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## **Importance of Judicial Activism to Ensure Transparency in Pakistan: A Case Study on Privatization of Pakistan Steel Mills Case 2006**

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### **Abstract**

This case study analyzes the attempt of the Government to privatize the Pakistan Steel Mills, after it had been revamped and had started generating profit. There were many irregularities in this case with respect to the actual decision to privatize, valuation of the assets as the land and other assets were not included, pre-qualification of the highest bidder, the final setting of the share price, and even undue concessions were provided to materialize the deal. Through this landmark judgment, the Supreme Court of Pakistan directed the Government to stop the process of privatization of a prime asset of Pakistan. The Court intervened only to the extent of applicability of the relevant rules regarding the privatization and tried to refrain from interference in the policy-making authority of the Government.

**Keywords:** Suo Moto, Law making, Judicial review, Constitutional democracy, Separation of powers, Constitutional provisions, Pakistan Steel Mills Case.

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## **Introduction**

Judicial activism in Pakistan has reached new heights in the year 2018, with the honorable Chief Justice appearing to intervene in many areas that seem to fall within the domain of the Executive. The Supreme Court has taken up cases dealing with services being provided in hospitals, cases concerning drinking water, the misuse of water, the building of dams and reservoirs, money laundering, corruption, land-grabbing and housing projects, and mass transit and communications. The Court is doing all this on grounds of public interest and the protection of fundamental rights. The intervention by the Court is praised by the general public, but has drawn severe criticism from various quarters, who maintain that this amounts to encroachment upon the domain of the Executive and the shaping of public policy. It is also said that the Court is occupied with these matters, even though they do not fall within its jurisdiction, while hundreds of thousands of regular cases are pending before the superior courts. Debates and discussions about these issues fill the pages of the print media and occupy the prime time of TV channels. It is seldom discussed, however, as to what kind of an impact these interventions by the Court have on the formulation of policy and the administrative decisions of the Executive, nor is it discussed what impact the actions of the Court has on the legislative process as well as the content of the laws.

## **The Dawn of Judicial Activism**

Maryam S. Khan, a Research Fellow at the Institute of Development & Economic Alternatives (IDEAS), Lahore, Pakistan, has stated that

The concept of public interest law or PIL is not novel and is often instinctively traced back to the PIL phenomenon of the 1960s in the United States. In recent decades, American practice has been a notional counterpart of public interest in courts in other constitutional systems (Khan, 2015).

Muhammad Amir Munir, working as judicial officer in Punjab Judiciary, in his 2007 thesis on Public Interest Litigation in Pakistan, finds the precedents from the American experience as follows:

The concept of public interest litigation or PIL—as is understood in present day jurisprudence—was firstly emerged in USA in early 1960s. The underlying theme of this concept was civic justice, which could be described as full opportunity for all citizens to participate in public life. Although various legal jurisdictions have their own system of PIL, but all agree on the point that in modern jurisprudence, USA was the first to follow PIL techniques to enforce the fundamental rights in unconventional way (Munir, 2007, pp.2-3).

## **Critical Perspectives**

There is an ongoing debate that non-expert courts are ill-equipped to deal with the expert policies and it has been suggested that there should be a judicial restraint in such issues. Judicial review on administrative rule making often befuddles the exact scope of authority of such administrative institutions.

Amy Street (2014) in her book titled “Judicial Review and the Rule of Law: Who is in control?” explains the relationship between the judicial review and rule of law. She also explores how differently the concept of rule of law is interpreted by the government and the judiciary. The debate could parliament legislate contrary to rule of law has also been discussed at length. In the end the book explores the potential consequences of legislation limiting the judicial review.

Robert Justin Lipkin, in his article titled “We Are All Judicial Activists Now”, remarkably concluded as;

Consequently, reasonable disagreement over key constitutional provisions should not be regarded negatively; it is an inevitable and positive feature of any society championing liberty, equality, and pluralism. However, the inevitability and desirability of reasonable disagreement have institutional consequences for constitutional review. When reasonable disagreement is inevitable, legislatures, not courts should have the last word on constitutional meaning (Lipkin, 2009).

### **Judicial Activism in the Subcontinent**

The phenomenon of judicial activism became familiar in the subcontinent after promulgation of Independence of India Act 1947. In the Constitution of the India, Articles 32 and 226 authorize the Supreme Court and the respective High Courts to exercise the power of judicial activism and protect rights of general public by issuing various kinds of writs. It is said that the foundation of judicial activism was laid by Krishna Iyer J., in 1976 in India in *Mumbai Kamgar Sabha vs. Abdul Thai* (AIR 1976 Supreme Court, 1455) and in *Akhil Bharatiya Shoshit Karmachari Sangh (Railway) v. Union of India* (AIR 1981 Supreme Court, 298). In the second case Supreme Court for the first time authorized an association of workers which was not registered, to invoke Article 32 of the Constitution of India and file a writ petition for raising the plea of general public importance. Justice Krishna Iyer enumerated the reasons for broadening the scope of locus standi in *Fertilizer Corporation Kamgar Union v. Union of India* (AIR 1981 Supreme Court, 344). Similarly in the case of *S.P. Gupta and others vs. Union of India* (AIR 1982 Supreme Court, 149) the concept of public interest litigation was established by Indian Supreme Court.

### **Emergence of Judicial Activism in Pakistan**

The validity of judicial activism by Supreme Court in Pakistan is based on Article 184(3) of the Constitution. This Article gives original jurisdiction to the Supreme Court to pronounce any judgment in a matter of public importance and with reference to enforcement of fundamental rights. The term 'public importance' has not been defined in the Constitution thus this term has been interpreted in accordance with facts and circumstances of each case. This paper also highlights how the concept of 'doctrine of necessity' (coined by the judiciary) created constitutional crisis in the country. The last part of the paper focuses on the state of affairs after the restoration of judiciary in 2009. The Supreme Court took a proactive approach in dealing with cases of human rights violations and there was a paradigm shift in the attitude and approach of this institution. While concluding the paper it has been justified, the approach of judicial activism by maintaining that poor governance has created dissatisfaction and disenchantment among the common people, thus there was a need for an institution to check the actions of the executive and judiciary has to play this role. The Constitution of Islamic Republic of Pakistan has provided three organs of state, namely, legislature, executive and the judiciary. The concept of separation of powers among these organs also exists; however, recently this concept has become a merely theoretical concept as judiciary has assumed many additional roles in the name of judicial review. It has been a matter of common observation that the judiciary has intervened in the cases of blatant misuse of powers by the executive.

The judicial activism in Pakistan had gained attraction due to inaction by the executive in ensuring provision of basic necessities of life to general public. The judiciary has thus intervened on many occasions to keep the executive responsible for implementation of fundamental rights. The apex court defined the 'basic structure doctrine' to prevent the misuse of powers by the executive and the legislature.

### **Pakistan Steel Mills Case – 2006<sup>3</sup>**

The process to privatize the steel mill established by the Government of Pakistan "PSM" was the landmark and major case (*Wattan Party and others vs. Federation of Pakistan and others*) become more attractive case of general public importance in 2006. The larger bench constituted by the SCP declared the submission of the \$362 million bid for the privatization of PSM as null and void.

Government of Pakistan initiated the process of privatization of steel mill in 2005. The Supreme Court took suo moto notice under Article 184(3) of the Constitution of Pakistan and constituted a bench comprising of nine Honorable judges. This is one of the most important cases as the decision on this case is what caused

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<sup>3</sup> PLD 2012 SC 610.

the initial friction between Chief Justice Chaudhry Ifitikhar Muhammad and the Government. It was, therefore, necessary to analyze this case in depth. The court started hearing and taken into consideration all facts and figures raised by the concerned officials who are against the process of this transaction.

It is considered as the first important case which ultimately leads apex court to start public interest litigation under Article 184(3) of the Constitution and took suo moto notices of all cases wherein the public interest was at stake<sup>4</sup> and element of transparency was lacking.

### **Facts of the Case**

As per the case file of the Supreme Court of Pakistan, “Pakistan Steel Mills Corporation (P.S.M.C.) is a private limited company and its 100% equity is owned by Government of Pakistan” (Supreme Court of Pakistan, 2006). It is actually a “Government” company, now called “Public Sector Company,” and not a private limited company. The Court has most probably used this term to indicate that its shares are not listed publicly on the Stock Exchange. This concept is elaborated by Imran Ahsan Khan Nyazee in his book, “Company Law” as;

Government companies are to be distinguished from statutory companies. Statutory companies are established through a special Act and are not established by registration under the Companies Act, 2017. Government companies, however, are those that are registered under the Act. The Government owns the major share in these companies.

S 2(54) states: ‘public sector company’ means a company, whether public or private, which is directly or indirectly controlled, beneficially owned or not less than fifty-one percent of the voting securities or voting power of which are held by the Government or any agency of the Government or a statutory body, or in respect of which the Government or any agency of the Government or a statutory body, has otherwise power to elect, nominate or appoint majority of its directors and includes a public sector association not for profit, licensed under section 42:

Both statutory bodies and Government companies are autonomous in their day to day operations, however, their vital decisions are controlled by the Government. The law through which the Government exercises its authority of controlling certain decisions is the Public Investments (Financial Safeguards) Ordinance, 1960. When such companies are privatised an amendment is needed in this law to remove the control of the Government. A recent example is PTCL. An amendment was made in Clause 5(2). The amendment exempted the entities privatised pursuant to the Privatisation Commission Ordinance, 2000 from the purview of the Public Investments (Financial Safeguards) Ordinance 1960 (Nyazee, 2019).

The Court goes on to describe the background information about Pakistan Steel Mills as:

It was incorporated in 1968 at a total cost of Rs. 24.7 billion. It commenced production from 1981 to 1984. The Mill is the biggest producer of steel in Pakistan and the only major manufacturer of flat and long bars and billet. It being situated near Port Qasim (Karachi) has got its jetty, water, natural gas and power. The plant was installed with the collaboration of Russian Government by the Ministry of Industries, Production and Special Initiatives. Mills net assets include land measuring about 19000 acres out of which the plant and the machinery is located on 4457 acres of land (core land) besides the land of downstream industrial estates.

3. The annual designed capacity of P.S.M.C. is 1.1 million tons. As explained in the written reply submitted by the management of the Mill, during initial years of its establishment, its profitability was not too remarkable on account of overstaffing, financial liabilities, poor work discipline, low capacity utilization, low

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<sup>4</sup> SCP took notice of cases of vital importance and directly linked with general public benefits such as, privatization of steel mill: installation of McDonald’s in a place reserve for green belt and construction of public park in F/9 Islamabad etc.

sales, mismanagement and lack of a culture of accountability, etc. It was added that no appreciable investment was made in maintenance and mandatory repairs resulting in deterioration of machinery/equipment (Supreme Court of Pakistan, 2006).

The Council of Common Interests (CCI) took the decision to privatize Pakistan Steel Mills in 1997, however, in the year 2000, the decision was taken to restructure and revamp the steel mill instead by the then Chief Executive of Pakistan, General Pervez Musharraf.

The restructuring included “Financial Restructuring,” “Manpower Restructuring,” “Repair & Maintenance,” “Offer of Equity to Private Sector,” and “No New Investment in Direct Expansion.” As a result of this restructuring, the Pakistan Steel Mills was able to turn things around and become a profitable entity of the years “2002-03, 2003-04, 2004-05” (Supreme Court of Pakistan, 2006)

Before inviting expressions of interest, Valuers, M/s City Group, were appointed for the purpose of carrying out a valuation, who, it turns out, prepare the Evaluation Report without taking independent exercises to obtain the information and often copied the information verbatim that was provided by their advisors. The Court document explains this as;

Before inviting E.O.I the Valuers were appointed to carry out a valuation. As per record, M/s City Group were appointed. The Group was assisted by Advisors namely M/s CORUS to provide technical ‘due diligence’, including plant mechanical integrity assessment and technical inputs to the valuation model and environmental ‘due diligence’ and M/s A.F. Ferguson & Co. (an affiliate firm of Price Waterhouse Coopers) for the purpose of Accounting, Tax, HR and IT ‘due diligence’ along with M/s ORR, Dignam & Co. Advocates for legal ‘due diligence’. It is relevant to point out that Financial Advisors/Valuers prepared the Valuation Report on the basis of the report submitted by A.F. Ferguson, CORUS and ORR, Dignam & Co. without undertaking independent exercise in respect of accounting, tax, etc and other aspects of the matter. A.F. Ferguson had also relied upon the Statement of Accounts furnished by P.S.M.C. In fact, the Statement of Accounts and the balance sheet were copied in verbatim by the A.F. Ferguson (Supreme Court of Pakistan, 2006).

On October 28, 2005, “the Financial Advisor (F.A.) City Group submitted the interim report of Valuation of Shares followed by the final report on 30.03.2006.” The Court adds that “...at the time of the issuance of the E.O.I., the Privatization Commission intended to sell 51 to 74% out of 100% equity stake in P.S.M.C. but at the time of bidding total 75% shares were put on sale.” The additional incentives that were going to be provided to the successful bidder were not made public or published anywhere. These included;

(i) The stock in trade contained in the Unit worth about Rs. 10.00 billion.

(ii) The commitment of the Government of Pakistan to clear the loan liability of PSMC which was due for the year 2013 to 2019, amounting to about Rs.7.67 billion from the cash of Rs.8.559 billion lying with the Mills as per the Statement of Account.

(iii) Refund of Rs.1.00 billion paid in advance as tax to Government of Pakistan.

(iv) Responsibility accepted by Government of Pakistan to satisfy the claim of the workers opting for Voluntary Separation Scheme (V.S.S.) up to Rs. 15.00 billion (Supreme Court of Pakistan, 2006).

Additionally, the value of the land of the mill had, “not been added in calculating the share price.” The Privatization Commission Board (BOPC) proposed that the “current market value of total assets of P.S.M.C. may also be taken into account,” however, they decided that “the total value of P.S.M.C. would be U.S. \$ 500 Million and based on this the reference price for 75% strategic stake would come to US \$ 375 million i.e. Rs. 17.43 per share calculated at the rate of Rs. 60 per U.S. \$.” (Supreme Court of Pakistan, 2006).

The next day, on March 31, 2006, the matter was placed before the Cabinet Committee on Privatization (CCOP), who “...did not accede to the proposal of the Privatization Board with regard to the inclusion of the value of total assets as also the per share price worked out by it on the basis of F.A. Valuation and the

replacement cost (Rs. 17.43 per share).” Despite the reservation of the CCOP with respect to valuation of share price and inclusion of assets, “the consortium comprising M/s Arif Habib Group of Companies, M/s AlTuwairqi Group of Companies and M/s Magnitogorsk Iron and Steel Works, Russia was declared successful bidder at the rate of Rs.16.80 per share. Thereafter the matter was not again placed before the CCOP and the Letter of Acceptance (LoA) was issued on the same date.” (Supreme Court of Pakistan, 2006).

Prior to this, on February 27th, 2006, “the ongoing process of privatization of P.S.M.C. was challenged by Pakistan Steel Mills Workers Union (CBA) and three others before the High Court of Sindh at Karachi in a Constitutional petition (bearing No. 240 of 2006).” This petition “came up for hearing on 30th March 2006 before acceptance/finalization of the bid and it was dismissed,” with the High Court stating that,

For reasons to be recorded later, we are of the view that the provisions of Article 154 are mandatory and the functions of the Cabinet under the Privatization Ordinance 2000 ought to be performed by the Council of Common Interest. Nevertheless, in view of the fact that the Provincial Government has consented to the privatization of the respondent No.5 and other facts and circumstances we are not persuaded to exercise discretionary jurisdiction under Article 199 for the purpose of issuing any directions in respect of respondent No.5. The petition stands disposed of (Supreme Court of Pakistan, 2006).

In response to this decision of the Sindh High Court, the Workers Union submitted a Constitutional Petition to the Supreme Court of Pakistan, and the Federation of Pakistan also submitted a petition to the Supreme Court challenging the statement of the High Court with the view,

...that Articles 153 and 154 of the Constitution of Islamic Republic of Pakistan are not attracted in the case of privatization of a company wholly owned by the Federal Government and further that in exercise of its Constitutional jurisdiction, the High Court cannot decide academic question like vires of a statute when such decision was not warranted, upon the facts of the case (Supreme Court of Pakistan, 2006).

Another petition was filed, to the Supreme Court, by Wattan Party through Barrister Zafarullah Khan, “under Article 184 (3) of the Constitution of the Islamic Republic of Pakistan challenging the process of privatization and acceptance of bid of respondent No.7 before this Court.” (Supreme Court of Pakistan, 2006).

### **Major Issues Addressed**

The issues to be resolved as stated by the Court are as follows:

- (i) Whether the terms of reference framed for the valuer were in accord with the Privatization Commission Valuation Rules, 2001?
- (ii) Whether the method adopted in valuing the property satisfied the mandate of law contained in Privatization Ordinance 2000 and the rules framed thereunder and whether it is in accord with the internationally recognized principles in this regard?
- (iii) Whether the process of pre-qualification of potential bidders satisfied the requirement of Privatization Commission Regulations?
- (iv) Whether the decision dated 31.03.2006 taken by the Cabinet Committee (CCOP) to sell the Mill if the bid was above Rs.16.18 per share satisfied the requirements of law?
- (v) Whether the final terms/concession offered to the highest bidder/consortium on 31.03.2006 were in accord with the terms and conditions of initial public offering given to the potential bidders through advertisement dated 19.10.2005 and if not whether these can be justified on the touchstone of law and ‘reasonableness’? (Supreme Court of Pakistan, 2006).

Rules relevant to the issue can give a background of the rule. This is where the Supreme Court has shown on multiple occasions in the order of this case that it is cognizant of the fact that it must not interfere in the policy matters of the Executive, and is to focus on the Law and the rules. From all this discussion of the

Court, a broad and high level rule, for the actions of the Executive, can be formulated as follows: The Executive must follow the Law and the Rules made thereunder and is not to deviate from them under any circumstances, but this does not apply for issues concerning policy matters that are dependent on the discretion and sound judgment of the Executive.

This is a very generic and broad rule that the Court is trying to apply to the facts of the case and to decide the issues. The awareness of the Court to this rule is highlighted in point 9(4) of the Order file as follows:

While exercising the power of judicial review, it is not the function of this Court, ordinarily, to interfere in the policy-making domain of the Executive which in the instant case is relatable to the privatization of State owned projects as it has its own merits reflected in the economic indicators. However, the process of privatization of Pakistan Steel Mills Corporation stands vitiated by acts of omissions and commissions on the part of certain State functionaries reflecting violation of mandatory provisions of law and the rules framed there-under which adversely affected the decisions qua prequalification of a member of the successful consortium (Mr. Arif Habib), valuation of the project and the final terms offered to the successful consortium which were not in accord with the initial public offering given through advertisement (Supreme Court of Pakistan, 2006).

### **Analysis from the Perspective of Policy**

From the record of the Court, it has been determined that five issues have been placed before the Court which need to be addressed. Below, this study has taken the analysis of each issue separately, by citing the position of the Court, utilizing the Judgment and Order files of the case, before giving a combined analysis of the individual issues as they relate to the outcome of the case. For each issue below, this study has reproduced the relevant content, from the Judgment and Order files for the case provided by the Supreme Court of Pakistan, to assist in establishing whether the issue at hand was addressed.

#### **1. Analysis of Issue Number One**

From the official case file of the Supreme Court of Pakistan, the first issue identified for this case is as follows: “(i) Whether the terms of reference framed for the valuer were in accord with the Privatization Commission Valuation Rules, 2001?” (Supreme Court of Pakistan, 2006).

From the Order file of the case, the following concise information related to the terms of reference for the “valuer” is as follows:

M/s Citi Group was appointed as Financial Advisor (FA) for the purpose of evaluation of the assets of the PSMC. In the terms of reference, following guidelines were provided to the FA:--

‘The objective is to apply various internationally accepted valuation techniques to obtain a valuation range for PSMC as a going concern. The valuation model will take into account the capital expenditure and earning projects, costs and other business considerations. The model will be used to undertake a sensitivity analysis in order to highlight the impact of changes in different variables, such as gross product margins, rate of customs duty on import of iron. A valuation based on comparative pricing analysis will also be prepared. Inputs of the valuation model and valuation methodology will be reviewed with the PSMC management’ (Supreme Court of Pakistan, 2006).

The main Judgment file of the case, from the Supreme Court of Pakistan, highlights the following with respect to the appointment of financial advisors/valuers:

It is not disputed that before the appointment of Financial Advisor (F.A.), the P.C. was required to determine and decide the most important issue i.e. valuation of property according to section 24 of the Ordinance 2000 and its mode. The valuation of property is to be done in the prescribed manner i.e. the Privatization Commission (Valuation of Property) Rules, 2001 by independent valuers who are to be hired

in accordance with Privatization Commission (Hiring of Valuers) Regulations, 2001 (Supreme Court of Pakistan, 2006).

The Court also notes in the Judgment file that,

Regulation 3 of which provides that for a fair and independent valuation of the property the Privatization Commission shall frame terms of reference for the valuer which shall, 'include inter alia, a brief history of the entity, the financial position, a description of the production line/service of the entity if any, a description of land, building, plant and machinery, the current assets and liabilities and the current state of industry' (Supreme Court of Pakistan, 2006).

Although this is referring to the calculation of shares, the Court makes a reference to the inadequacy of the terms of reference of the valuer/financial advisor,

The crux whereof is that in the fiscal year 2004-2005, PSMC had recorded annual sales of over Rs.30.00 billion and net profit of Rs.6.00 billion. It is equally important to note that after restructuring, the liquidity of the Corporation improved and it paid off principal amount of debt of Rs. 11.35 billion on 30th June 2003. Therefore under these circumstances it was incumbent upon the Privatization Commission to have taken care about these facts and these must have been mentioned categorically in the Terms of Reference framed for the Financial Advisor that the Mill is ongoing profitable concern and it has marketable assets and the liabilities are much less than the assets, therefore, keeping in view these facts any internationally acceptable methodology for calculating its shares may be adopted (Supreme Court of Pakistan, 2006).

## **2. Analysis of Issue Number Two**

From the official case file of the Supreme Court of Pakistan, the second issue identified for this case is as follows: "(ii) Whether the method adopted in valuing the property satisfied the mandate of law contained in Privatization Ordinance 2000 and the rules framed thereunder and whether it is in accord with the internationally recognized principles in this regard?" (Supreme Court of Pakistan, 2006).

There is extensive information related to the process that was followed for valuing the property/land of the Pakistan Steel Mills. Excerpts relevant to the requirements and actual process followed for valuing the land have been extracted from the Judgment file of the case. Referring to the main objective for privatization of Federal Government owned projects or entities, the Court notes the following from the Preamble of the relevant ordinance:

...approval dated 29th May 1997 had given the approval for the privatization of the Federal Government owned projects or entities for the purpose of retiring the debts and this object has been duly transformed in the Preamble of the Ordinance 2000, therefore, keeping in view the object for privatization it should have been the endeavour on the part of the Privatization Commission to adopt such ways and means which may fetch highest price of its assets (Supreme Court of Pakistan, 2006).

The Court further notes,

It may be noted that as per section 2 (l) of the Ordinance, property 'includes any right, title or interest in property, moveable or immovable in whole or in part or any means and instruments of production owned or controlled directly or indirectly by the Federal Government or any enterprise owned or controlled by the Federal Government whether in or outside Pakistan'. The cumulative effect of the relevant law/rules/regulations is that the valuation of the property is part of the process of privatization of an ongoing concern (Supreme Court of Pakistan, 2006).

And,

Admittedly, in this context, the report of the statement of affairs submitted on behalf of the Chairman of PSMC becomes more relevant coupled with the Statements of Accounts. The owners generally make their efforts to show less book value of the assets for the purpose of lessening the tax burden on the concern.



Admittedly such balance sheets and the statements of accounts were never prepared for the purposes of disposing of the assets, shares, etc in the market. It is not disputed that before the appointment of Financial Advisor (F.A.), the P.C. was required to determine and decide the most important issue i.e. valuation of property according to section 24 of the Ordinance 2000 and its mode. The valuation of property is to be done in the prescribed manner i.e. the Privatization Commission (Valuation of Property) Rules, 2001 by independent valuers who are to be hired in accordance with Privatization Commission (Hiring of Valuers) Regulations, 2001. It may be noted that as per section 2 (l) of the Ordinance, property 'includes any right, title or interest in property, moveable or immovable in whole or in part or any means and instruments of production owned or controlled directly or indirectly by the Federal Government or any enterprise owned or controlled by the Federal Government whether in or outside Pakistan'. The cumulative effect of the relevant law/rules/regulations is that the valuation of the property is part of the process of privatization of an ongoing concern. This conclusion about legislative intent is further reiterated by the Privatization Commission (Hiring of Valuers) Regulation 2001. Regulation 3 of which provides that for a fair and independent valuation of the property the Privatization Commission shall frame terms of reference for the valuer which shall, "include inter alia, a brief history of the entity, the financial position, a description of the produce line/service of the entity if any, a description of land, building, plant and machinery, the current assets and liabilities and the current state of industry' (Supreme Court of Pakistan, 2006).

Quoting statements made by counsel for the respondents, the Court highlights,

When the case was being heard and reports were being examined the learned counsel appearing for the respondents candidly admitted that the Financial Advisor (City Group) had not valued the land on which the PSMC is located which is described as core land. This fact is also evident from the report of the City Group. Contrary to it the agreement of sale and purchase as per clause 4.2 of the Share and Purchase Agreement dated 24.04.2006 entered with purchasers, lays down condition precedent to completion that notwithstanding any other provision of this agreement completion shall not occur until and unless the unmutated land has been mutated in the name of the company in the relevant record of rights. When we inquired from the learned counsel for P.C. that without adding the value in the property (assets) of PSMC in terms of section 24 read with valuation rule 3 how can the property/land be mutated, he got recorded following statement as an officer of the Court but not as a counsel for P.C.

'Admittedly the land has not been evaluated. What is the nature of the land subject to the document which has been produced by the learned Advocate General of Sindh, my submission is that since the land has not been valued and it appears that land was partly acquired under Acquisition Act for the purpose of the PSM by the Sindh Government and secondly it was given by the Sindh Government at a special rate again for the purpose of Steel Mill, so my personal opinion, I am not speaking as a counsel for the Privatization, my personal opinion as officer of the Hon'ble Court, that so long as the unit of the Steel Mills they can leave/use it, but if they are not going to leave/use it as Steel Mill then they are not entitled to the land, it will revert to the Federal Government, subject to the document which will come.'

The above facts are sufficient to draw the inference that in the valuation process of the property the land underneath the unit was not added (Supreme Court of Pakistan, 2006).

### **3. Analysis of Issue Number Three**

From the official case file of the Supreme Court of Pakistan, the third issue identified for this case is as follows: "(iii) Whether the process of pre-qualification of potential bidders satisfied the requirement of Privatization Commission Regulations?" (Supreme Court of Pakistan, 2006).

The references made towards addressing the issues of pre-qualification of bidders, the Court documents contains the following important information:

This transaction is outcome of a process reflecting serious violation of law and gross irregularities with regard to sale of the first and the biggest steel mill that this country has. From the facts admitted before us, even the procedural irregularities are not disputed. It has been argued by Mr. Abdul Hafeez Pirzada that rule 4(2) of the Privatization Commission (Modes & Procedure) Rules 2001 has been satisfactorily applied even though it was conceded that the name of the highest bidder was neither before the CCOP nor approved. The fact is that even the bidding took place after CCOP decision dated 31.03.2006. He obliquely suggested that in any case the CCOP knew the names of the bidders. If this be correct, how could the CCOP import its behind the scene knowledge into decision making and that also without noting it. Learned Attorney General argued somewhat on the similar lines even though he admitted that PC and CCOP have adopted somewhat 'convoluted' procedure (Supreme Court of Pakistan, 2006)

And,

In our judgment rule 4 is couched in absolute language which requires full compliance. The rule has a wisdom behind it when it says that the CCOP will approve the name of the highest ranked bidder and not the highest bid. To us the wisdom in requiring approval of the highest bidder rather than the highest bid is that the Cabinet/CCOP will also have to keep in view the considerations not purely economic in approving or not approving the names of the highest bidder. As mandatory and absolute requirement of Rule 4 has not been met, in our considered view this alone is sufficient to invalidate the Letter of Acceptance and the Share Purchase Agreement based on it (Supreme Court of Pakistan, 2006).

In addition to the fact that a member of the consortium was undergoing litigation in various cases, which disqualified him, it turns out that an offshore company was set up for taxation purposes, which meant that the actual purchasers were different from the bidders. This violation of rules is addressed by the Court as follows:

...we cannot encourage such practice because if at all the bidders wanted to have any benefit of taxation they should have resorted to the municipal law of Pakistan and in this behalf if at all there was necessity they could have obtained incorporation of any other company within the territory of Pakistan having its own permanent office or business. Although we are mindful of the fact that after starting the business in Pakistan a company can open its office and can get the registration for the same purpose in terms of section 450 of the Companies Act. But if a corporate body i.e. PSMC SVP (Mauritius) Limited had got incorporation few days before entering into an agreement i.e. on 19th April 2006 in a different country coupled with the fact that this company is not a bidder, the PC should have not entered into contract in the present shape (Supreme Court of Pakistan, 2006).

#### **4. Analysis of Issue Number Four and Five**

The fourth issue to be analyzed addresses whether the decision of the Cabinet Committee (CCOP) to sell the Mill if the bid was above Rs.16.18 per share satisfied the requirements of law. With respect to the share price finalized, it has already been pointed out above that a major objective of privatization was to maximize sale price for the purpose of servicing the debt of the Country, which means that maximum amount should have been sought. As also pointed out above, the valuation of land and other assets, and the creation of balance sheets and statements of accounts, from the perspective of a seller, were not undertaken, which shows that the intention of the Government was not to maximize the sale price for the benefit of the Country and its people. This viewpoint can be highlighted with the following statements of the Court in the Judgment file of the case.

A final statement by the Court on this topic is worth mentioning where the Court categorically states that, "...there was no necessity to privatize the PSMC at a lesser price instead of selling it at a fair market price for achieving the objects set out for privatization" (Supreme Court of Pakistan, 2006).

Thus, it is clear in this analysis, using the decisions of the Court that the final share price was not set in the best interest of the people of Pakistan or in accordance with the Law.

### **Judicial Activism and Constitution of Pakistan, 1973**

Part VII, Chapter 2 of the Constitution of Pakistan exclusively dealt with the jurisdiction of the SCP. Article 184(3) of the Constitution empowers the SCP to take suo moto and original jurisdiction. It empowers apex court to take judicial notice on violation of any fundamental rights guaranteed in chapter I of the part II of the constitution. The SCP can issue an appropriate order or direction to the state functionaries to do or refrain from doing something particular which appears to the SCP just and proper for the enforcement of rights under question<sup>5</sup>. To take jurisdiction and exercise authority, the SCP refers and relies upon two phrases provided in 184(3) of the Constitution “A question of public importance” and “Enforcement of any of the Fundamental Rights conferred by Chapter I of Part II of the constitution is involved”.

Composition of Art 184(3) *requires claiming the violation of matter of public importance and infringement of fundamental rights* enumerated in the Constitution of Pakistan. Therefore the apex courts are required to examine the composition of phrase “public importance” on case to case basis (*Mian Muhammad Shahbaz Sharif vs. Federation of Pakistan*, PLD 2004 SC 583). It cannot be applicable on the cases, where outcome of the case benefits to an individual or a group of individuals only. It is applicable only if outcome relates to the right and liberty of the public as a whole or collectively. The word “public” denotes something used collectively such as owned by the nation, large fragment of the society or the State. Case of public importance cannot be established where the controversy pertains to the interests of one or a group of people (*Syed Zulfiqar Mehdi vs. PIA*, 1998 SCMR 801).

### **Conclusion**

The critics have always considered the phenomena of judicial activism as detrimental to the democratic order, since it leads to mistrust of the people on the different institutions of the State. The critics also maintain that judicial activism reflects the desire of judiciary to be in limelight and to call shots in every affair. They also point out that public interest litigation has been misused to a great extent. The judicial activism has been criticized by many commentators as they see it as encroachment upon the rights of legislature and is detrimental to the citizen’s right of democratic participation and self-government. It is never easy to identify judicial activism as it has not been defined.

However, on the other hand there are other several aspects of judicial activism. These distinct jurisprudential aspects of judicial activism and their applicability in diverse societies are required to be investigated. For instance, the scholars criticize that the process of striking down of constitutional actions taken by the legislature or the executive constitute judicial activism, than it starts debate on the question that who is competent to interpret the Constitution and where courts can use the term judicial review, when all three organs of state are working independently. Moreover, the accusation of not following precedents in judicial activism may give rise the issues of complex nature.

The supporters of judicial activism maintain that it has played vital role in improving the conditions of people and in keeping a check on misuse of powers by the executive. They also maintain that the superior judiciary has itself laid down certain parameters and limits for the public interest litigation, thus the tales about its misuse are nothing more than exaggeration.

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<sup>5</sup> Mr. Justice Khilji Arif Hussain, Prime Minister’s disqualification case dated 19/06/12 (Additional note), Describing the scope and limits of art 184(3) of the constitution, Fundamental rights and locus standi to invoke jurisdiction of SCP.

The judicial activism has been an effective tool to keep a check on the functioning of the governmental institutions, however, the concept of separation of powers among organs should also be complied with. Many scholars and judges believe that the ambit of judicial review should be narrowed down so that judiciary does not undertake issues which do not fall within its domain. Particularly it has been suggested that the judiciary should refrain from taking positions in policy issues in which it does not have requisite expertise. Similarly, in privatization of steel mill case, it is concluded the actions of certain functionaries has violated certain rules and laws, therefore, the Letter of Acceptance dated 31st March, 2006, did not meet the standards required for the privatization of a valuable project and declared it null and void.

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