged either in the form of Constitutional petitions or *Suo Motu* notices or Human Rights applications. Such jurisdiction, however, has been commonly exercised within the constitutional provisions of Article 184(3). The Constitutional petitions as a source for PIL have emerged either through PIL petitions brought to the Supreme Court so far, or the petitions though not described as PIL, the judgments delivered therein have made them as PIL (Cheema & Gilani, 2015, p. 83).

The Supreme Court, however, is alleged for its judicial overreach and self-restraint while exercising judicial review as *modus operandi* for PIL. This situation is, resultantly, reported for frustrating the PIL objectives. To avoid such situation, different studies have suggested the pursuing of judicious interpretative approach. Since, there is a call for appraising the paradigm of such approach as exercised in PIL jurisdiction in *Jurists Foundation* (2020) to avoid the PIL problems. So, this research article attempts to explore the answer of a question, 'Whether the exercising of judicial review powers in PIL jurisdiction as assumed in *Jurists Foundation* (2020) concerning the matter of extension for the office of Chief of Army Staff, was within the constitutional parameters amounting to a classical paradigm of judicious interpretative approach of constitutional law including the ordinary laws.' While making such appraisal, our own opinion may be different from the judicial reasoning in PIL perspective. All this, however, is with great regard of the judiciary whose judicial insight is always appreciable with optimal respect, in scholastic and research viewpoint.

Exercising of PIL Jurisdiction in Constitutional Petitions: An Overview

The provisions of Article 184 (3) provide for extraordinary judicial powers to the Supreme Court for the safeguarding of fundamental rights. This Article was inserted in the Constitution, 1973 for the first time in constitutional history of Pakistan (*Iftikhar v. President*, 2010, p. 209). This type of provision pertains to the original jurisdiction of the Supreme Court. The purpose behind this provision is, indeed, the protection of fundamental rights of public importance (*Muhammad v. Federation*, 1993, p. 735) which otherwise would have become an illusion under adversarial judicial system of Pakistan. For ensuring the protection of fundamental rights, the adversarial justice system, indeed, is not receptive for access to justice.

The Supreme Court, however, through proactive constitutional interpretative approach has extended the scope of fundamental rights, and relaxed the adversarial mode of litigation for addressing the matters of enforcement of fundamental rights through PIL strategy in different cases (*Ghulam v. Ghulam*, 1990; *Fazal v. Roshan*, 1990; *Dharshan v. State*, 1990; *Mst. Nasreen v. Fayyaz*, 1991; *Faheemuddin v. Sabeeha*, 1991; *Abdul Matin v. NWFP*, 1993; *Muhammad v. Muhammad* 1993; *Human Right Case*, 1993). The provisions of Article 184(3) were put so open-ended (*Benazir v. Federation*, 1988 488, p. 493) that a chance was let for exercising the judicial discretion while entertaining the constitutional petitions. Exercising of such jurisdiction has developed the strategy of PIL which indeed, is the outcome of the judicial review based constitutional interpretation however subject to certain constitutional principles.

PIL in Pakistan is constitutional litigation having its justification within the framework of the Constitution 1973(Ali, 2020, p. 213). The concept of PIL is not expressly provided in the constitutional text. It is, rather, implied in constitutional provisions. The development of the concept of PIL indeed, became possible because of the proactive judicial interpretative approach of the constitution and other relevant laws. This trend was developed in *Benazir Bhutto*, 1988. In this case, Supreme Court observed that this medium of interpretation will enable the court to relax the procedure, and to extend the merits of socio-economic changes to all sections of the citizens (*Benazir v. Federation* 1988).

As guidelines for proactive interpretation, however, the Supreme Court established two principles in *Benazir Bhutto* 1988. Firstly, the Court asserted that "...regard should be had to the object and the purpose for which this article is enacted...". Such objective definitely was the enforcement of fundamental rights of public importance. The other principle for proactive interpretative approach established in this case was considering the constitution as a whole. In this regard, the Court observed that "*this interpretative approach must receive inspiration from the provisions which saturate and invigorate the entire constitution...*". The proactive interpretative approach as developed in the *Benazir Bhutto* case has been frequently followed in the subsequent cases (Ali, 2020, p. 132).

Since, an overview is taken of the cases brought to the Supreme Court through constitutional petitions under Articles 184(3), and wherein matters were dealt with in the context of the PIL. This overview will provide a foundation for the detailed analytical discussion of the case '*Jurists Foundation* (2020) in hand.

Cases of Judicial Interpretation

PIL had measured beginning in its early stage (Khan, 2015). This view is reflected from the study of the cases, namely *Khalil-uz- Zaman* (1994), *Syed Wasey Zafar*, (1994), *Employees of Pakistan*(1994), and *General Secretary*(1994). In these cases, Court exercised judicious judicial review approach, and delivered the pure PIL judgments. This trend even afterward continued and appeared in cases of *Farooq*

Ahmed Khan (1999), Sh. Liaquat Hussain, (1999), Khan Asfand Yar Wali (2001) Moulvi Iqbal Haider (2006) and Pakistan Muslim League (2007). In these cases, justified judicial jurisprudence emerged for exercising PIL jurisdiction for protecting fundamental rights. In context of such judicial trend, Khan observed that “*The Court has scarcely engaged in activism in the past and that the use of PIL as a political and strategic tool has no noteworthy precedents in the court’s history*” (Khan, 2015, p. 290).

We agree with Khan on this issue. The absence of PIL problems in the judgments of these cases is the evidence that judicious interpretation is the appropriate criterion for avoiding PIL problems. The similar view has been given by Mr. Justice Saqib Nisar the then CJP, the most activist judge of the judicial history of Pakistan during the period, 2017 to 2019. He himself recognized that there is a need of care in exercising judicial activism- *judicious approach in interpretation*- italic is our own (Geo News, 2018; UN, 2013; International Commission, 2013; Omer, 2018). This, indeed, happened because the Court observed the principle of ‘separation of powers’ including ‘checks and balances’ while interpreting the constitution and other related matters for discretionary PIL jurisdiction. Such judicial practice reflects the pursuance of the pattern of judicial review of structural nature persuaded by celebrated scholars (Ali, 2020, p. 277).

Matters of Judicial Overreach

Subsequently, PIL started suffering certain problems because of judicial activism. It suffered particularly with *judicial populism*. The Comparative Scholars have referred this problem as *judicialization of politics* (Vallinder, 1994; Shapiro and Sweet, 2002; Hirschl, 2006; Siddique, 2015; Barkow, 2002). Such problem of judicialization appeared when Court took the cognizance of the matters of dissolution of assemblies (*Muhammad v. Federation*, 1993), appointment of Chief Justice (*Malik v. Federation* 1998), economic policy (*Wattan v. Federation*, 2006), *Maulana v. Government* 2013), judges’ restoration (*Iftikhar v. President* 2010) and disqualification of a public representative (*Muhammad v. Federation* 2012).

Another problem with the use of PIL jurisdiction is in term of the jurisdictional flaws. The Supreme Court went beyond its jurisdiction as provided under Article 175(2) of the Constitution, 1973, while entertaining the Constitutional petitions under Article 184(3). This issue is found in Court’s judgments as delivered in I.A Sharwani (1991) and Ch. Muhammad Siddique (2005). Such jurisdictional flaws happened in horizontal perspectives when Court intervenes in the domain of the other branches of the government. It appeared in vertical viewpoint when Court took the cognizance of the matters without taking into account the alternative remedy available in High Courts (*Ch. Muhammad v. Government*, 2005) or in any tribunal (*I.A Sharwani v. Government*, 1991).

The problems with PIL as referred above are indeed because of the judicial overreach. It has been increasing constantly since the early history of PIL in Pakistan. Similar is the viewpoint of the legal scholarship from all corners. Khan observed as

“Most, if not all, of these political questions, along with a litany of other issues, were litigated and adjudicated under the ever-expanding umbrella of PIL” (Khan, 2015, pp. 287, 288; Khan, 2013). Siddique has also referred the PIL problems to the judicial attitude of judicial overreach (Siddique, 2015). The similar reservations are of the judges, the jurists, and the International Institutions (Omer, 2018).

In our viewpoint it is not necessarily the simple judicial activism, it is indeed hyper activism (Khan, 2015, p .358) contrary to the constitutional accords (Omer, 2018). The judicial overreach indeed, is contravening the constitutional parameters for judicial review jurisdiction as embodied in the Constitution, 1973.

Cases of Judicial Self-Restraint

The judicial exercise of PIL jurisdiction has also resulted the unjustified judicial restraint. It sometimes appears at the cost of rights of citizens to deny justice to them. *Hajj Scandal Case*, (2010), *Syed Zafar Ali Shah*, (2000) and *Tika Iqbal Muhammad Khan*, (2008) are the classic examples of such judicial mind set. The Court adopted the principle of restraint not in a sense of restraining from activism, rather it appeared a passive virtue of self-restraint type. The exercise of such interpretative approach while exercising discretionary PIL jurisdiction has also resulted the problems, and affected eventually the PIL objectives of protecting fundamental rights. In case of such type of judicial restraint, judiciary hesitates from scrutinizing the governmental measures affecting constitutional supremacy including the fundamental rights. Thus, it results in the non-observance of ‘check and balances’ resulting the disregard of the constitution.

The cases of both of the above categories of judicial review i.e., restraint and activism, however, were involving political questions which drag the Court to the judicialization of politics, and thus has made the exercise of PIL controversial. The judicial reasoning either for activism or for restraint in such like cases substantiates the reservation of legal scholarship. Khan a celebrated constitutionalist (Khan, 2006) comments that the judiciary uses the strategic apparatus of interpretation for the adjudication of extra-constitutional matters according to the trend of time and space. On the same point, identical are the observations of Justice A.R Cornelius (Mahmood Politically, 2013) and Brohi (Brohi, 1958) the legal legends of Pakistani judicial jurisprudence. Such a judicial trend arguably influences the domain of other organs of the government, and contradicts the basic essence of ‘separation of powers’ including ‘checks and balances’, and as per view of Mahmood *“can be manipulated by extra-judicial factors, which are inherent in the constitution of the human mind”* (Mahmood Politically, 2013). It causes the judicial decisions vulnerable; irrespective of the fact that these are the outcome either of activism (*Dr. Mobashir v. Federation*, 2010; *Watan Part v. Federation*, 2006; *Maulana v. Government*, 2013) or restraint (*Tika v. General*, 2008; Khan, 2009) and the fundamental rights yet remains unenforced and become illusions.

The above overview demonstrates that PIL jurisdiction could not have gained the recognition and appreciation from the legal scholarship (Tridimas, 2010; Vaberg, 1998; Schmidhauser, 1984; Khan, 2015; Siddique, 2015; Cheema & Gilani, 2015) because of the issues of activism and passivism as identified above. These issues are confronting the PIL objectives. The judicial review should be neither the hyper activism (Khan, 2015) nor judicial chill (Heba and SilkeNoa, 2015). Rather, it should be 'proper judicial activism' (Jones, 2001) preserving the 'structure of constitutional government' which includes separation of powers and checks and balances. The classical example of such trend among other is referred to the *Jurists Foundation* case (2020) case in the history of the PIL judicial jurisprudence. In this context, a critical appraisal of exercising of PIL jurisdiction in this case is made in the next sections.

Jurists Foundation Case (2020): Appraising PIL Jurisdiction

This case was adjudicated in PIL perspective under Article 184(3). In such context, the manner of examining the case is in qualitative viewpoint. Starting from the facts finding of the case including parties' contentions especially PIL related aspects, and finally entering into judgment, focus is made for appraising PIL jurisdiction. The critical appraisal of the case is dwelled upon the principle of constitutionalism as embodied in the constitution (Ali, 2020, p. 244) and followed for the development of PIL in the first leading case *Benazir Bhutto*, 1988.(Ali, 2020, 317).

Narrating the Facts

The Ministry of Defence moved a summary for the extension of the term of office of the sitting Chief of the Army Staff (COAS) citing the 'regional security environment' (The News, 2019, November 28) as justification for the proposal. The Prime Minister himself passed an order appointing the present COAS for a second term on 19.08.2019. According to the Article 243 of the Constitution, 1973 it is the President, and not the Prime Minister who is appointing authority for the office of COAS. So, knowing subsequently the procedural constitutional deficiency for such appointment, an advice was moved from the Prime Minister's office to the President. On such advice, President granted the extension for the tenure of three years. Once again such appointment suffered another procedural flaw as it was without the approval of the Cabinet. So, on 20.08.2019 a summary was moved to the Cabinet whose purported approval dated 21.08.2019 by 11 out of 25 members, was lacking the majority vote. Yet, after such so-called approval of the Cabinet, the matter was never submitted to the Prime Minister or the President for a fresh advice and order respectively. This act of the government was called in question before Supreme Court. This court took the cognizance of the matter as PIL by invoking the jurisdiction under Article 184(3).

Petitioner's Version

The petitioner alleged that such extension is in contravention of the provisions of Article 243(4) (b) of the Constitution, 1973, and thereby, such

appointment must be strike down. However, the petitioner did not appear on the first day of hearing. Rather, a handwritten application statedly submitted by the petitioner, was brought before the Supreme Court seeking the withdrawal of this petition. Though, the Court Associate may be asked as to the source of such application, it was rejected. On the next hearing, petitioner appeared in person with an oral request for withdraw of the petition, but it was turned down as well.

Respondent's Version

The Federal Government as respondent defended the extension, and argued that the extension of the COAS is within the constitutional and legal parameters. For justification of the extension, the reliance was made on Regulation 255 of the Army Regulations (Rules) framed under section 176-A of the Pakistan Army Act, 1952. It was submitted that according to these legal provisions a retirement of an Army officer can temporarily be suspended or limited. Further, it was argued that even a retired Army General can be appointed as COAS under Article 243(4) of the Constitution, 1973 as this clause is not subject to law.

Moreover, it was submitted that as per convention and practice, the tenure of a General/COAS has become three years. It was asserted that the Federal Government has the authority to re-appoint or extend the services of the sitting COAS before his retirement on the basis of exigencies of the service or public interest. Rather, the Supreme Court was beseeched for guidance in this matter.

Court's Verdict

The case was heard by three member bench comprising Chief Justice Mr. Asif Saeed Khan Khosa, Justice Mr. Mazhar Alam Khan Miankhel and Justice Mr. Syed Mansoor Ali Shah. The judgement was authored by Justice Mr. Syed Mansoor Ali Shah who was agreed by the rest of the bench. However, Chief Justice Mr. Asif Saeed Khan Khosa wrote a separate note while agreeing with the other judges. Hence, this was a unanimous judgement pronounced in the context of PIL jurisdiction.

Though critics commented it 'unprecedented move' (Wolf, 2019, p .1), the Supreme Court took the matter as PIL, and concentrated to establish whether the post of COAS, and its tenure and extension are governed by the Rule of Law or otherwise. The same is indeed, the one of the main objective of PIL. In this case, indeed, the legal framework under which the appointments, retirements and extensions of the COAS take place came into question while determining the constitutionality of COAS' extension of tenure on the touchstone of Article 243 of the Constitution, 1973. In this regard the Supreme Court focussed and interpreted the different constitutional provisions in addition to the Pakistan Army Act, 1952 and Regulation 255 of the Army Regulations (Rules), the Pakistan Army Act, 1952. Further, Supreme Court identified and focused the flaws in the process and

exercising of powers by Government of Pakistan concerning the extension of the incumbent COAS.

The Supreme Court finally decided that the relevant Law falls deficient of the structural requirements for raising and maintaining the Army under clause (3) of Article 243 of the Constitution, 1973. Even, then, there is absence of any consistent and continuous institutional practice for extending service of a General for tenure as well. Hence, the summaries for the extension and fresh appointment of the incumbent COAS seems to be meaningless, and of no consequence.

So, the matter in hand should be allowed to be regulated by law made by the legislature, as mandated by the Constitution, 1973 within six months, and during such period the incumbent COAS may continue in order to preserve continuity of the institution. It is said that “*judiciary can’t direct parliament to convert ‘convention into codified law’, as it can only interfere in legislative domain to avert illegalities*” (Staff Reporter, 2020, p. 1). Though critics named it a ‘compromise’ our study concludes such judgment a meritorious one in the light of the analysis as demonstrated in next sections of this research paper.

Exercising of PIL Jurisdiction in COAS Matter: A Critical Appraisal

The COAS case was basically to determine the constitutional *vires* of an executive act and proceedings regarding the extension of the COAS office and certain legislative provisions of Pakistan Army Act, 1952 and Regulation 255 of the Army Regulations (Rules) the Pakistan Army Act, Rules 1954. These provisions as followed for the said executive act and proceedings were alleged to be violative to the provisions of Article 243(4) (b) of the Constitution, 1973.

Our study in this section is to examine that how the Supreme Court did interpret the constitutional and other legal provisions concerning COAS matter. Further, it focuses, whether the approach adopted for interpretation, was of judicious nature, while exercising PIL jurisdiction.

Structural Interpretation: A Judicious Interpretative Approach

The major issue in this case was concerned with the legal structure of Pakistan Army, and the raising and maintaining of the Armed Forces including the term of services of COAS. Since, relating to these matters, the Supreme Court dwelled on the scope of provisions of the Article 243, Constitution, 1973. The Supreme Court confirmed the view that the constitution is a living organism and is “*capable of growth and development over time to meet new social, political and historical realities often unimagined by the framers*” (*Jurists v. Federal*, 2020, p. 14). So, the court followed the principle that “*the judiciary must, in interpreting its provisions, bear these considerations in mind*” . Such judicial mindset arouse for the structural interpretation that while interpreting one provision the regard should be given to the rest of the constitution as well.

So, the Supreme Court interpreted the said provisions of keeping in view the structural scheme of the Constitution, 1973, and the relevant sub-constitutional laws as well. For this purpose the court rightfully went through the history of the Article 243 starting from the Constitution 1956, and surviving in 1962 Constitution, which travelled for 54 years to take its present shape in the year 2010 through the Constitution (Eighteenth Amendment) Act, 2010. While determining the scope of constitutional provision 243, the Court also reviewed the successive amendments and the relevant laws (Army Act, 1952, Pakistan Army Act Rules, 1954, Army Regulation, Rules, 255, Section 176A of the Act in the year 1965 and Military Laws of other countries made regarding the raising and maintaining the Armed forces. Hence, it concluded that *"The power to appoint COAS under Article 243(4) is, therefore, not an exercise in isolation but stands rooted and connected to the Army raised and maintained under Article 243(3) of the Constitution"* (Jurists v. Federal, 2020, p. 17).

The Supreme Court observed the structural interpretative approach, and rightly discarded the interpretation of the respondent made in oblivion of the overall constitutional scheme of appointment to the constitutional posts. The Supreme Court asserted that *"It is a settled principle of interpretation that the words in a provision cannot be read and interpreted in isolation. The meaning and scope of a provision is determined by looking not to the isolated words used therein but by reading its text in context"* (Gundy v. United States, 2019, p. 2126; Bennion, 2005, p. 501-502; Caries & Edgar 1963, p. 159-160; Greenberg, 2010, p. 682-683; Zafar, 2016, pp. 575-580) The Supreme Court further confirmed that, *"The relevant provision of the Constitution is, therefore, to be read in its immediate context as well as in the overall scheme of the constitutional appointments"* (Jurists v. Federal, 2020, p. 23).

The structural interpretative approach proves, indeed, the adherence to the principle of separation of powers which the court itself observed strictly while hearing this case. Some summaries, were generating an impression that the same have been made in due deference to observations and directions of this court. In such situation, the Court not only rebutted such impression, it dispelled by conduct as it did not interfere in the domain of the executive just for the separation of powers.

Though the Supreme Court identified (Jurists v. Federal 2020, pp. 11-13) some prima facie constitutional and legal flaws in the process of granting extension to the COAS (Extension Notification, 19-8-2019), it did not strike down the notification of grant. It simply suspended the notification, and noticed all the respondents impleading the incumbent COAS. Furthermore, the Supreme Court did not strike down the amendment made in the Regulation 255, overnight on 26.11.2019 during the pendency of this case. (p. 31). Just suspension instead of striking down these alleged acts, move the critics to refer the judicial mindset to judicial overreach (Wolf, 2019 p. 4) and self-restraint. Such judicial policy indeed proves judicious one entailing the constitutional mandate.

In order to provide a legal cover to the Army Regulations, section 176-A was inserted in the Act *vide* the Pakistan Army (Amendment) Ordinance, 1965 (Act XV of 1965) which empowered the Federal Government to make Regulations. In this context the Court held that “*The power of the Parliament under the Constitution cannot be delegated to the Federal Government without the Parliament performing the basic essential legislative function, i.e. providing policy guidelines on these areas*” (*Jurists v. Federal* 2020, p. 34). This way the Court, once again affirmed the principle of separation of powers and held it as “*a fundamental principle of our constitutional construct*” (*Jurist v. Federal*, 2020, p. 34).

The Supreme Court did not decide the COAS matter in isolation of the constitutional procedure of appointment similar for the other constitutional appointments. Rather it went through the scheme of the constitution embodying the procedure regulating constitutional appointments including the COAS. This was, in fact, a pattern of construe the constitution in structural context-taking the constitution as whole.

Separation of Powers Instead of Self-Restraint

In this case though the court apparently followed the principle of judicial restraint, however, it was not the case of self-restraint and passivism. The Supreme Court clearly dispelled this version. It asserted that the judicial review an effective tool for interpreting the constitution, should be exercised with due diligence and within the constitutional parameter particularly the separation of powers. A judicial restraint in this perspective becomes essential for the continuance of the Rule of Law, and reposing the confidence in political impartiality of judiciary and political authority of the political branches of the government. Thus, “*The separation of powers as suggested the best course available to serve as the basis to resolve the lingering crisis of imbalanced re-captions*” (Hussain, 2019) was followed while interpreting the constitution.

The court clearly, proclaims that an opportunity is given to the political branches to carry out their constitutional duties of filling the vacuum in laws concerning the matter of COAS (*Jurists v. Federal*, 2020, p. 38). The Supreme Court granted the period of six months for making the appropriate legislation with the remarks ‘*as first instance*’ demonstrating the judicial intent that in case of failure of the political branches the judiciary will eventually step in for upholding the constitutional supremacy. While the Court was avoiding the activism, it escaped the passivism as well. By leaving the matter for the Parliament ‘*as first instance*’ demonstrates that the Court was conscious of its duty to defend the constitution however recognizing the legislative domain at priority. Meaning thereby, Court was not discounting its constitutional duty of defending the constitution; it was just regarding the separation of powers (*Jurists v. Federal*, p. 37).

Some critics have referred it as, maintaining ‘judicial self-restraint’ by referring the matter back to the parliament which is supposed to do the required

legislation to ensure (Hussain, 2019), and allowing of the continuity of incumbent COAS for six months has been viewed in terms of the hybridized 'doctrine of necessity' (Hussain 2019. It is without explanation, and may not be termed as judicial passivism, and revival of the Law of Necessity. Rather it was a judicious approach to preserve the smooth functioning of Pakistan Army for ensuring the protection of fundamental rights.

Checks & Balances Instead of Activism: A True Judicious Approach

The critics have raised the question that taking the cognisance of the matter was intruding on the powers of the Executive and legislative (Staff Reporter, 2020). To us, Supreme Court adopted the progressive approach which is not necessarily the activism. Rather it was constitutional obligation to uphold the constitutional supremacy. To ascertain this situation an analysis is made under these lines.

Entrenching the PIL Jurisdiction

The critics have referred this litigation a fight for "*potential power struggles between the different branches of government*" (Wolf, 2019, p. 1) and alleged the verdict as an act for judicialization to highlight the judicial independence. This argument is not justified. The Supreme Court indeed considered the matter in question, though, impliedly of public importance with reference to the enforcement of fundamental rights, and took the cognisance of the matter as PIL. The matter involved in this case was indeed, the upholding of the rule of law which itself is the fundamental right, and one of the main objectives of the PIL. Such rule of law was alleged as not observed, while extending the COAS' tenure. So, Justice Mansoor Ali Shah at the opening of the judgement pronounces that, "*At the heart of this case lies the fundamental question of rule of law: Is our government of laws or of men*" (Jurists v. Federal, p. 2).

Since, while declaring certain provisions of different laws as violative to the constitutional provisions, it discarded the discriminatory acts and proceedings done by public authorities. Such acts influencing the principle of rule of law and seemingly encouraging the rule of men have been occurred in the different summaries concerning the extension of tenure of COAS. It was, indeed, the pursuance of the principle of Checks and Balances, a constitutional mandate for upholding the constitutional supremacy.

While identifying such issues, Supreme Court apparently seems to be engaged in the proactive interpretative approach, however this approach was of judicious nature falling within the constitutional structure and parameters i.e., rule of law. Such type of interpretation has led the judgement in COAS case as a classical example of exercising PIL jurisdiction.

Settling the Withdrawal Request

The Supreme Court was requested twice that the petitioner be allowed to withdraw the petition. Firstly, through an application statedly submitted by the petitioner who however, did not appear in court in person. Secondly, petitioner appeared in person with oral request for withdrawal of the petition. This pray was dealt by the court proactively but with judicious mindset keeping in view the nature of the petition taken as PIL. It turned down both of these requests by observing that *“the petition in hand invokes Article 184(3) of the Constitution and the subject matter of the petition involves a question of public importance with reference to enforcement of fundamental rights and, thus, the individual capacity of the petitioner pales into insignificance even if he decides not to pursue the present petition”* (Jurists v. Federation, 2020).

Some critics speculated that the matter involved the personal interest and judicial contentious on the basis of which the withdrawal was refused (Afzal, 2019). We disagree with such type of speculation. The Supreme Court rightly established the principle of considering the public interest as raised in PIL, and ensuring that it does not result in the abuse of the process of law for oblique ends (*S.P. v. H.D.* 1997). So, it held rightly that a PIL can only be withdrawn with the permission of the Court because such matter does not raise a personal issue limited to the petitioner, and rightly turned down the request of PIL withdrawal (*Jurist v. Federation*, 2020, pp. 3, 4). Such judicial policy for exercising PIL jurisdiction exercised for determining substantive as well as procedural matters of this case, was of judicious nature.

Enforcing and Extending Fundamental Rights and Maintainability

The COAS case was indeed, for the enforcement of FRs which was alleged to be violated by the extension of the COAS tenure. In addition to other matters, the issues raised therein also attracted fundamental right to information, and the right to non-discrimination in services under Articles 10-A and 27 of the Constitution, 1973 respectively. Furthermore, the question of extension of COAS was inextricably linked with some other important fundamental rights and issues of public interest.

For assuming the jurisdiction and determining the maintainability of the petition Supreme Court, indeed, extended the scope of the fundamental rights in the context of the principles of Islamic nature as embodied in Objective Resolution. It held that *“fundamental rights in a living Constitution are to be liberally interpreted so that they continue to embolden freedom, equality, tolerance and social justice”* (Jurists v. Foundation 2020, p. 5).

So, keeping in view the constitutional role, commanding responsibilities, structural and organizational nature of the COAS office, the Court held that appointment of such office is, thus, inextricably linked with security, dignity of citizen, and sovereignty of the State. Thus, the Supreme Court properly interpreted the COAS functions for linking them with the fundamental rights and making the case fit for the jurisdiction under Article 184(3) of the Constitution, 1973. Even the

respondents did not raise any objection to the assumption of jurisdiction by this Court or to the maintainability of this petition.

While declaring the certain provisions of different Laws being violative to fundamental rights, Supreme Court established certain principles for the enforcement of fundamental rights. Though, it protected the fundamental rights through the proactive interpretative approach of the Constitution, however, it exercises this approach judiciously.

Instructing for Legislation

The Supreme Court in letter and spirit of Article 203-D directed the Government to initiate for legislation for the law concerning the issue of extension for post of COAS' extension. So, it held that "*It is now for the people of Pakistan and their chosen representatives in the parliament to come up with a law that will provide certainty and predictability to the post of COAS, remembering that in strengthening institutions, nations prosper*" (*Jurists v. Federation*, 2020, p. 42). However, it is criticised that "*judiciary can't direct parliament to convert 'convention into codified law', as it can only interfere in legislative domain to avert illegalities*" (Staff Reporter, 2020). Such viewpoint cannot be agreed. Though "*courts cannot issue a writ/direction to the legislature to enact law*" (*Mian v. Superintendent* 2020). However, the Court may direct the Government for initiating the law making as it happened in the case in hand.

The previous judicial jurisprudence supports Supreme Court's stance of directing the Government for taking the legislative measures. The reference may be made to the judgement in *Sharaf Faridi* (1989) wherein it was held that "*in exceptional circumstances it may issue a direction to the Federal and/or Provincial government to initiate legislative measures.*" This view was upheld by the Supreme Court in *Al-Jehad Trust v. Federation of Pakistan*. Following this principle, the High Courts have given directions to the government in the number of cases to take steps for enacting the law or making amendments in an existing one. In this regard reference may be made to different judgements (*Minoo v. Arnaz* (2008), *Riaz v. Federation* (2015), *Walid v. Federation* (2018) and *Subay v. Federation* (2018)).

Conclusion

PIL needs a judicious interpretative approach instead of judicial overreach and passivism for the proper protection of fundamental rights. Such approach is possible through the structural construction of the constitution including the activism and restraint. In the case in hand, the judicial approach is balanced by enforcing on one side the Rule of Law through the constitutional principle of Checks and Balances limiting discretionary powers, and on other side letting the political branches of the government to enjoy their domain as per dictate of the separation of powers. The grant of six months extension and requiring the government to make the law for deciding the extension both were eventually for the protection of fundamental rights. Hence, it is evident that such judicial insight was

establishing judicious interpretative approach instead of judicial self- restraint or overreach, making this judgement a classic one on subject of PIL under Article 184(3) of the Constitution, 1973. As a suggestion it seems appropriate that the compliance of 'Separation of Powers' including 'Checks and Balance' be not ensured only for the legislature and executive. Rather, the judiciary should observe these principles as appeared in the case in hand.

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