

A Review on Judicial Activism in Pakistan

Syed Jazib Shamim

M.Phil. Scholar

University of Karachi

Abstract

Judicial activism is a broader term used to define the process of judicial review i.e. a constitutional power vested with the superior courts to adjudicate on the constitutionality of a law, statute, administrative action, constitutional provision or an amendment. The power of judicial review is exercised worldwide by the superior courts as it is a strong legal tool in the hands of the judiciary to make ineffective all extra-constitutional acts and policies of the administrative, executive and legislative authorities. Likewise, the Supreme Court of Pakistan is also exercising this power though more frequently now-a-days to check the arbitrariness of various state/government actions and policies. Although, this practice is not new in Pakistan, it dates back to famous Maulvi Tameezuddin Case 1953 till present day Panama Leaks Case, but this term gained significant attention since 2007 especially due to the active role of the then Chief Justice Iftikhar Chaudhary and lawyers' movement. Supreme Court judges are often criticized for intervening in government policies and nullify them on various accounts. Critics say that the Supreme Court is intermeddling in the affairs of the State by travelling beyond its jurisdictional domain thus damaging democratic values. This research paper will be presenting a brief history of judicial activism in Pakistan since its inception and on the question as to whether judicial activism on the part of the apex court i.e. the Supreme Court of Pakistan has historically contributed in improving the role of executive and protecting democracy or served as a facilitator to the military regimes by giving verdicts on the basis of doctrine of necessity.

Judicial activism which is a broader term used as a substitute of Judicial review is the procedure that basically allows courts to pass judgments and give a final verdict over the legality of matters decided by executive, parliament or any other state organization. Sathe (2001) defines judicial review as scrutiny by the courts of the acts of other government organs to ensure that they act within the limits of the constitution.¹

According to Ahmed (2015), the concept of Judicial Review was originated from Great Britain. The British courts only vetted the acts of the executive against the touchstone of the statutes enacted by the Parliament.² This is to be noted that British courts didn't invalidate the acts of the parliament but this practice is widespread in many British colonies including Canada, Australia, Bangladesh and Pakistan.

Sathe(2001) explains the difference thus: 'Colonial legislatures, unlike the British Parliament, were not supreme and their powers were circumscribed by the provisions of the constituent acts enacted by the British Parliament.'³

Paula Newberg's book "*Judging the State: Courts and Constitutional Politics in Pakistan*" stands out in the literature as a major scholarly treatment of the role and function of Pakistan's superior courts. Newberg (1995) sees Pakistan's superior courts as having maintained the British vice-regal tradition that concentrated power in the hands of the colonial administrator. According to Newberg, Pakistan's superior courts see it as a duty to preserve the state by endorsing military rule and have been called upon to restore social order in moments of crisis. By accepting this role and

¹ S. P. Sathe, *Judicial Activism: The Indian Experience*, 6 Wash. U. J. L. & Pol'y 029 (2001), https://openscholarship.wustl.edu/law_journal_law_policy/vol6/iss1/3

² Ahmed, S. (2017). Supremely Fallible? A Debate on Judicial Restraint and Activism in Pakistan. *ICL Journal*, 9(2), pp. 213-239. Retrieved 20 Jan. 2018, from doi:10.1515/icl-2015-0205

³ S. P. Sathe, *Judicial Activism: The Indian Experience*, 6 Wash. U. J. L. & Pol'y 029 (2001), https://openscholarship.wustl.edu/law_journal_law_policy/vol6/iss1/3

carrying it out over time, Pakistan's superior courts developed a strong sense of autonomy and independence that encouraged further judicial intervention in political disputes.

She claims that the courts proved more important to Pakistan's survival as a country than any other branch of government. She states her thoughts in this regard in following words:

*“When constitutions have not accomplished their tasks - when they have not adequately constituted the state in terms meaningful to their citizens - judges and lawyers have reconstituted the state anew. Given the frequency of constitutional change in Pakistan, its courts have developed rituals of re-creation: not only do they interpret the constitution of the day, but they reread political history and constitutional language to establish their own definitions of political community. These activities lend to judicial proceedings an autonomy only partially written into constitutions and to their judgments an unparalleled importance in the development of the state”.*⁴

She maintains that the ineffectiveness of the parliament and executive also contributed to this judicial role for two reasons. First, the courts began to take on tasks and responsibilities that were not traditionally seen as part of the judicial function. Second, the court became a popular forum for citizens to present demands against the state institutions mainly parliament and executive.

Newberg (1995) in his book *“Judging the state Courts and constitutional politics in Pakistan”* tried to describe the role of courts in Pakistan in these words:

“When constitutions have not accomplished their task , when they have not adequately constituted the state in terms meaningful to their citizens - judges and lawyers have reconstituted the state anew. Given the frequency of constitutional change in Pakistan, its courts have developed rituals

⁴ Newberg, P. R. (1995). *Judging the state Courts and constitutional politics in Pakistan*. London: Cambridge University Press.

*of re-creation: not only do they interpret the constitution of the day, but they reread political history and constitutional language to establish their own definitions of political community. These activities lend to judicial proceedings an autonomy only partially written into constitutions and to their judgments an unparalleled importance in the development of the state”.*⁵

Newberg maintains that Pakistan’s superior courts have found themselves caught in a dilemma. On the one hand, the judiciary seeks to maintain its image as operating outside of the political process, which allows it to enjoy significant popular support. On the other hand, the judiciary sees itself as an institution of governance, which drives it to weigh in on political controversies. In hearing politically-charged cases, how can judges maintain perceptions of independence and impartiality? Newberg describes the conflict as follows:

*“If the superior courts take explicit account of political trends, their autonomy and impartiality seem compromised, and with it the reach of justice; if they ignore politics, their judgments seem suspiciously suspended from contemporary history and the realities of the state”*⁶

In considering the meaning of judicial independence, Newberg was of opinion that it is shaped by strategic decisions that are made by the superior courts, which has produced a confusing constitutional doctrine. Over time, superior courts have learned from their encounters with the executive and have imposed limits on the judicial role and their independence. In the past, when judges confronted the executive too strongly they provoked reactions that curbed judicial powers. Superior court judges understand that the military acts as the ultimate backstop to prevent social

⁵ Ibid, p.31

⁶ Ibid, p. 33

disorder and the breakdown of the state. The meaning of judicial independence in the law of Pakistan therefore must therefore yield to the practical limits of judicial power.

She concludes by terming Pakistan's superior courts as political institutions.⁷ Newberg criticizes Pakistan's superior courts for straying outside the traditional and more limited judicial role by taking up cases related to ideology, political power, and governance that are more suitable for representative institutions.⁸ To facilitate a democratic future, Newberg argues that Pakistan's superior courts should take a more cooperative approach that places value on the contributions of the other branches of government. In deciding cases, judges should look for ways to allow meaningful democratic participation and avoid a judicial pre-determination of the outcome.⁹

Professor H.P. Lee published a brief analysis on judicial independence in several countries in 2010, including Pakistan. Lee focuses on the 2007 conflict between the Supreme Court and the government. According to Lee's assessment, the events damaged the reputation of Pakistan's courts. However, not all has been lost since 2007. Lee notes that the new judicial appointment process established in the Eighteenth Amendment seeks to promote an independent judiciary. In fact, in Lee's view, the judicial selection process may go too far by handing over extensive control to the courts and the Chief Justice. Lee concludes by recommending an appointments commission with more limited judicial participation that would strike a balance between the principles of judicial independence and judicial accountability.

Muhammad Azeem in his book "Law, State and Inequality in Pakistan Explaining the Rise of the Judiciary" states that that military regimes have almost every time got legitimacy through the

⁷ Ibid, p. 11

⁸ Ibid,p.9

⁹ Ibid,p.250

judiciary. Furthermore, he states the role of judiciary in validating the dissolution of assemblies in such words:

“The judiciary has always been there to put its stamp on this dissolution of assembly as ‘constitutional deviation’”¹⁰

Discussing the constitution of Pakistan, Neudorf(2017) discusses the concept of judicial activism or freedom as stated below:

“Judicial independence is a theme that can be seen throughout Pakistan’s history. For example, Pakistan’s first Constituent Assembly passed a resolution in 1947 on the Aims and Objectives of the new country that expressly called for an independent judiciary”¹¹

He maintains that the clause of protection of human rights of citizens creates potential for conflicts between Supreme Court and executive since it’s the constitutional responsibility of the Supreme Court. ¹² He terms Pakistani constitution as ambiguous when it comes to ensuring fundamental rights of the citizens thus it leads to a tussle among the judiciary, executive and legislature i.e. parliament. One can observe its example when recently certain amendments were challenged in Supreme Court of Pakistan leading to tension between the judiciary and executive.

He further explains this tussle in these words:

¹⁰ Azeem, M. (2017). *Law, State and Inequality in Pakistan Explaining the Rise of the Judiciary*. Singapore: Springer Nature Singapore Pte Ltd

¹¹ Neudorf, L. (n.d.). *The Dynamics of Judicial Independence: A Comparative Study of Courts in Malaysia and Pakistan*. Kamloops: Springer International Publishing AG

¹² Ibid,p.152

“Constitution insulates judicial decision-making from the most obvious forms of direct interference or improper influence by the executive and legislative branches, the role it assigns to the courts creates the potential for tension between judges and the elected branches. First, the Constitution calls upon the Supreme Court to interpret fundamental rights and scrutinize actions taken by the executive and legislature to ensure compliance with those rights. Second, the Constitution establishes the principal institutions of government and imposes limits on their powers, which are enforced by the judicial branch”¹³

He argues that Executive and legislative action is subordinate to judicial decision-making in both types of cases and may be held to be constitutionally invalid. The judiciary faces a delicate task in deciding these important and closely watched cases because of the important interests at stake. While not every decision stands to implicate the independence of the judiciary, the suggestion of a preference toward the government in a case or large proportion of cases decided in favor of the government might call judicial impartiality into question. On the other hand, the government itself is a party to the litigation, presenting arguments on the interpretation and application of constitutional terms that may be rejected by the judicial panel, which could raise tension between the branches. Court judgments adverse in interest to the government could be perceived by the government as an impediment to the realization of public policy. These decisions could be especially embarrassing as members of the executive and legislature are sworn to uphold the Constitution in the same manner as the judiciary. In effect, an adverse judicial decision in a constitutional case could be seen as a judicial admonishment that government officials violated the oaths of their offices to discharge their duties “faithfully in accordance with the Constitution” and

¹³ Ibid,p.151

to “preserve, protect and defend the Constitution”. Pakistan’s courts have decided against the government in a number of significant constitutional cases during civilian rule.

While discussing the role of Supreme Court in facing military intervention, he argues that Supreme Court adopted a submissively deferential approach to the regime in order to prevent the breakdown of the state. Describing the submissive policy of Supreme Court during the 1999 Emergency of Gen. Musharraf, he defends the policy in these words:

“Supreme Court took a bold new approach from its previous pattern: it continued to enforce constitutional rights under military rule, something it had only previously done under civilian governments. During Pervez Musharraf’s time in office, the Supreme Court imposed new limits on the regime, including mandating timelines for elections. The Supreme Court also continued to review the legality of government decisions despite privative clauses attempting to oust judicial oversight. The constitutional doctrine of judicial independence continued to develop through the case law during military rule, shifting from an institutional focus to the role of the Chief Justice as the head of the judiciary”¹⁴

He terms Judiciary incapable of maintaining its expanded role of judicial activism in the longer run. Firstly, popular expectations of what the Supreme Court can achieve might not be sustainable if the Supreme Court continues to decide highly contested cases with real winners and losers and creates legal uncertainty through its unpredictable intervention especially in the light of recent high-profile cases. Secondly, retirement of Chief Justice Iftikhar Muhammad Chaudhry resulted in a less confrontational or even divided bench on the Supreme Court, which could weaken its powers and institutional standing. It is notable that the public now appears divided on the record

¹⁴ Ibid,p.146

of the former Chief Justice. Thirdly, the support of international organizations, a key component of the success of the Lawyers' Movement, has become muted in recent years. Criticism of *Suo Motu* notices by the International Commission of Jurists and the call for clear guidelines on its use by the United Nations Special Rapporteur on the Independence of Judges and Lawyers indicate a more qualified international support for Pakistan's conception of judicial independence than in the past. Fourth, a future economic or social crisis may require an urgent response from the government or the military, which could highlight the institutional limitations of the judicial branch.

Neodorf concludes the discussion with these final words:

“This judicial victory cannot mean that a nearly limitless conception of judicial independence and power should ultimately prevail in a democratic state. Moving toward a more balanced system of government, which includes space for genuine dialogue and contributions by each branch, appears necessary for a democratic future.”¹⁵

¹⁵ Ibid, p.216

References:

- Ahmed, S. (2017). Supremely Fallible? A Debate on Judicial Restraint and Activism in Pakistan. *ICL Journal*, 9(2), pp. 213-239. Retrieved 17 Jan. 2018, from doi:10.1515/icl-2015-0205
- Azeem, M. (2017). *Law, State and Inequality in Pakistan Explaining the Rise of the Judiciary*. Singapore: Springer Nature Singapore Pte Ltd.
- Neudorf, L. (n.d.). *The Dynamics of Judicial Independence: A Comparative Study of Courts in Malaysia and Pakistan*. Kamloops: Springer International Publishing AG
- Newberg, P. R. (1995). *Judging the state Courts and constitutional politics in Pakistan*. London: Cambridge University Press.
- S. P. Sathe, *Judicial Activism: The Indian Experience*, 6 Wash. U. J. L. & Pol'y 029 (2001).
- Shamim, S. J. (2018). Nuclear Proliferation in South Asia – Towards World War III. Retrieved February 15, 2018, from https://www.academia.edu/35810528/Nuclear_Proliferation_in_South_Asia_Towards_World_War_III.pdf
- Shamim, S. J. (2018, February 16). Nuclear Proliferation in South Asia – Towards World War III. Retrieved February 17, 2018, from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3111513
- Shamim, S. J. (2018, February 17). Franco German Reconciliation: Lessons for India and Pakistan. Retrieved February 18, 2018, from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3125243

- Shamim, Syed Jazib and Hameed, Irfan, Ethnic Conflict & Politics in Karachi – A Case Study (2018). Available at SSRN:
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3125608