

Topic: Is curtailing powers of judiciary injustice to justice?

Outline

1- Introduction

Thesis Statement: The judicial restructuring has developed a double-tier court system in Pakistan. It curtailed the powers of the Supreme Court on the pretext of the power redistribution. However, the defective flow of inter-institutional power is injustice to justice.

2- Correlation between the curtailing judicial powers and legal framework in Pakistan

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3- Curtailing Powers of judiciary is injustice to justice (Theis)

- a) Deteriorating balance of power negates the constitutional guarantees of the independence of judiciary
- b) Non-binding nature of Supreme Court's verdicts create trust deficit in public
- c) The political influence in the appointment of judges may elicit defective constitutional interpretations
- d) Abolition of *Suo-motu* powers endangers fundamental rights
- e) Arbitrary transfer of judges as a pressure tactic against judiciary

4- Curtailing powers of judiciary re-distribute the power structure (Anti-theis)

- a) Empowerment of the legislature resonates with the democratic norms
- b) Double-tier apex court system controls the work load of the traditional courts
- c) Constitutional interpretation by the

exclusive court might end constitutional ambiguities

d) Bar on judicial activism eliminates the power hunting practices

e) Fear of transfer may harbour a sense of accountability in judiciary

5- Defective flow of inter-institutional power is injustice to justice (Synthesis)

a) Over-concentration of power by the Executive as a fatal tool against institutional coordination

b) Ineffective system of checks and balances promotes injustice

c) Power deprived judiciary as a tool of political victimization

d) Fragmentation of judicial power as a threat to federation

e) Absence of job security as a way towards massive corruption

6- Conclusion

The French political philosopher **Baron De Montesquieu** is considered as the father of the doctrine of the "separation of powers". In his publication "**The Spirit of Laws**", he postulates for the ~~even~~ distribution of balanced powers among the three pillars of the state i.e., the legislature, the judiciary, and the executive. Among these three pillars, the judiciary is entrusted with the powers of dispute settlement, protection of the civil rights, dispensation of the justice, and the interpretation of the constitution. But the establishment of the special constitutional court in Pakistan has raised questions regarding the stature of the judiciary within the country. The judicial restructuring has developed a double-tier apex court system in Pakistan. It curtailed the powers of the Supreme Court on the pretext of the power redistribution. However, the defective flow of the inter-institutional power; ~~might lead~~ is injustice to

injustice. In the American constitution, the concept of the "**Judicial Review**" is not clearly mentioned. However, the "**doctrine of the implied powers**" gave birth to the judicial review in **1803**. The interpretation of the constitution is considered the an important role of the judiciary. But in the USA, the **unified model** of courts exist. It implies that all the courts within the country can interpret the constitution. On the other hand, about seventy-eight countries follow the **Kelsenian model** which advocates for the establishment of the specialized constitutional courts in the country. In this model, only constitutional court is vested with the power of constitutional interpretation. Although, the concept of exclusive constitutional court is not unique but for many people are considering it as a step towards the curtailing of judicial powers, mainly due to excessive political interference.

In the context of Pakistan, the twenty-sixth and twenty-seventh amendment in the **1973** constitution; are considered as the stepping-stone towards judicial power condensation. There is a rift between the legislature and the judiciary with respect to ^{the judicial} power restructuring. In a politically motivated country like Pakistan about **40%**

of the judicial workload emanates from the ^{cases subject to the} constitutional interpretation. The hybridization of the political regime and unstoppable cycle of political victimization laid the foundation of the double-tier apex court systems in Pakistan. Thus, marking the end of an era of the supremacy of the traditional court system in Pakistan.

In a democratic country, curtailing powers of the judiciary is an injustice to the justice. The fortress of the democracy is standing on three ^{strong} pillars i.e., legislature, executive, and judiciary. These three pillars demand even-handed

flow of power. The deteriorating balance of power among the three pillars may result in the inter-institutional rivalry. A ^{country} ~~state~~ where its constituents are in the ~~form~~ ^{state} of conflict; will surely go towards chaos. The principle of the proportional representation in the **"Special Parliamentary Committee"** responsible for the appointment of the judges in the apex courts, leave a little to no space for dissent. Thus, sabotaging the constitutional guarantee of the separation of the judiciary from the other pillars.

Secondly, the non-binding nature of the Supreme Court's verdicts over the Federal Constitutional Court creates a trust deficit in the public. This trust deficit is an injustice to the justice system as people resort to the regressive methods of dispute settlement due to ^{binary} judicial composition. According to the **Article 189** of the twenty-seventh amendment, the verdicts of the constitutional court are binding over all the courts

of the country but not vice versa. The skepticism of the public about the Supreme Court's interpretation of the legal codes, obliged them to ~~resort to non~~

seek help from unconstitutional means. The local village Councils will can replace the constitutional courts due to trust deficit. Thus, pushing the country towards the centuries-old repressive judicial system; depriving people from justice.

Thirdly, the political influence in the constitutional interpretation of the legal codes may trigger conflict of the mutual interests. The **Article 175-A** of the twenty-seventh amendment, provides the ^{with unprecedented opportunity} legislators for the appointment of the judges. The system of favouritism compromises the integrity of the judiciary.

A country like Pakistan where **"Doctrine of necessity"** has ^{been} validated multiple times due to the inter-institutional factionalism might not stand condensation of judicial

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powers. In short, the looming political influence over the judicial interpretations of the constitution may not fared well in terms of judicial transparency.

Furthermore, the abolition of *suo-moto* powers from the traditional courts may endanger the fundamental rights. The amendment in the **Article 184(3)** of the Pakistan's constitution deprives the traditional courts from taking up matters at their own. It is not a good sign for a country ^{already} suffering from the violations of the fundamental rights. According to the report of the **World Justice Project 2025**, Pakistan ranks **128** out of **143** countries in terms of **fundamental rights**. The abductions, detentions and extra-judicial killings are the big concerns of the international organizations. In a federation, judiciary acts as a custodian of the public rights. So, the deprivation of the judiciary from *suo-moto* is an injustice to the justice system.

In addition to this, the arbitrary transfer of the judges across the country is a form of pressure tactic to extract favourable decisions. The **Article 200** of the twenty-seventh amendment gives arbitrary powers to the government to transfer a judge from one place to another. The experts perceive this clause as a threat against the independence of the judiciary. The clause of the arbitrary transfer is highly resembled with the bureaucratic transfers. This is the sheer violation of the **"Objective Resolution of 1949"** which ensured full independence of the judiciary. So, curtailing powers of the judiciary is the violation of its constitutional framing principle.

The other faction supports the Kelsenian model as a way to redistribute powers among the pillars of the state. First of all, the curtailing powers of the judiciary results in the legislature's empowerment. In a democratic country, the legislature

represents the will of the general public. The **Consensus View** of the Criminology, postulates that the legislators represent the "general will" of the people. The legislature's sanction of the establishment of the Federal Constitutional Court reaffirms the supremacy of the "general will". Though having a unified system of courts, in the United Kingdom courts do not have any right to nullify the legislation sanctioned by the Parliament. Thus, curtailing powers of the judiciary is not an injustice to justice but the empowerment of the legislature.

Secondly, the double-tier apex courts ^{will reduce} ~~controls~~ the work load of the traditional ^{court} system. The acute paucity of the resources, shortage of the judges and the subsequent adjournments are the major causes behind the huge backlog of judicial cases. According to the **Law and Justice Commission of Pakistan**, approximately 2.25 million cases are pending nationwide. Owing to the

excessive media coverage and the pressure of the civil society, the traditional courts used to prioritize cases of constitutional nature. So, the establishment of the Federal Constitutional Court is not the condensation of the judicial powers but a stepping-stone towards prioritising civil and criminal justice.

Thirdly, the constitutional interpretation ~~of~~ by the exclusive court, will put ~~to~~ an end to the constitutional ambiguities. It will finish the debate about ~~for~~ constitutional interpretation and re-writing. The intra-judicial ambiguity about the important legal codes has added fuel to the fire of the political instability within the country. For instance, the interpretation of the **Article 63** of the 1973 constitution added insult to the injury in terms of the constitutional crisis. Two contradictory verdicts regarding the interpretation of the Article 63 fueled political polarization in the country. The ^{doubt} ~~debate~~ about whether

the
a parliamentarian ^{can} cast a vote against the
party lines or not, has been a matter
of debate under different Chief Justices.
So, the exclusive constitutional court
will ^{end} ~~modify~~ the room for ~~its~~ interpretational
errors.

Apart from this, bar on the
judicial activism eliminates the power
hunting practices by the judiciary. The
power of *suo motu* makes the judiciary,
a parallel unelected legislature. The
abolition of Article 184(3) from the 1973
Constitution, ended the populist measures
taken by ^{the} judges. The judges cannot
get public sympathy by visiting hospitals
or collecting funds for the power
projects. The **Article 175(3)** of the
constitution ensures the separation of the
judiciary from the executive. It advocates
for the principle of non-interference
by two State pillars in one's
another functions. Thus, Now *suo motu*
can only be taken ^{by the constitutional court} on the advice of
the constitutional bench. Thus putting an
end to the power hunting practices.

Last but not the least, the curtailing powers of the judiciary may harbour a sense of accountability in the judges. In the past, judges have acted like "untouchables" when it came to accountability. The judges could be removed by the "Supreme Judicial Council". However, with the introduction of the rotational clause - a clause permitting the transfer of the judges nationwide; the judges may act in accordance with the law, to improve criminal justice system in Pakistan. According to the report of **World Justice Project 2025**, Pakistan ranks **101** and **129** out of **143** countries in terms of **Criminal** and **Civil Justice** ^{respectively.} ~~accordingly.~~ So, the rotational policy may act as a blessing in the disguise in improving country's judicial system.

Nevertheless, curtailing powers of the judiciary and re-distributing it to the exclusive courts have some brighter prospects ahead but the ~~diffective~~ defective flow of inter-institutional power is injustice to

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justice. The over-concentration of the powers by the executive is a fatal tool against institutional coordination. The inter-institutional harmony is vested in the unique functions of the each institution. The executive has the upper hand in the appointment of the judges. The members of the executive clearly overshadow the members of the oppositions. **Baron De Montesquieu** has claimed that the concentration of executive, legislative and the judicial powers in a single entity is a recipe for disaster. The close resemblance of the over-concentration of all kinds of powers in one hand is ~~known as~~ close to the kingship theory of "**Persian Paganism**". So, the despotic nature of the condensed powers of the judiciary makes it injustice to the justice.

Besides this, the ineffective system of checks and balances is against the democratic norms. The notions of liberty, equality, and fraternity cannot be ensured without effective accountability.

of each organ of the government. The father of the US constitution **James Madison** manifested the system of effective checks and balances in the US constitution. He was of the view that "**an ambition must be made to counteract ambition.**" The system of checks and balances is even more important in Pakistan which has been declared as an **Authoritarian regime** by **The Economist Intelligence Unit**. The over flow of power in one organ without ^{the} system of checks and balances bears resemblance with the despotic regimes. So, the violation of the democratic norms is injustice to justice.

Furthermore, the power deprived judiciary may be used as a tool for political victimization. The political philosopher **John Locke** stressed upon the rule of law in relation to the social contract. As judiciary is a custodian to ensure rule of law, curtailing its powers may be used for ^{the} suppression of the same voices in the society. The judiciary in Pakistan

is agreed on the fact that it had been used for in the judicial murder of the former Prime Minister Zulfiqar Ali Bhutto. The suspension of the 1973 constitution in the era of dictator Zia-ul-Haq deprived the judiciary of its true responsibilities, resulted in the political victimization of the former Prime Minister of Pakistan. So, the curtailing powers of the judiciary may result in the repetition of the history in an attempt to injustice to the justice.

Moreover, the fragmentation of the judicial power may act as a recipe for disaster in a federation. Pakistan is a culturally and ethnically diverse society. The constitution of 1973 was a collective effort to create a legal consensus. However, the twenty-sixth and the twenty-seventh amendment were introduced in an unprecedented haste. The stakeholders all across Pakistan, did not get a suitable chance to table their grievances. ~~So~~ ⁱⁿ these

circumstances, the fragmentation of the supreme judicial powers, may prove to be a threat to the cohesion of the federation.

Lastly, the curtailing of judicial powers may result in job insecurity and subsequent corruption.

The absence of the economic security is the biggest driver for corruption.

The Pakistan's judiciary is already suffering from the menace of corruption. According to the report of the **Transparency International**, Judiciary is the third most corrupt institution in Pakistan. The amendment in the

Article 175-A of the constitution, accompanies with the abolition of the seniority clause. The special Parliamentary Committee will choose ^{one} from the three seniormost judges. If a senior judge declines nomination, they will be subject to the immediate retirement under the

"Refusal clause". So, the arbitrary

nomination ~~process~~ process alongwith the transfer ~~process~~ process harbours the sense of job insecurity which paves the way for

the subsequent massive corruption.

To sum up, it can be concluded that the curtailing powers of the judiciary is injustice to justice. In a democratic system, every organ of the state is vested with the exclusive rights and responsibilities.

The deteriorating balance of power elicits inter-institutional rivalry. The fragmentation of the apex court system may create disharmony among the federal components. The over-centralization of judicial powers might create trust deficit in the public. The political appointments of the judges of the apex courts violate the principle of the separation of the judiciary from other state's components. Moreover, the political influence in judiciary may result in the distorted interpretations of the constitution. The abolition of the judicial activism may create hurdles in the protection of the civil rights. The arbitrary process of transfer of judges may be used as a pressure tactic against the decisions of the judiciary.

Last but not the least, the absence of the job security will provide an avenue for massive corruption. So, without a dint of doubt, it can be concluded that curtailing powers of the judiciary is injustice to justice.
