

JUDICIAL ACTIVISM DURING MUSHARAF REGIME AND ITS IMPACT ON PAKISTAN'S SOCIETY

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Abstract

Activism on the part of the judiciary can take many forms. Generally, judges should make their decisions based on the law, rules, and regulations governing the case and not on their personal opinions or viewpoints. Main purpose of this study is to investigate the impact of judicial activism on Pakistani society as whole and to judge whether judicial activism is in accordance with the constitution of Pakistan 1973. Methods used in this study include both qualitative and quantitative approaches. To assess the perception of Pakistani people regarding judicial activism, researchers conducted a survey. People from different professions, including lawyers, law students, public policy students, and others, were the target population for sampling. According to 95% of respondents, the judiciary in Pakistan is not performing its functions properly in response to a statement about its functioning. Media played a significant role in promoting judicial activism during Musharaf's rule, according to 91% of respondents. During Musharaf's rule, 88% of people believe that some judges misused their constitutional powers. A large number of people, 92%, agree that judges decide matters using discretionary powers, meaning that they do not decide matters based on their own preferences, but rather based on the circumstances and situation of the case as well as within the law's scope. A true spirit of justice cannot be achieved without deciding millions of cases that are pending. A significant portion of the Supreme Court's work focused on undermining parliament and the administration, while the basic duty to provide justice in a timely manner was ignored.

INTRODUCTION

In Pakistan, the judiciary is one of the most important institutions of the government. The judiciary is charged with interpreting laws passed by the legislature. These laws are implemented by the executive, whereas the legislative is responsible for enacting them. When there is a question regarding public interest, judicial activism involves judicial rulings based on personal desires or opinions rather than the law as written. Pakistan's judicial history is replete with historical verdicts validating executive acts such as martial law and the PCO. The Black's law dictionary explains that judges make public policy decisions based on their personal views (Khan, 2001).

Activism on the part of the judiciary can take many forms. Generally, judges should make their decisions based on the law, rules, and regulations governing the case and not on their personal opinions or viewpoints. As a judge, even when you adjudicate a case in your discretion, you must be impartial and must follow the existing rules, regulations, and laws while deciding the case. According to Dickson (2007).

It is the Judiciary's responsibility to interpret the laws by determining whether the legislature can make these laws constitutionally as the third pillar of the state. A law can be declared 'ultra vires' if the Supreme Court considers it to be contradictory to existing law or to Islamic teaching.

Historical Development of Judicial Activism

Judicial activism is an idea that dates back much further than the term itself. There had been a debate among scholars before the 20th century about judicial legislation. It was favored by Blackstone, while Bentham saw it as the usurpation of legislative power. According to Austin, judicial legislation is a form of legislation. A vehement criticism of judicial legislation was leveled during Lochner's era. 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, when he described judges as 'judicial activists' and 'champions of self-restraint'. In the early 17th century England, Justice Coke and King James disagreed about the authority for transferring and deciding the Bonham Case, which led to the foundation of judicial activism.

The American Supreme Court ruled in *Marbury vs Madison* (1803) that certain provisions of Judiciary Act 1789 were unconstitutional, and that the appointment of Marbury as justice of peace by President Adam was invalid. According to US Constitution Articles III and VI, judges are bound by laws and Constitution and can set aside laws. This judicial review doctrine was explicitly stated in some states' constitutions before Marbury, and by the end of 1803 it was being followed both by state and federal courts.

Pakistan's Constitution mentions separation of powers. A separation of judicial power from legislative and executive power is fundamental to liberty, according to Montesquieu. A judge who is also a legislator would have arbitrary power over citizens' lives and liberty if legislative and judicial powers are not separated. In the absence of separation, the judge would have the power of an oppressor" (Montesquieu, 1877).

In 1857, *Dred Scot vs Sanford* led to further escalation of the situation. From 1865 to 1900, the Supreme Court rendered approximately twenty four decisions declaring parts of or Acts of Congress unconstitutional, and from 1900 to 1934 about forty such decisions preventing the implementation of the New Deal. The Supreme Court changed its approach after 1937 and avoided creating hurdles in legislation containing social and economic aspects, thereby avoiding controversies and direct confrontations.

Judicial Activism in Pakistan

Pakistan is not a very old country when it comes to judicial activism. Historically, *Suomotu* power has been used in public interest litigation (PIL) since the famous *Darshan Masih Case* (1990), when the CJP took action on a telegram message regarding forced labor in brick kilns. Eventually, the CJP acted on a letter regarding the construction of a power plant that could negatively impact the general public's health (*Shehla Zia Case*, 1994). When Zia restored the Constitution and lifted martial law in the mid-80s, the judiciary began to become active. Fundamental rights are increasingly being violated through PILs. PIL is regarded as its golden era between 1990 and 1995. There have been *suomotu* cases taken by the court regarding kite flying, bonded labor, NICL scams, Hajj scams, inhuman treatment in jails, ephedrine scams, and missing persons' cases to name a few.

Critics, however, argue that judicial activism upsets the delicate balance between state organs. Proactive judiciaries must understand that they must use their power only in legitimate cases judiciously to avoid arbitrariness and abuse. Critics assert that the court interferes in governmental affairs by going beyond its constitutional responsibilities, thereby damaging democratic values. It is claimed by Newberg (1995) that Pakistan's superior courts have strayed from their traditional judicial roles into a more political role, thereby becoming political

institutions. Politics, governance, and ideology-related issues, aimed at avoiding meaningful democratic participation and establishing judicial predetermination. By validating unconstitutional acts, the judiciary almost always gives legitimacy to military regimes, and a government or military response requiring institutional limits is urgently required, according to Azeem, M.

From the Dosso Case (1958), to the Asma Jilani Case (1972), to the Nusrat Bhutto Case (1977), to the SaifUllah Khan Case (1989), the doctrine of necessity, with different shapes and interpretations leading to selective justice, was the darkest and ugliest face of the judiciary. The Tariq Rahim Case (1992), the Nawaz Sharif Case (1993); Benazir Bhutto Case (2000) and the Zafar Ali Shah Case (1998) were all legal black holes and contributed to political instability and disruption of democracy.

Review of Literature

Hussain (2013) claims that judicial activism occurs when judges decide cases based on their personal opinions, instead of following existing law, in order to resolve public policy or public interest issues. The apex court of Pakistan is excessively exercising Suo Moto power by raising public policy and public interest issues. Pakistan's Supreme Court is overusing judicial review and Suo Moto powers in performing its judicial duties. Under Pakistan's 1973 Constitution, the principle of separation of powers is clearly violated by judicial activism.

According to Dahraj (2010), judicial activism upholds the independence of the judiciary to perform justice in accordance with public policy and the public interest, in contrast to Hussain's (2013) criticism of judicial activism. The role of judicial activism in democracy varies based on how individuals perceive it and how they think about it. The doctrine of judicial review is embodied in activist judicial review, he argues. Pakistan's supreme judiciary is responsible for implementing the Constitution's rules, laws, and regulations. To minimize the image of judicial activism with particular regard to political matters, the apex judiciary and subordinate judiciary should work effectively so that effective results are achieved. To ensure the judiciary serves the state more effectively, these problems must be resolved.

According to Hussain (2013), judges are guilty of judicial activism when they decide matters of public interest based on their own opinions and sometimes based on their own perceptions instead of following the law, rules, and regulations of their governments. There is a real danger associated with defining the existing laws, which may result in amending the existing laws. In some cases, common people criticize the supreme judiciary instead of focusing on its positive aspects. It is viewed by the government and political parties alike as an unnecessary intervention in state administration.

Ahmed (2017), concludes that the Supreme Court only intervenes when executive authority and government is unable to fulfil their tasks related to public interest. But it is reality that Judiciary can not substitute the role executive.

Movement for Independence of Judiciary in Pakistan

Lawyers movements against Musharaf sparked when the executive dismissed Iftikhar Choudhary unconstitutionally. This resulted in a strong backlash against the dictators famously known as the Lawyers movements for independence of judiciary (Rizvi, 2009).

A lawyer, Naveed Akhtar, was arrested without reason during the start of lawyers' movement, resulting in lawyer-military rivalry. Several attempts have been made by his friends to get him out of this situation, but to no avail. On a later occasion, Mian Muhibullah Kakakhel, a senior

advocate for the Pakistani Supreme Court, appeared. Numerous prominent lawyers of Pakistan took active part in the struggle for freedom of judiciary (Mahmood, 2001).

The lawyers' movement for the lifting of emergency and restoration of the judiciary brought together people from all walks of life. The president of Pakistan was Asif Ali Zardari when Musharraf resigned. This lawyers' movement was heavily influenced by political parties, especially the opposition party PML(N). Ultimately, Yousaf Raza Gillani, the Prime Minister of Pakistan, restored Chief Justice Iftikhar Chaudhry.

Suo Moto Actions

The Supreme Court came out as the victorious force against the establishment as they were able to re-appoint their Chief. But the sad part was that the public opinion changed a lot after the success of this struggle as the common people were unable to get any relief. The slogan state shall act like a mother feel short according to the later happenings.

Research Methodology

Methods used in this study include both qualitative and quantitative approaches. To assess the perception of Pakistani people regarding judicial activism, researchers conducted a survey. People from different professions, including lawyers, law students, public policy students, and others, were the target population for sampling. The majority of respondents are in the legal profession, so their opinion can be considered valuable since the matter in question is related to law and society. This research involved a survey of 170 respondents. Researchers collected data by visiting courts, law colleges, and public policy departments. Researchers developed a questionnaire themselves. An analysis of the collected data was carried out using the statistical tool SPSS. In all cases, the researchers are responsible for generating and calculating their own results. The tables are given below Findings:

Based on the measurement scale of one to five, and then based on the likert scale, this research has been evaluated. Five is strongly disagree, four is disagree, three is neutral, two is in agreement, and one is strongly in agreement.

According to 95% of respondents, the judiciary in Pakistan is not performing its functions properly in response to a statement about its functioning. Feedback like this shows that the judicial department is not carrying out its duties effectively, leading to judicial activism in Pakistan, where judges decide cases based on their personal preferences rather than on the law. Eighty-eight percent of Pakistanis believe that judicial activism is not effective in resolving the country's problems when asked about its effectiveness. There is no doubt that a majority of respondents believe judicial activism doesn't address the real problems of society. The judiciary continues to be less active during democratic regimes than during dictatorial regimes, according to 80 percent of respondents. It may be because of the democratic system and respect for public opinion. When asked about the judiciary's activeness under dictatorship rule, 80% of respondents believed that it was more active. Due to one-man rule, the judicial organ may become active in such an environment as there is no respect for public opinion.

Media played a significant role in promoting judicial activism during Musharraf's rule, according to 91% of respondents. There were many prominent political leaders who supported the media. Due to censorship during dictatorial regimes in Pakistan, media have always allied themselves with democracy. Ninety-two percent of respondents agreed that media plays a major role in restoring judges. The results show 75% disagree with the idea that judicial activism is useful for social change. According to the majority, judicial activism has more demerits than merits since it

ultimately results in little benefit for the common man, and judges are assumed to be motivated more by personal motives than by law enacted. It would eventually not contribute to social change. According to the constitution, the judiciary is one of the most important organs of the state of Pakistan. Its duty is to keep an eye on the laws passed by the legislature. However, this survey shows the judiciary is interfering in the functions of the other two organs instead of interpreting laws as per its assigned task. A majority of respondents believe judges are more inclined to make new laws than to interpret existing laws.

During Musharraf's rule, 88% of people believe that some judges misused their constitutional powers. A large number of people, 92 %, agree that judges decide matters using discretionary powers, meaning that they do not decide matters based on their own preferences, but rather based on the circumstances and situation of the case as well as within the law's scope. Despite being restored as a result of the lawyers' movement, Justice Iftikhar became a controversial figure in the post-restoration movement due to various reasons, according to 89% of the people polled. There is no doubt that the judiciary is one of the most important pillars of state government and can work on the principle of separation of powers or balance of power. The Judiciary, however, is believed to be interfering in the activities of other state organs by 94% of the Pakistani population since independence.

As difficult as it is to stand against dictatorial regimes, lawyers played a crucial role in the resistance movement. According to the survey, 94% agree that lawyers' movement contributed to the feeling of independence in the judiciary during the Musharraf regime. Judiciary activism is typically seen as a way of addressing real issues and maintaining social justice. For Pakistan, on the other hand, an overwhelming majority of 75% think that judicial activism isn't essential for redressing injustices. There is no justice in Pakistan due to judicial activism. Also revealed by the post-restoration of judges was that the lawyers' protest was for their own personal gain, not the benefit of the nation. Based on the researchers' survey, 88% of respondents agree.

Conclusion

In Pakistan, the judiciary does not function properly based on the survey. It has been more active during dictatorial regimes, whereas it plays a passive role during democratic regimes. As Chief Justice of Pakistan, Justice Iftikhar Muhammad Chaudhry exercised the powers of *Suo Moto* judicial review after he was appointed in 2005. It was the judicial activism that prompted President Musharraf to consider amending the Constitution to remove the apex court's power of judicial review and *Suo Moto*. Since he was a dictator, he wanted unlimited power to control the state so that no one could stop him from making the state the way he wanted it. Due to the history of military coups in Pakistan, the judiciary has always supported them, hence the apex court has been closely related to the military, and this nexus has always prevented democracy from functioning effectively and continuously. It was his confrontation with the Supreme Court in general and with the Chief Justice in particular that led to his fall. President Musharraf attempted to prolong his mandate as did his predecessors in 2007 but the Chief Justice of Pakistan refused to support him. Iftikhar Choudhary was given undue strength by the masses and began dealing with multiple public challenges without realizing that handling multiple complex issues at once would be impossible. There were cases where he was successful, but there were also cases where he failed without reaching a proper conclusion. Therefore, judicial activism has both pros and cons, depending on how it is implemented. There is a clear separation of powers among three pillars of government - the legislature, the executive, and the judiciary - in the

Constitution of Pakistan. In these state institutions, however, there is no separation of powers. The three institutions were always curious about getting more power. Pakistan's military establishment, however, cannot be ignored, since in the past, the apex judiciary was often the one to validate unconstitutional steps. Moreover, the Supreme Court has the power to suo motu and to conduct judicial review in order to ensure a check and balance system of governance as well as to guarantee the fundamental rights of its citizens. It is important to use these powers only in exceptional circumstances where the state's survival is at stake, and not excessively.

In Pakistan, constitutionalism requires judges to follow the law and not their preferences. The term "law" refers to a set of established principles, such as values, standards, rules, or ideals. As an honorable Chief Justice used to take suo-motu notices on a daily basis, making him a household name, judges need to understand not to impose their personal preferences. The result was a total breakdown of the system, where administrators feared taking even bonafide steps and politicians could not fulfill their constitutional duties. A need of the hour is for judges to understand that they are custodians of law and creators and re-creators of social policy. It is still important for them to set some personal limits. A true spirit of justice cannot be achieved without deciding millions of cases that are pending. A significant portion of the Supreme Court's work focused on undermining parliament and the administration, while the basic duty to provide justice in a timely manner was ignored. Parliamentarians and the executive dis-heartedly accepted the role of judges, which halted the lawmaking process and made judges the sole decision makers. As Pakistan's judicial activism grew, democracy, parliamentary sovereignty, and supremacy were threatened (Jamal, U. 2018). The need of the hour is to establish a balance, in which judges should exercise restraint and the other two organs should operate diligently, effectively, and honestly for the benefit of society. A person in power, including a judge, should follow the law, which is a set of established principles that exist independently of that individual or office. This requires an allegiance greater in value or prestige, no matter how wise or strong the office may be. According to the authors, if this type of unbound and hyperjudicial activism continues, Parliament might attempt to amend the Constitution in order to limit the judicial power of the courts, opening a Pandora's Box of interpreting the validity of such amendments.

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