[**Role of the judiciary**](https://www.dawn.com/news/1696448/role-of-the-judiciary)

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THE role of the judiciary has once again taken centre stage. For an apolitical institution that is built upon the tenets of independence, due process and equality, it is concerning how often its most senior members become arbiters of political events.

Unlike most other countries, personalities in the superior judiciary and ‘suo motu’ have become household names in Pakistan. Recently, the chief justice of Pakistan felt the need to take [suo motu notice](https://www.dawn.com/news/1690306) of what he felt were perceptions about interference in the criminal investigation of government officials and who remains on the Exit Control List.

If judges are able to bring cases themselves to the apex court, then certain rules must be established to ensure against the appearance of bias. Should the judiciary be receptive to invitations for interventions from politicians or opinion-makers? Questions are also raised about suo motu benches excluding particular members of the judiciary. The façade of judicial propriety has descended to a new low, where one group of senior judges criticise another group for deliberately excluding them from deciding constitutional petitions of a political nature.

**Read:** [*The suo motu question*](https://www.dawn.com/news/1688038)

Suo motu empowers the senior judiciary to enforce fundamental rights on a ‘question of public importance’, but applying this power selectively can cause irreparable damage to the dignity of the judiciary. Where cases against political leaders, commercial enterprises or government departments are selected to ensure that they are prosecuted with zeal in the interest of preserving the rule of law, and other cases do not raise such judicial fervour, it raises the fundamental question of equality before the law. Are certain political leaders more equal than others? Some examples are the targeted investigations by NAB officials, as noted by the apex court itself; the [murder of activists](https://www.dawn.com/news/1695727) in North Waziristan; the recent police brutality against Afghan refugees; and even a case filed against PTI leader Imran Khan, which was later withdrawn by the prosecution. No suo motu followed these instances.

Public interest litigation can be a useful tool, which the judiciary can use for the empowerment of vulnerable groups, but its exercise should be limited to the rules.

In India, following the emergency imposed by Indira Gandhi, an era of judicial activism followed, in which the Indian supreme court took suo motu cases based on letters or press reports of state excesses. There were reported instances of judges soliciting petitions from journalists, which led to the formation of a public interest litigation cell, tasked with screening petitions, which are then placed before the chief justice for assignment. This took away the power of individual judges or benches to select and control issues being brought before the court. Despite rules to prevent selection by individual judges, suo motu cases have been on the rise in India.

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In Bangladesh, the power is used more sparingly, and mainly in existing or decided criminal cases. Beyond South Asia, suo motu cases have been taken up by the Nigerian court, but mainly in relation to issues in ongoing or decided cases.

The moralistic leaning of our Supreme Court also comes forth in the court’s observations in other politically charged cases. For example, the majority opinion in the [defections case](https://www.dawn.com/news/1690120) compared defections to a cancer afflicting the body politic. The minority judgement noted that not counting the vote of defecting lawmakers is in effect rewriting the Constitution, in which Article 63-A clearly lays out the remedial process. The majority went further to advise parliament that strict sanctions must be put in place for defecting lawmakers.

In India, defection laws are wider, but nowhere does the law state that the vote of a defecting lawmaker in a no-confidence motion should not be counted. In established democracies like the United Kingdom and United States, there is no sanction when members of the legislature defect other than to exclude them from the party.

Article 95 of our Constitution provides for a no-confidence motion against the prime minister. If this is successful, the Constitution stipulates that he or she shall cease to hold office. If the votes of defecting lawmakers cannot be counted, as ruled by the majority bench, then Article 95 would become futile. It would be career suicide for a parliamentarian to vote out even a most repugnant leader if it meant that not only would his or her vote not be counted but that he or she would also be subjected to punitive sanctions.

In the UK, which has inspired our own parliamentary system, there have been several defections in the last few years over political issues such as Brexit. More recently, Prime Minister Boris Joh­nson faced a no-confidence motion in his own party when 148 parliamentarians voted against him.

The purpose of Article 63-A was to deter established forces from engineering another regime change. Given that not one prime minister has managed to finish his or her term in the last 75 years, the apprehensions that informed Article 63-A were legitimate. It was not meant to quell freedom of choice of legislators where they are compelled to represent their constituencies. While the majority judiciary in the defections case clearly expressed their disdain for politicians who switch parties, the reality is that switching loyalties is rife in every party because of how regime changes are brought about and not because parliamentarians exercise their right to vote on a no-trust motion when they believe that a leader is unable to deliver effectively.

The apex court has supervisory and standard-setting responsibilities, and it is the routine application of rules that provides a stable and certain justice system. Where it would be rare to find two households who would agree on a set of morals, it is concerning that the senior judiciary must select matters and intervene in the running of the state for the cause of ensuring that elected members of parliament display the ‘correct’ morals. It is for the people to make that decision.

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