**[Taxing thoughts](https://www.dawn.com/news/1771332/taxing-thoughts)**

[Muhammad Mohsin Masood](https://www.dawn.com/authors/10221/muhammad-mohsin-masood) Published August 21, 2023

THE famed jurist Oliver Wendell Holmes did not say ‘The power to tax is the power to destroy’; his exact words were “Power to tax is not the power to destroy while this court sits”. Just recently after sitting on it for months, the Islamabad High Court finally delivered the judgement on the challenge to Section 4C of the Income Tax Ordinance, 2001 — the super tax imposed in 2022. What a judgement it surely is! Laced with puns and mindful analogies to keep the reader engaged, the honourable judge delivered an eloquent and fantastic exposition of legal reasoning to conclude that the super tax is ultra vires the Constitution.

The judgement is not only well structured with an index, it also probes all the questions and complexities raised before the court during the hearings. With its crisp legal reasoning, it slices through the arguments of the revenue authorities. With its epigrammatic phraseology, it not only clarifies exactly why the super tax is ultra vires the Constitution, it also makes for a good read.

Indeed, it seems that one of the objectives achieved is to have the judgement read widely. Legally speaking, the court has read down Section 4C and explicitly shut the door on retrospective taxation, especially of past and closed transactions. This means that if you have closed your account books before the tax applies and taken steps to cement that, you will not be asked to open them up again for tax deduction.

The court also afforded relief to segments of the economy for whom tax liability has crystallised in the past. Crucially, however, the court found Section 4C to be ultra vires the fundamental rights under Articles 18, 23 and 24, read with Article 4.

When courts probe reasons behind lawmaking, they do so as unelected forums.

This is where the brilliance of the judgement cuts too far deep. On the face of it, the judge found the actions of the legislature inconsistent with the written words of the Constitution. The devil, however, is in the details. Within the exuberance of this judgement is a potent shot in the arm to judicial review. The honourable court had been much taxed by the pleaders and, resultantly, overstretched itself to sit in judgement over not only the actions but also the intentions of the legislature. The court tried to judge the imposition of a super tax on property on the anvil of Article 23 and noted that since economic rights do not provide a “formulaic prescription” for such a task, one must refer to the context and the raison d’être of such legislation.

This is dangerous territory. With the greatest respect to the honourable judge, who is amongst one of the best if not the very best in our superior courts, this is also territory where previous robed crusaders stampeded across clicking their heels at Article 184(3). The ground still remains a swamp of legal exigency with a few skeletons of political necessity sticking out. No sooner does Mount Doom heave into view than the empire of law turns Mordor-esque. This caution is needed because when the judiciary starts to probe the reasons behind lawmaking, it sits as unelected officials over the will of the elected representatives of the people.

Yes, our last parliament (National Assembly) was a truncated debating club where sexist remarks were easier to pass than meaningful legislation. Yes, our parliamentarians hardly represented the vast majority of the people, and yes, parliament also failed to prevent successive governments from wilfully disobeying constitutional and statutory mandates. However, does our social contract with the state allow an unelected body to step in? Who gets to rectify the failures of our institutions? Should that remedy be administered by the courts or by those stubbornly trying on the slippers of democracy till it fits right? These are questions that need to be answered.

The court has chosen to descend from the ivory tower in an attempt to answer them. It is certainly right in doing so; however, the answers should not be taken as the past and closed. For one, they form obiter dicta and the court did not need to overstep to a point as to include reports from the World Bank to showcase the demise of our parliament. These remarks are important, however, as part of a discourse of the nature of state institutions. If we are to stop Pakistan from becoming ‘ad-hocistan’ we must take note of these debates. On the other hand, the potential for misuse of these observations and the broadening of judicial review as a result remain a taxing thought at least for this writer.

*The writer is a litigator based in Islamabad.*

[**mohsin.masood@ajuris.com.pk**](mailto:mohsin.masood@ajuris.com.pk)

*Published in Dawn, August 21st, 2023*