



RESEARCH PAPER

**Judicial Politics and Judicial Independence at Crossroads: A Study of
Judicial Activism in Pakistan**

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DOI

[http://doi.org/10.47205/plhr.2021\(5-II-sep\)1.07](http://doi.org/10.47205/plhr.2021(5-II-sep)1.07)

PAPER INFO

ABSTRACT

Received:

July 29, 2021

Accepted:

September 10, 2021

Online:

September 25, 2021

Keywords:

Judicial Activism,
Judicial Restraint,
Judicial Review,
Public Interest
Litigation,
Suo Motu

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Judicial activism is a philosophy where judges reach a particular decision by allowing their personal views regarding public policy along with other factors to guide their decisions. Pakistani judiciary has, during the last decade or so, become highly proactive and we have now seen a new phase called, Supreme Court Reborn. This new wave of judicial activism has on the one hand provided relief and confidence to the common people, but has also created issues for executive and legislature and suo motu has opened a new debate among legal fraternity, politicians and academicians. This work will highlight the importance of judicial activism and its impacts in Pakistan. The researcher will highlight the impacts of judicial activism and try to find the answer to the question, whether this tussle between different organs of the State, especially very pro-active judiciary will in future result in legislature and executive to go for revamping and restructuring of social contract i.e. Constitution of Pakistan.

Introduction

Judicial activism is the practice in judiciary of protecting or expanding individual rights through decisions that depart from established precedent or are independent of or in opposition to supposed constitutional or legislative intent (Merriam-Webster's Dictionary of Law) whereas, Black's Law Dictionary defines Judicial Activism as, "a philosophy of judicial decision making whereby judges allow their personal views about public policy, among other factors, to guide their decisions..."

Pakistani Apex Court has been relatively passive in political matters in the past; however it is witnessing a new phase called, "Supreme Court Reborn" creating issues for the executive and legislature, where practice of 'Suo Motu' has opened new debate among the legal fraternity, politicians and academicians. As per few, the executive has failed to fulfill its functions and the State is at the verge of disaster due to corruption and wrong policies, therefore judiciary has come forward to rectify the mistakes of politicians and executive. It is also apprehended that this frequent encroachment by judiciary in the name of judicial activism, has resulted into a situation where judiciary has gone wild and is hindering the day to day functioning

of other two branches. The same had been the situation in early 19th century in USA, where judicial review power of the Supreme Court was used so frequently that the whole system was held stuck. The concept of separation of powers as propounded by Montesquieu, which restricts each organ of the State into its limits and only allows interference in special circumstances, has been negated by the judiciary and resulted into political and administrative unrest in the country. This situation may result into resentment and agitation in the future. A federation with a strong commitment to separation of powers, excellence, accountability and integrity has a greater impact on the integration and cooperation in a state. Pakistan is a federation, but lacks these spirits, there is mostly a confronting situation among the judiciary and executive and quite little research has been conducted on the relevance of judiciary-executive and judiciary-legislature relations in Pakistan, having a great research gap in this regard.

In Pakistan Article 184 (3) of 1973 Constitution gives power to declare any legislation or executive act, void if it is against the constitutional spirit. The Parliament accuses judiciary on the ground of judicial intervention i.e. the judges overreach their constitutional powers. Pakistani judiciary has turbulent history of being very submissive during military rules to bit active in democratic eras. It has in past given legal covers to illegal military rules via notorious 'doctrine of necessity' and almost 180 degree turn in 2007, when CJP Iftikhar Ch. refused to resign, ending up the famous Lawyer's Movement for restoration of judiciary, leading to a new era of judicial activism, where supreme judiciary started pursuing issues of public importance through suo-motu.

Judicial Activism

The term judicial activism has been assigned range of meanings and applications. Usually five core things are assigned to it i.e. (i) the constitutional actions of other branches are invalidated, (ii) legislation through judiciary, (iii) non-following of established precedents. (iv) departure from accepted interpretative methods, (v) result oriented judging (Kmiec, KD. 2004). Black's Law Dictionary defines it as, "*a philosophy of judicial decision making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent*".

Judicial activism is when State action is reviewed by the Courts. Article 184 (3) of the Pakistan Constitution gives this power to the Supreme Court to declare any action by executive, administrative or legislative, as invalid, if it considers it unconstitutional. Sathe (2001) is of the view that judicial review power is a scrutiny of the acts of the governmental organs by the courts, to ensure that they remain in their constitutional limits.

Historical Development of Judicial Activism

Judicial activism as a concept is way older than the term itself. Before 20th century there had been a debate on judicial legislation among scholars. Blackstone favored it, whereas Bentham considered it as usurpation of legislative functions. Austin defended a form of judicial legislation. During Lochner era the criticism was vehement on judicial legislation. It is interesting to note that the term Judicial Activism was not coined by judges, rather it was used by a non-lawyer Arthur Schlesinger Jr. in 1947 in an article written for Fortune magazine, where he divided the judges as

'judicial activist' and 'champions of self-restraint'. Even few authors trace the foundation of judicial activism in early 17th century England, where Justice Coke had a disagreement with the King James as to authority of transferring and deciding Bonham Case.

Marbury vs Madison (1803) was the first case where American Supreme Court exercised the power of judicial review and declared certain provisions of Judiciary Act 1789 unconstitutional and appointment of Marbury as justice of peace by the President Adam, was not validated. Articles III and VI of US Constitution bestow the power to set aside laws and brings judges to be bound by the laws and the Constitution. Even before Marbury, this judicial review doctrine was specifically stated in some states' constitutions and by the end of 1803 the same was being followed in state as well as, federal courts.

The Pakistani Constitution talks of separation of powers. As Montesquieu said, "*There is no liberty where judicial power is not separated from both legislative and executive power. If judicial and legislative powers are not separated, power over the life and liberty of citizens would be arbitrary, because the judge would be also a legislator. If it were not separated from executive power, the judge would have the strength of an oppressor*" (Montesquieu, 1877)

The situation was intensified when Dred Scot vs Sanford Case (1857) was decided. Supreme Court restricted its powers after civil war, as from 1865 till 1900 approximately twenty four decisions held some parts or Acts of Congress unconstitutional and from 1900 till 1934 about such forty cases came creating barriers to new deal program. It is noteworthy that after 1937 Supreme Court started to take different approach and did not create hurdles in legislations containing social and economic aspects; hence avoiding controversies and direct confrontation.

Judicial Activism in Pakistan

In Pakistan judicial activism is not very old phenomena. Suomotu power in public interest litigation (PIL) dates back to the famous DarshanMasih Case (1990), where CJP took action on a telegram message regarding forced bounded labor in brick kilns, later on CJP took action on a letter regarding construction of a power station with its negative impacts on health of general public (Shehla Zia Case, 1994). However, from mid-80's judiciary started to become active, when Zia restored Constitution and lifted martial law. PIL started to become common in case of infringement of any of the fundamental rights. 1990-95 is treated as golden era of PIL. Court has taken suomotu cases ranging from kite flying, bonded labor, NICL scam, Hajj scam, inhuman treatment in jails, ephedrine scam, missing persons' cases to name a few which have given relief to common people.

However, critics are of the view that judicial activism upsets the intricate balance of power among state organs. The pro-active judiciary needs to understand that it has to be cautiously self-restraint and use power only in genuine cases judiciously, to avoid arbitrariness and abuse. It should avoid intervening in governmental policies; critics further state that court interferes in governmental affairs by going beyond its constitutional domain, ultimately damaging democratic values. Newberg (1995) declares Pakistan's superior courts as political institutions, as they have strayed outside the limited and more traditional judicial role and have taken up

more policy oriented, political, governance and ideology related matters, which avoid meaningful democratic participation and establish judicial pre-determination of the outcome. Azeem, M (2007) thinks judiciary almost every time gave legitimacy to military regimes by validating the unconstitutional acts and opines that an urgent response is needed from the government or military requiring institutional limitations to judicial branch.

The darkest and ugliest face of judiciary in the shape of doctrine of necessity, with different shapes and interpretations resulting into selective justice, travelled from Dosso Case (1958); AsmaJilani Case (1972); Nusrat Bhutto Case (1977); SaifUllah Khan Case (1989); Tariq Rahim Case (1992); Nawaz Sharif Case (1993); Benazir Bhutto Case (1998) to Zafar Ali Shah Case (2000), proving to be legal black hole and contributed to democratic disruption and political instability.

On the other hand, there has been a positive side of judicial activism too, if we look at Benazir Bhutto Case (1988); DarshanMasih Case (1990); Shehla Zia Case (1994); Human Rights Cases like Syed A Tajawar (1994), Khalil uz Zaman Case (1994), Missing Persons Case (2005), cases involving misuse of public funds, extra-judicial killings, Karo-Kari cases, child marriages, rape cases, illegal appointments and promotions and SHCBA Case (2009) / PCO judges case shunning direct or indirect military rule once and for all. In recent years, if we leave the controversial decisions like removal of elected PM in contempt of court proceedings (2012) and interim orders in ArslanIftikhar Case (2012), the overall impact is positive like in Tariq Azizuddin Case (2010), setting aside promotions of number of bureaucrats, Hujj Corruption Case (2011), BOP Case (2010), National Insurance Co. Scam (2011), New Murree Housing Project (2010), Appointment of Chairman NAB (2011) and JV Agreement Case (2011).

LITERATURE REVIEW

Christopher Wolfe (1997) offers a lucid summary of origin and definitions of judicial activism by presenting comparison between traditional and modern views. He also discussed the pros and cons of judicial activism with reference to America. The lessons from USA can be applied in our context to get healthy results. Dr. AmanUllah (2011) discussed briefly the importance of fundamental rights of citizens which are embedded in the constitutions of India and Pakistan. S.P. Sathe (2003) sees Indian Apex Court evolving from a passive to activist one, being custodian of democracy. Hamid Khan (2013) covers Pakistani constitutional history and critically analyzes important constitutional cases. Hence gives lucid information regarding different governments and military occupational regimes qua constitutional matters alongwith role of judiciary. Iqbal S. Hussain (n.d.) studies political and constitutional misadventures and briefly writes about the movement for restoration of judiciary and gives a lucid explanation as to how clash of institutions viz judiciary and executive started.

Cox, A. (1987) sees courts as political bodies pursuing policy goals, i.e. judicial policy making, often described as 'activist', politicizing the process of constitutional interpretation. The extreme judicial activist believes that law itself is only a policy and judges concentrate on society building as per their vision. Syed Sami Ahmad (n.d.) vividly elaborates important cases, their impact on political scene and behavior of judiciary during times of political crisis. Dr. Bhure Lal (2004) explains judicial

activism, judicial review, public interest litigation and judicial accountability in the Indian context.

Craig Green (2009) analyzes the legal-rhetoric, post-war origins of the phrase "Judicial Activism" and its modern definitions, also offers a common law method of reaching the specific decisions of judges as activists. RajshreeJetly (n.d.) suggests as to how a perfect balance can be achieved through creating meaningful relationship between judiciary and other institutions in order to ensure the success of Pakistan's return to democracy. SaroopIjaz (2012) emphasizes that Supreme Court should show judicial restraint as judiciary is not the representative of people; it is the Parliament. ArpitaSaha (2008) tries to explain the exact meaning of "judicial activism" especially in recent era where societal norms are continuously changing in the Indian context.

Dr. Iram Khalid (2012) is of the considered opinion that political stability and democratic survival can only be ensured if institutions work in their prescribed limits. This is the only way to avoid future martial laws and attain sound democratic values.

Muhammad Nasrullah Virk (2012) critically analyzes how judiciary followed necessity doctrine to give legal cover to martial laws, which resulted into further martial laws later on. Adnan Falak Sher (n.d.) makes an analogy of good governance vis-à-vis judicial activism having a strong relation, if good governance is established than there is a rule of law too. Dr. AmanUllah and Samee Uzair (2011) focus on impacts of Kesavananda judgment in Indian constitutional history. They also focus on the importance of basic constitutional structure; critically evaluate Kesavananda judgment and discuss post judicial developments, alongwith the conflict between parliament and judiciary at the time of decision.

Ashraf, MM. (2013) says that judges should refrain to give statements on political matters; his view is that the dream for an independent judiciary has gone awry which is very unfortunate. Eminent lawyers, jurists and senior bar members have also been expressing apprehensions and concerns over the phenomenon of judicial activism in Pakistan and conduct of judges. The Judiciary gave decisions on political grounds rather than on legal grounds. Removal of Prime Minister is not a good sign for the evolvement of democracy. There are several reasons for the rise of judicial sovereignty. Firstly, there is a tussle between government and opposition and secondly intra state conflict dramatically emerged judicial powers.

For Dr. Hasan Askari (2012) there is no institutional balance in Pakistan, rather a confrontation on exercise of authority between elected and non-elected institutions. He says that Supreme Court clearly rejected the notion of supremacy of Parliament and argued that it is their duty to keep checks on executive and legislature. Dr. Hasan Askari (8 August, 2012) writes that in past, the struggle was between non-elected military and the elected institution, but in present situation this conflict is between non-elected judiciary and the elected institutions and liberal intelligentsia is divided on the domain of Supreme Court under the pretext of Judicial Activism. Although, the independence of judiciary is necessary for democracy but it is not the only condition as institutional balance is also necessary.

Dr. Hasan Askari (February 8, 2012) says that Pakistan is experiencing judicial activism after restoration of judiciary; Apex Court has become pro-active and has taken suo-motu notices un-precedently. The role of judiciary since 2009 has generated

a debate among legal and political circles that to what extent judiciary can interfere in the domains of other institutions.

MarkandeyKatju (2012), a former judge of Indian Supreme Court, suggests two options to Pakistani Supreme Court; to adopt the path of judicial restraint and to reverse its judgment given in Prime Minister Removal case. He quotes number of precedents in which the Court has accepted its mistake and reversed its decisions, like in Maneka Gandhi case, the Court reversed its earlier decision given in Gopalan case. He is of the opinion that Prime Minister's office is subject to Parliament's confidence and Court cannot oust the Prime Minister who enjoys Parliament's majority.

Chaudhry Faisal Hussain (2013) says that through judicial activism Supreme Court has become the most powerful institution, which deviated from philosophy of judicial restraint and adopted philosophy of judicial activism after restoration. He says that there is a schism on the question of judicial activism. The supporters of judicial restraint believe that there is no space for judicial activism in Pakistan as the Constitution is based on separation of powers whereas the defenders of judicial activism say that bad-governance and corruption are the reasons for judicial interference.

Judicial Independence or Judicial Politics?

In Pakistan, politics has been judicialized, as we saw disqualification of Khawaja Asif in 2018, barring him from holding public office for life. There have been questions raised about the growing outreach of judiciary and its encroachment into the domains of other organs, publicizing and politicized role of Apex Court, where Parliament's role is publically criticized rather than fulfilling its own duties. A country where almost 2 million cases are pending; where corruption is at every level of judicial system; where judiciary is getting highest perks and privileges, even after retirement; we witnessed that honorable CJP visiting schools, medical colleges, hospitals, offices, taking *suomotu* on almost every aspect of administrative matters, rather than looking at and mending his own house. We felt ashamed when a foreign newspaper declared the Apex Judiciary as bitches of riches. This growing judicial activism is clearly at the expense of Parliamentary independence as well as, against the spirit of separation of powers doctrine. Jamal, U. (2018) states that law making process in Pakistan has become dependent on the whims of judges, whereas, the Court keeps itself aloof when question of military's role in Faizabad fiasco is raised by stating, "*it fell outside the judicial domain*", which depicts that judiciary has started working as an extension of military's constitutional arm. Youxing, L & Qureshi, MF (2020) state that this judicial activism is likely to pose threats to Chinese investors, as in the past it had created issues for foreign investments as in privatization of Steel Mill, Rental Power Project, RekoDiq Mines and Chinese investment in Orange Train was halted; it is not only dreadful for foreign investors, but also for local ones. This practice has been increased and, at the start, it was only limited to constitutional matters, but now it is more into public affairs, forcing executive to undo its decisions at the whims of judges' personal likings and dis-likings. Remember that judicial institution cannot replace governance. The basic built in mechanism for the Pakistani Constitution is legislature has prerogative to legislate, executive to administer and judiciary to interpret. Although judiciary is independent (Articles 2-A & 175 (3)) and separate from executive and legislature, yet detailed provisions regarding qualifications and procedure of appointment of judges have been prescribed to ensure independence and avoid

politicizing of their appointment (see, 18th and 19th Amendments). Resultantly slowly and gradually, judiciary achieved institutional, administrative and functional independence (Munir, K & Dr. Iram, K, 2018). But ironically, it started to encroach into domains of executive and legislature and started to dictate them through its *suomotu* powers, which is viewed as if judiciary is politicized and is rendering selective justice. In order to gain popularity and to be highlighted in media, courts encroached into domains of other organs and attempted to fix the prices of electricity, sugar, poultry, vegetables and petroleum; which produced no healthy results. *Suomotu* power has at times produced good results, yet incongruous use of this power usually stops the due process, necessary for development of democratic norms.

It is always in the best interests of society that every organ should work in its constitutional limits and framework. Studies have shown that popular cases like Pakistan Steel Mills and Rental Power produced negative impacts on economy, governmental exchequer as well as, international and political outcomes (Awan, R. 2014). The elected representatives always have requisite expertise and authority for policy decisions and not the judges; as courts are not primarily established to work in that way. Current approach of Apex Court to compel the Parliament to legislate in a particular way is in conflict with the settled principles of law as well as, basic constitutional structure. Nevertheless, it is needless to state that every authority should have some limitations, to avoid institutional authoritarianism. Judiciary has power to undo or invalidate the acts of executive and legislature in case they attempt to cross their constitutional limits, but whether someone has power to question judiciary when it crosses its constitutional boundaries in the name of judicial activism or there are no boundaries in this regard?

Conclusion

The constitutionalism in Pakistan requires the understanding that judges are to be governed by law and not by their preferences. Law here means set of established principles, which may be values, standards, rules or ideals. Judges need to understand not to impose their personal preferences, as we witnessed in the past where an honorable CJP used to take *suo-motu* notices on daily basis, making him a household name, but resulting in complete halting the system, where administration feared to take even bonafide steps and politicians were unable to perform their constitutional work. Need of the hour is to understand that judges are custodians of law and makers and re-makers of social policy. Yet they need to set some limits for themselves. The number of pending cases is in millions and without deciding those, true spirit of justice cannot be achieved. Apex Court remained focused on undermining the role of parliament and administration; and basic duty of providing timely justice was neglected. Judiciary took the role of elected officials, resulting in dis-heartedness among parliamentarians and executive, hence halting the law making process and making it dependent on judges. This growing judicial activism in Pakistan came at the expense of democracy, parliamentary sovereignty and supremacy (Jamal, U. 2018). Need of the hour is to establish a balance, where judges must show some restraint and other two organs should do their work for the betterment of society, diligently, effectively and sincerely. The men in power, including judges should follow the law i.e. set of established principles which exist separately from an individual or an office; these require an allegiance higher in value or persona; prestige, however wise or strong it may be. The authors apprehend that if such practice of unbound and hyper judicial activism goes on, there might be a situation where Parliament would try to

amend the Constitution to put some checks on judicial powers and a Pandora's Box regarding interpretations as to validity of such amendment will be opened. It is high time that judges must understand the true meaning of law, and not to impose their personal preferences and put some restraint on judicial activism. Lord Atkin once said, "*All powers corrupt, but absolute power tends to corrupt absolutely*".

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