OGRA — NEWS BRIEF

A daily news brief brought to you by Corporate and Media Affairs Department

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Reflections on a complicated legacy

Since the restoration of judges in March 2009 through the lawyers movement, exercising of public interest jurisdictions under Article 184 (3) of the constitution by the Supreme Court (SC) have remained under severe criticism.

Seven former chief justices, namely Iftikhar Muhammad Chaudhry, Tassaduq Hussain Jilani, Nasirul Mulk, Jawwad S Khawaja, Anwar Zaheer Jamali, Mian Saqib Nisar and Asif Saeed Khosa, worked for the purpose after the judiciary's restoration through a mass movement of political parties and lawyers that year.

During their respective tenures, there has been consistent concern that the superior judiciary encroached in the domain of executive and legislature. Instead of focusing on improving the justice system in order to implement Article 37-d, the superior judiciary largely gave priority to issues of maladministration and good governance.

Similarly, the superior judiciary has also remained a key player in shaping the country's politics for the past one decade. Instead of giving space to political leaderships, the top judges gave them a tough time on various issues, especially during the Pakistan Peoples Party (PPP) and the Pakistan Muslim League-Nawaz (PML-N) regimes. Even two prime ministers – PPP's Yousaf Raza Gillani and PML-N's Nawaz Sharif – were disqualified by the SC along with three dozen MNAs who were also disqualified on the basis of fake degrees, dual nationalities and non-disclosure of assets in their nomination papers. Likewise, a few of them were also convicted in contempt matters.

A section of legal experts allege that after the restoration of the judiciary, the apex court exercised its public interest litigation for the purpose of 'political engineering' in the country. Moreover, the country is also facing massive financial losses due to the apex court's rulings in matters related the Pakistan Steel Mills Privitisation and Reko Diq, among others.

During the tenure of former Chief Justice of Pakistan (CJP) Iftikhar Muhammad Chaudhry, the SC took up a number of important issues and cases, including those about fixation of CNG prices, rental power project case, the illegal appointment of OGRA chairman, the ephedrine case, the Pakistan Steel Mills, waived-off loans, breaches in embankments during the 2010 floods, the National Insurance Company Limited case, promotions of 54 bureaucrats, Hajj corruption, ISAF containers, contract employees and irregularities in Pakistan International Airlines (PIA).

Likewise, the SC also constituted special benches regarding the implementation of different judgements in other cases like rental power projects corruption, illegal appointment of OGRA chairman, LPG quota and Pakistan Steel Mills scam. However, no major change was witnessed on account of excercising public interest jurisdiction in matters related to good governance and maladministration.

After the retirement of CJP Chaudhry in December 2013, the superior judiciary led by successors, especially Justice Tassaduq Jilani and Justice Nasirul Mulk avoided interfering into executive and parliamentary affairs. However, within 25 days of his tenure as chief justice, Justice Jawad S Khawaja began to focus on the maladministration in the country.

The 15-month tenure of Justice Anwar Zaheer Jamali was more or less a continuation of the 'judicial restraint' policy adopted by his two predecessors. However, during his last days, Justice Jamali took up Pakistan Tehreek-e-Insaf's petition seeking

disqualification of former premier Nawaz Sharif in the wake of the Panamagate scandal. The matter, however, could not be decided during his tenure. Likewise, Justice Jamali mainly focused governance issues related to Sindh. Justice Amir Hani also passed several directives to improve service structure.

After his retirement, Justice Saqib Nisar became the new CJP. Justice Nisar visibly changed his approach in the last year of his tenure and started a unique 'judicial overreach', which was completely different from what he did as a superior court judge throughout his 20-year career.

It is also a fact that his judicial activism has overshadowed his previous pro-executive and pro-parliament approach which was also characterised by judicial restraint. Many lawyers describe his judicial activism as a ‘U-turn’ in his approach. Justice Nisar had believed in political-constitutional supremacy until 2017. However that year, he emerged as a believer of the judicial-constitutional supremacy.

Justice Nisar had been pro-executive throughout his career but in his last year he became skeptical about powers of the executive. He had been skeptic about the public interest litigation under Article 184 (3) of the constitution but eventually became a strong proponent of exercising suo motu powers. He mainly focused on construction of dams in the country. Likewise, he campaigned for fund collection for dams. Moreover, he also arranged conference on population control.

Perhaps it was the first time in judicial history of Pakistan that a CJP heard cases also on the weekends. Water, health, education and population control were his main priorities. Likewise, the CJP conducted unique proceedings in public interest matters at the Lahore Registry.

Justice Nisar not only adjudicated matters related to public interest but also visited different hospitals and jails. In regard to his dam fund collection, despite reservations, people largely appreciated his efforts in highlighting the issue of water shortage in the country.

During the last year of his tenure, Courtroom Number 1 always remained packed during hearings of high profile cases, in which several politicians, civil servants and common people appeared.

After his retirement in January 2019, Justice Asif Saeed Khosa became the CJP. He also retired on December 2019 and thus will be remembered for his short tenure in judicial history for many years. Justice Khosa’s entire focus during his tenure was to improve the criminal justice system in the country. Aside from that, in regards to the matters of the executive, he adopted the policy of judicial restraint. Moreover, it is to be noted that he also did not take a single suo motu notice on governance issues.

Judicial activism of the incumbent CJP Gulzar Ahmed has so far been harmless for the executive. It was reflected in CJP Gulzar's first speech on December 20, 2019 that judicial activism will be revised and eradication of corruption as well as maladministration would be his high priorities. However, despite these harsh remarks and observations against maladministration and the federal government functionaries, the CJP has not passed any coercive orders during the last five months.

The SC has in fact, even facilitated the federal government in few matters like rehabilitation of the Pakistan Steel Mills, holding of election in Gilgit-Baltistan (GB) and execution of its policy related to Covid-19 in the provinces, especially Sindh.

Likewise, CJP is focusing to complete Railways Circular project in Karachi. Even in order to complete this project, a contempt notice was issued Chief Minister Murad Ali Shah regarding non implementation of SC directives to complete underpasses.

During hearing of a suo motu case regarding billions of rupees losses in Pakistan Railways, the CJP on January 28 grilled Minister for Railways Sheikh Rashid for the organisation's poor performance and said the minister should have resigned after the Tezgam tragedy, which claimed the lives of 74 people.

On the same day, Rashid expressed apprehension over the ongoing judicial activism during a cabinet meeting. At the next hearing, the CJ showed restraint and did not make any harsh observation against Rashid. After hearing of the case, the minister was jubilant as he escaped a tougher treatment at the hands of the chief justice.

During the hearing of a case against the appointment of Air Marshal Arshad Malik as the chief executive officer (CEO) of the PIA, the SC again showed restraint. Earlier, the SC bench led by the CJ, grilled the federal government for appointing a serviceman as the CEO of the national flag carrier by violating the rules and regulations.

The judges had also questioned performance of the PIA during Malik's tenure, suspended his appointed as the PIA chief and asked him to abandon one of the two posts. The government sources had revealed that Malik had expressed unwillingness to leave the PAF. However, Attorney General for Pakistan (AGP) Khalid Javed Khan on March 18, 2020 convinced the bench to restore Arshad Malik as the PIA chief.

It is also being witnessed that with the passage of time, the superior courts judges are seeing the error in judicial interference in the domain of other institutions. In 2016, former SC judge Ejaz Afzal Khan observed that judicial interference is not a substitute for prudent management.

Contrary to its historical judgment wherein it had halted the process of PSM privatisation, Justice Khan had declared, "judicial analysis, assessment or adjudication of such matters, which is more or less theoretical, cannot be a substitute for prudent management". He said the PSMC alone is not in the lurch. PIAC (Pakistan International Airline Corporation), which was one of the best airlines of the world, is also in troubled waters.

Justice Ejaz Afzal Khan, while authoring the four-page verdict, said overcoming failures of PSM is the domain of the executive and legislature. "The executive in the first instance could take stock of the situation, examine the causes of their failure and find ways and means to bring them out of such straits. The legislature could legislate to deal with the problems besetting the corporations if the existing dispensation in its wisdom is not equal to the occasion," he said in its judgment.

Justice Mansoor Ali Shah on judicial overreach

Justice Syed Mansoor Ali Shah, who is in line to become the next Chief Justice of Pakistan, in a judgment ruled that when judges commit "judicial overreach" they violate their oath, in a judgment that adjudicated on the distinction between judicial review, judicial activism and judicial overreach.

He described the judicial overreach as the court's exercise of power outside the constitution and the law and encroachment on the domain of legislature or the executive.

Justice Shah also said that judicial overreach is when the judiciary starts interfering with the proper functioning of the legislative or executive organs of the government. “This is totally uncharacteristic of the role of the judiciary envisaged under the constitution and is most undesirable in a constitutional democracy.

He said that judicial overreach is transgressive as it transforms the judicial role of adjudication and interpretation of law into that of judicial legislation or judicial policy making, thus encroaching upon the other branches of the government and disregarding the fine line of separation of powers, upon which is pillared the very construct of constitutional democracy.

Justice Shah in his judgment said that such judicial leap in the dark is also known as “judicial adventurism” or “judicial imperialism,” adding: “A judge is to remain within the confines of the dispute brought before him and decide the matter by remaining within the confines of the law and the constitution.”

According to the judgment, the role of a constitutional judge is different from that of a king, who is free to exert power and pass orders of his choice over subjects. It added that after taking an oath to preserve, protect and defend the Constitution, a constitutional judge cannot be forgetful of the fact that he himself, is first and foremost subject to the constitution and the law.

“When judges uncontrollably tread the path of judicial overreach, they lower the public image of the judiciary and weaken the public trust reposed in the judicial institution. In doing so they violate their oath and turn a blind eye to their constitutional role,” the ruling said.

On judicial activism and judicial restraint, the ruling said: “Activist judges (or judicial activism) are less influenced by considerations of security, preserving the status quo, and the institutional constraints. On the other hand, self-restrained judges (or judicial restraint) give significant weight to security, preserving the status quo and the institutional constraints.”

Both judicial activism and judicial self-restraint operate within the bounds of judicial legitimacy, the judgment added. “It is one thing for a judge to progressively interpret the law because of human rights considerations about which he has substantial information. It is quite another to change or ignore the law for economic or social or political reasons based on polycentric considerations beyond the judge’s expertise,” it added.

“According to Chief Justice John Marshall, judicial power is never exercised for the purpose of giving effect to the will of the judge; but always for the purpose of giving effect to the will of the legislature; or in other words, to the will of the law.”

Justice Ijazul Ahsan’s approach

In his verdict in the Royal Palm Club lease agreement case, Justice Ijazul Ahsan, who will be one of the future CJPs, cited several past rulings to justify power of judicial review in financial matters under Article 184(3).

Justice Ahsan while summing up scope of the power of judicial review noted that the court can use these powers in cases of acts or omissions on the part of state functionaries – reflecting violation of mandatory provisions of law or the rules framed there under.

The judgment also notes that breaches of contracts – which do not entail examination of minute or disputed questions of fact committed by public functionaries involving dereliction of obligations flowing from a statute, rules or instructions – can also be reviewed.

It says public functionaries must exercise authority, especially while dealing with public property, public funds or assets, in a fair, just, transparent and reasonable manner.

Such exercise of power should not be untainted by malafides or colourable exercise of power for ulterior motives; without discrimination and in accordance with law, keeping in view constitutional rights of citizens, even in the absence of any specific statutory provisions setting forth the process in this behalf.

“Interference with the decision-making process is warranted where it is vitiated on account of arbitrariness, illegality, irrationality and procedural impropriety or where it is actuated by malafides,” the judgement reads.

“Governmental bodies’ powers to dispense and regulate special services by means of leases, licences, contracts, quotas, etc, are expected to act fairly, justly and in a transparent manner and such powers cannot be exercised in an arbitrary or irrational manner,” it adds.

The judgment rules that public funds, public property, licences, jobs or any other government largesse is to be dealt with by public functionaries on behalf of and for the benefit of the people. “Scrutinise matters where public money is being expended through procurement or public property is being sold, so as to ensure that transactions by the government are undertaken and contracts executed in a transparent manner, legally, fairly and justly without any arbitrariness or irrationality and public money and public property is not squandered or stolen.”

It says judicial review can also be made in view of presence of elements such as personal solicitation and personal influence in procurement of contracts directly leading to inefficiency in the public service and to unnecessary expenditures of the public funds. “All agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question, whether improper means are contemplated or used in their execution.

“If material changes are brought about in agreements subsequent to the bidding to benefit a particular party, this will in fact negate the notion of a fair and open competitive bidding process.”

It also notes that the courts should ordinarily refrain from interfering in the policy-making domain of the executive or in the award of contracts and should not substitute its decision for that of the latter unless the acts or omissions smack of arbitrariness, favouritism and a total disregard of the mandate of law.

https://tribune.com.pk/story/2295435/reflections-on-a-complicated-legacy

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Gas companies resist allocation of pipeline capacity to new terminals

LAHORE: The dispute between the state-owned gas companies and sponsors of the two proposed private LNG terminals — Tabeer and Energas — over pipeline capacity allocations for the projects will likely linger for a much longer period than anticipated by the investors.

While the investors are looking for firm commitments from Sui Sothern Gas Company (SSGC) and Sui Northern Gas Pipelines Limited (SNGPL) over allocation of gas pipeline capacity before they start work on the construction of the two terminals at Port Qasim, the gas companies argue they are not bound to allocate pipeline capacity before projects completion under the February decision of a committee on LNG pipeline capacity allocation, which had been constituted by the Cabinet Committee on Energy (CCoE).

A senior Energas executive, who wants to stay anonymous, told *Dawn* on Saturday that both Tabeer and Energas had requested the SSGC and SNGPL to allocate to them pipeline capacity equal to just 40pc of their combined terminal capacity of 1,500 million cubic feet a day (mmcfd). “Both SSGC and SNGPL have rejected our request, saying they didn’t have spare capacity,” he said.

He claimed that both SSGC and SNGPL had between 400 and 600mmcfd capacity to spare and allocate to the new terminals. “This capacity can also be increased through a swap arrangement under which the gas companies would allow LNG brought by private terminals in place of the system gas,” he said. However, SSGC and SNGPL want them to bear the cost of 10-18pc UFG (unaccounted for gas) losses against the 6pc losses determined by Ogra.

Tabeer and Energas were granted a licence to undertake regulated activity related to the sale of re-gasified liquefied natural gas (RLNG) in Pakistan in January 2021. The last steps before the two RLNG firms commenced development of the terminals include construction licences from Ogra and the regulator and gas transportation agreements with the two gas utilities.

Ogra has already organised a public hearing on Monday in Karachi, which will expedite the grant of construction development licences to the investors for the establishment of the terminals including allied facilities. Nonetheless, the terminal developers have long been accusing the state gas utilities of creating roadblocks in the development of their projects. Both the private projects with RLNG capacity of 750mmcfd to 1000mmcfd each are scheduled to come online in two years during the first quarter of 2023.

However, the gas companies have a different story to tell.

“The February CCOE decision on spare existing pipeline capacity allocation to the terminals has three parts. One, Ogra can allocate spare capacity on a three-month

rolling basis on the 'as and when available' basis (during lean demand months from May to September). Two, the spare capacity in the existing system will be allocated to the new terminals after their completion against their indicated requirement. If the indicated requirement is greater than the spare capacity, both of them will get equal allocation. These are short-term measures though," a gas company official told *Dawn*.

The longer-term, permanent allocation of capacity suggested by the CCOE was the allocation of full required capacity to the private terminals only after the completion of the North-South pipeline, he said. The gas official wondered as to why the developers were in a hurry to get pipeline capacity allocations.

"The government has promised them to provide capacity once they become operational in 2023. They should have confidence in the government as it is making arrangements for the completion of the new pipeline before 2023," the official said.

With Pakistan becoming one of the fastest growing LNG markets since it imported its first cargo in 2015, the industry sources say there is an urgent need to expand import capacity expansions to meet the increasing future imported gas demand. The two projects intend to bring LNG for private power, cement, textiles, fertilizer and other companies through a floating storage and re-gasification unit (FSRU). Currently, Pakistan has two LNG terminals with a combined capacity of 1350mmcfd though the capacity of both terminals has been contracted by the government.

https://www.dawn.com/news/1618884

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Delay in access agreement irks CNG association

LAHORE: The Sui Northern Gas Pipelines Ltd (SNGPL) is allegedly delaying the approval of an agreement meant for accessing its distribution network by a consortium formed to import LNG and supply to several member stations of the All Pakistan CNG Association (APCNGA) in Punjab.

The delay is being seen as a move to stop private parties, especially the CNG sector, from importing LNG independently and instead keeping them dependent on the SNGPL for getting supplies to gas stations in the province, *Dawn* has learnt.

“We have been left with no option but to repeatedly request the SNGPL to approve the initial third party access agreement from its board of directors. However, the SNGPL has yet to process and place it before the board for approval,” APCNGA group leader and former chairman Ghayas Paracha said while talking to *Dawn* on Saturday. “It clearly reflects an ‘intentional delay’ on the part of the company that apparently doesn’t want private sector to import gas and distribute to their respective business community by using existing public sector gas distribution network,” he alleged.

The government in September last year had decided to accord permission to the private sector to independently import LNG and provide it to their consumers, thereby ending the monopoly of the SNGPL, Sui Southern Gas Company and others concerned on LNG purchase and distribution among various consumers. Prior to this, in 2016 the Oil and Gas Regulatory Authority (Ogra) had for the first time allowed a private consortium — Universal Gas Distribution Company (UGDC) — to import or purchase LNG from suppliers and sell it to the CNG stations across the country for vehicular consumption. It had also issued a formal licence to UGDC — a joint venture of CNG operators — for sale of natural gas for an initial period of 10 years.

“The CNG sector’s total demand is about 200 million cubic feet per day (mmcfd) that varies time to time keeping in view the weather. We have a total 3,400 gas stations/registered members, out of which 700 have closed business due to short supplies,” Mr Paracha claimed.

He said that once the SNGPL board approves the agreement, the UGDC will start getting LNG from suppliers to whom money has been paid in advance already.

On the other hand, a senior official of the Petroleum Division, requesting anonymity, dispelled the impression and said the signing of agreement was not an issue. The core problem is the access, which according to SNGPL, should be till the main line and not the other lines means for domestic supplies, he said. “The UGDC wants complete access including the domestic network which is not possible under the law. However, the Ogra is working on this issue and it is likely to be resolved soon,” the official explained.

He said another issue was the main pipeline which remained overburdened between August to March, including three peak winter months (November to January). In the off-peak months, the line remains busy in supply to domestic, commercial and industrial as well as the power sector. “If the company stops supply to the power plants and allows CNG sector to use, the public at large would get power on higher rates,” he highlighted. He added that another pipeline from North to South is being planned which will be helpful in resolving this issue.

https://www.dawn.com/news/1618869/delay-in-access-agreement-irks-cng

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