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<b>Article:</b>	<b>Separation of Judiciary from Executive: A Plea for Revision of Dictums by Superior Courts</b>
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### **Abstract**

The paper aims to critically review the law laid down by superior judiciary of Pakistan relating to separation of judiciary from the executive. The methodology adopted is mainly doctrinal and critical analysis of case law jotted down by superior judiciary. The findings of the research paper beckon restoration of judges from the executive in Pakistan along-with consideration of competent adjudicators from other walks of life like executive or academicians etc. The implications of the research have huge ramification in restoring of law and order in addition to justice system of Pakistan. Such an exercise in the form of research paper to the humble knowledge of author has not been undertaken before.

### **Key Words**

Judiciary, executive, executive magistracy, Constitution of Islamic Republic of Pakistan, review.

## **Introduction**

Gradual erosion in government authority calls for restoration of old age system of executive magistracy and revision of superior court dicta concerning separation of judiciary from executive. Presently, only judges from the institution of judiciary can adjudicate issues of judicial/contentious nature and others from executive etc. have been excluded by virtue of superior courts verdicts and General Retired Pervez Musharraf(military dictator) devolution plan. It is averred in this research paper that such a revision of superior court dicta is in interest of masses and such an exercise of restoring appointment of judges from other walks of life should not be carried out in derogation of fundamental rights of citizens. The value addition of this article will have consequences for reforms in adjudication mechanisms. The study proposes a method of reform for parliamentarians and superior judiciary as government is already mulling over reforms in justice system. It is proposed that instead of new reforms to the system, the time tested executive magistracy may be restored. The limitations of the study are interviews, field studies and case survey of all the available data due to the compactness of the research underhand.

## **Analysis**

The recent times in land of the pure of Islamic of Republic Pakistan has witnessed an erosion of state authority. This is evident from taking over by terrorists of large chunks of the country and setting up of their own justice system. These misdemeanors had origins in small scale activity rising to full scale terrorism resulting in killing of innocent civilians and destruction of their property. The erosion in state authority was gradually followed by military dictator General retired Pervez Musharraf devolution plan and many of the pronouncements by superior courts divesting the elite bureaucracy of executive magistracy powers. This meant that district management group of bureaucracy was relieved of the powers as provided in the Cr.PC regarding chapters VIII ('Offences against Public

Tranquility'), X ('Contempt of Lawful Authority of Public Servants'), XIII ('Offence Relating to Weights and Measures'), and XIV ('Offences Affecting Public Health, Safety, Convenience, Decency and Morals') (Noorani, *District magistrate* 2017). All these powers now stand transferred to judicial magistrates who are toothless in regard thereto and have not been exercising the same due to lack of administrative control which was available with district management group officers. The old age system of district magistracy was replaced without trial of the new system which entailed transfer of powers from executive magistrates to the judicial branch. It is true that system of executive magistrates was a relic of the past and leftover of colonial masters but the system was yielding results and it could have been reformed to divest itself of arbitrary powers. The executive magistracy system could also have been introduced with reforms safeguarding individual and fundamental rights. However, the system was completely made defunct pursuant to decision of Supreme Court in this regard titled as *Sharaf Faridi's case (Govt of Sind v Sharaf Afridi)*. Now arbitrary powers of opening of fire to disperse alleged unlawful assembly etc. is with police officer which was previously dependent upon orders of district magistrate. Therefore check and balances in this regard have been completely done away with as police is known to get violent in nature in Pakistan due to diverse factors e.g. lack of civil training. The cases of highhandedness of police are many in Pakistan. Police officer Rao Anwar case wherein he killed innocent civilians alleging terrorism can be quoted as a reference (Ali, *Rao Anwar held responsible for Naqeeb's killing* 2018). The killing of civilians in model town incident wherein protesters were directly shot and no responsibility could be attributed to anyone is another example (Khan, *Model Town case* 2018). Routine ghash(patrolling) for law and order purposes by district magistrates accompanying police is now a bygone thing and police is sovereign in this behalf presently to the detriment of civil society (CrPC,1898). The rising of outlawed elements urged the state to install executive magistracy system in Malakand and Swat (Shariah Nizam-e-Adl

Regulation, 2009). Hence, a deepest and earnest desire for peace was restored to the troubled region through the mechanism of erstwhile executive magistracy. The rising of terrorism in Waziristan belt of Pakistan could have been countered and innocent lives saved by installing of executive magistrates along with regular courts when Maliks( influential people of the area) were being divested of their powers by government. However, the Maliks diminished influence without any counter force drowned the area in the menace of terrorism. Thus, a flawed policy resulted in killings of many of innocent civilian bloodshed.

Article 175(3) of the Constitution of Islamic Republic of Pakistan stipulates that judiciary shall be progressively separated from the executive within fourteen years from the commencing day of the constitution i.e. 14<sup>th</sup> August, 1973 (Constitution of Pakistan, 1973). In this regard the foremost judgment that was pronounced by the Apex Court of Pakistan was *Government of Sind v Sharaf Afridi* (*Government of Sind v Sharaf Afridi*), which while interpreting Article 175(3) of Constitution of Islamic Republic of Pakistan inter-alia held that, ‘According to the consensus of the jurists, the independence of judiciary means-

- a.) That every judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law without improper influences, inducements or pressures, direct or indirect, from any quarter or for any reason; and
- b.) That the judiciary is independent of the executive and legislature, and has jurisdiction directly or by way of review over all issues of a judicial nature.

The apex court was wholly justified in holding that independence of judiciary primarily means understanding of law without any improper influences so that an impartial decision is rendered and that judiciary is independent of executive and legislature. However, the apex court observation that judiciary has jurisdiction directly or by way of review over all issues of a judicial nature is hard to comprehend as there is no such thing provided in the Constitution of Pakistan nor the specific Article 175 clause 3 of the Constitution of Islamic Republic of

Pakistan mandates any such thing. Independence of judiciary in its spirit implies impartial decision making and this does not mean only judges are impartial to decide all issues of a judicial nature as inducement to judges is also a common phenomenon in Pakistan and they have been seen to be more fickle in this regard than other quarters. There is no short tell tale stories of judges dishonesty whether moral or intellectual among the masses litigants. This made also the governments from time to time move for appropriate amendments towards judicial reforms but the issue of impartiality of judges remains a far cry. Judgments of incorrect application of law is rampant among lower and higher judiciary and some of such judgments are set-aside but many go unnoticed as litigants don't have the necessary expenses in this regard due to very high cost of litigation in Pakistan which is mostly out of the reach of middle income groups. The incumbent Prime Minister of Pakistan recently observed that, 'people's confidence in the country's judicial system has almost been shaken, and constituted two committees to suggest constitutional reforms and look into the plight of women prisoners and recommend remedial steps for the purpose (Reporter, *People's trust in judicial system has been shaken: Imran* 2020). The solution to all this could have been bringing diversity within judicial organ and installing people as judges from other walks of life that are competent in law and known to be men and women of impeccable integrity. Competence and integrity based on past performances has been completely missing in selection of lower judiciary while the selection criterion rests mainly on acumen shown in a written exam with interview. Competitive examinations without elite level training and passing of further exams has been producing power ambitious individuals who were lacking in capacity as promotions till now is a routine affair with huge benefits attached to offices. It is averred that promotion in the institution of judiciary be linked with scholarly work or performance be minutely gauged of judges so that promotion is not a routine affair in the judiciary as high perks and privileges are involved in today's times with the judicial institution which are far more than other

organs of the state. These perks and privileges which have been assumed by the judiciary for it are also quite contentious as the results are not forthcoming. Instead, the system requires streamlining as beseeched in this article through installation of competent judges from other fields of life by way of revision of interpretation of article 175(3) of the constitution of Islamic Republic of Pakistan which calls for separation of judiciary from executive.

In this regard, it is averred that superior judiciary should review its dicta and allow people competent from all walks of life to be made judges of administrative tribunals and courts and particularly executive magistracy should be restored with amendments so that people's rights are safeguarded. However, it is proposed that such a dispensation be brought into effect with due regard and remedial measures relating to fundamental rights of people. Particularly, it is proposed that this be instilled in the minds of all adjudicators that all individuals are equal in terms of mandate of Article 25 of the Constitution of Pakistan and vision of country's forefathers and such adjudicators are not to act as masters of people. There is nothing in the constitution which debars such a proposal and it is only the interpretation that has been placed by judiciary on words that is the hindrance. Article 175(3) only mandates separateness of judiciary from executive which was always the case in Pakistan as judiciary was a separate organ of the government from the executive with oversight over all actions of executive. This was the correct connotation of separation of power theory as it meant separation of organs with checks and balances as is seen in the constitutional dispensation of U.S.A and England. Judiciary is fully independent in Pakistan with power of judicial review over all actions of all organs of government and with financial autonomy which was also achieved by way of an overstretched interpretation in above referred *Sharaf faridi* case wherein executive magistracy was abolished. However, it is pleaded that executive magistracy may be restored with amendments so that it is not representative of colonial masters and consequently draconian in nature. In this regard, jurisdiction in cases for contempt of lawful authority can

be relegated to the high court from old amendments when executive magistracy was order of the day. Instead of making district management group completely redundant with function only as a coordinating agency, authors of this research paper are of the opinion that viable amendments could have been brought with a positive role for bureaucracy. All this was only possible if judiciary had not given a plethora of judgments which seem to be a verbal diarrhea with lengthy rebuttable arguments and far from real spirit of the constitution. The subject judgments included, 'Mehram Ali case PLD1998 SC 1445, Altaf Hussain vs The State PLD 1985 Lahore 10, Azizullah Memons Case PLD 1993 SC 341 and Al Jihad Trust case PLD 1996 SC 324 etc (G.M Chaudhry, *Essays on law, justice, human rights and legal system* 2009). By virtue of these and other judgments the judges have also taken over the executive powers to adjudicate from the bureaucracy besides some of the executive discretionary powers of bureaucracy which now are impliedly with judiciary but judicial magistrate and judges are powerless in that regard as the judges are dependent on certain judicial processes without which they cannot function. Besides, they are not trained in the art of the executive. Summary trials are almost an alien phenomenon for judges and in many trials of summary nature which are prescribed by law e.g. forest cases, the judges seem helpless and are attuned to doing the complete trials. Presently session judge is in-charge of police and buck stops at him as he is the chairperson of criminal justice coordination committee (Police Order 2002). Thus, new dispensation has jeopardized the executive authority and security at large of people. This has also intermingled judiciary with police and consequently judiciary with executive. It is averred that to put things in proper perspective, old system may be revived with amendments in light of fundamental rights of people.

The states of affairs as they stand today are not bright and reviving of time tested executive magistracy is one of the options. This can be only achieved if apex court revises its dicta on independence of judiciary and concludes that matters of judicial nature can also be



decided by specialized technocrats and this doesn't hurt independence of judiciary as the power of judicial review is constitutionally guaranteed with the apex courts. Recently Peshawar High Court following suit in case titled *Ali Azim Afridi vs Federation of Pakistan through Secretary through Secretary Ministry of Law and Justice, Islamabad and others (Ali Azim Afridi vs Federation of Pakistan through Secretary through Secretary Ministry of Law and Justice, Islamabad and others)*, has made all the revenue courts redundant based on the same principles as pronounced in *Sharaf Faridi* case supra, thus powers of revenue courts to decide issues of land revenue nature stand transferred to judges who are not the least trained in this regard and seasoned bureaucrats well versed in revenue matters have been divested to decide such issues of land revenue. Instead of suitably amending the system to yield results a system of adjudication is being superimposed and it is not known how it will solve already increasing complicated problems of judiciary whose judges at basic level come mostly without any formal training and there is increasing pointing of fingers on elevation of superior judiciary.

The above argument of establishment of administrative courts with adjudicators other than judges also finds support from Article 212 of the Constitution of Islamic Republic of Pakistan wherein it is provided that, 'Notwithstanding anything hereinbefore contained the appropriate Legislature may by Act 1[provide for the establishment of] one or more Administrative Courts or "**Tribunals**" to exercise exclusive jurisdiction in respect of—

The addition of words 'or tribunals' with 'courts' gives an indication that adjudication is not a function to be necessarily performed by judges from the institution of judiciary. Some of the best judges in the history of Pakistan from the likes of Justice Kiyani, Justice Shafi-ur-Rehman and Justice Samdani etc. have been from the executive. There are countries around the world where judges from military are also performing adjudication function and it doesn't threaten their independence of judiciary neither separation of powers e.g. Brazil, Haiti, Dominican Republic, Thailand, China and Angola. Article 8 to universal declaration of

human rights provides for an effective competent national tribunal for remedying of grievances relating to fundamental rights of people in a particular country (Universal Declaration of Human Rights, 1948). It doesn't say that only judges from the institution of judiciary are competent to ameliorate grievances relating to fundamental rights of citizens. The use of word 'tribunal' which is wide enough to include persons from other walks of life is representative of the fact there is no hindrance to such a dispensation of competent adjudicators from other walks of life. The only thing that requires ensuring is the right to 'due process' which is constitutionally guaranteed in Article 10 of the constitution of Islamic Republic of Pakistan along-with power of judicial review over all tribunals whether executive or judicial by superior judiciary of Pakistan that is also guaranteed under constitution by virtue of Article 199. It is time that we move past our preconceived notions in interpretation of Constitution articles and place interpretations on it that can be rebutted through counter arguments which can be presumably correct. Superior judiciary needs to be vigilant in this regard as they are playing with the ultimate pact of government with the people i.e. the constitution. It is averred that where words of constitution can go either way with interpretation, a balanced approach should be adopted and status quo be maintained rather than superimposing interpretations to constitutions that are tainted with preconceived notions.

## **Conclusion**

Numerous judicial reforms have been introduced by successive governments to streamline the deteriorating justice system but the desired results have not been forthcoming. It is beseeched in this research paper that instead of bringing new reforms that are alien to our judicial system, the time tested executive magistracy may be restored that has origins in ancient times. All this exercise may be done while protecting the cherished fundamental rights in Constitution of Pakistan, 1973. This will have huge ramifications in bringing peace to this war torn country and nipping the miscreants at inception wherein the successive

governments have proved to be lacking in capacity and power due to the powerless erstwhile influential district management group. It is also proposed in this article that competent judges from every walk of life particularly well learned academicians and bureaucrats may be brought in the institution of judiciary with prior trainings particularly in equality clause of the Constitution of Islamic Republic of Pakistan so that they don't adopt colonial masters attitude while presiding over of courts. It is also averred that promotion for the institution be linked with scholarly work or performance be minutely gauged of judges so that promotion is not a routine affair in the judiciary as high perks and privileges are involved in today's times with the judicial institution which are far more than other organs of the state.

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