

Judicial Activism in Pakistan: A Case Study of Supreme Court Judgments 2008-13

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ABSTRACT

In Pakistan, The judiciary takes on the driving seat particularly in the last decade. The judiciary takes up all the cases of Public Interest litigation (PIL), ranges from the inconsequential cases of kite flying to the privatization of national institution and to the constitutional cases. This proactive role of judiciary has created apprehensions not only in Pakistan but at international level too. The opponents of judicial activism hold that it cross its jurisdictional limits and interfere in the matters which are purely the prerogative of executive and legislature. The recurrent use of judicial powers by the Pakistan's apex court under the suo moto jurisdiction has taken up all the matters i.e. social, economic, political and constitutional. Pakistan has adopted the parliamentary democracy under the separation of power. The proactive role of judiciary violates the very principle of this theory by crossing its limits. The present research focuses on (i) The concept, origin and scope of judicial activism (ii) The impact of judicial activism in the political, constitutional and democratic process of Pakistan. The research will conclude that judiciary needs to adopt the policy of self-restraint rather than self-indulgent. Adherence to the democratic principle of separation of powers completely, Pakistan can build a strong democratic political system.

Key Words: **Judicial Powers, Self-restraint, Self-indulgent, Public Interest litigation**

Introduction

Now a day, judicial activism has touched almost each and every sphere of life ranges from human rights issues to maintenance of roads. It is the power of judiciary to proclaim any law annulled and unconstitutional. It is related more or less with the attitude of a judge handling the case and regarded as an attribute of the personality of the judge than any provision in the legal system. Democracy is based on theory of separation of power between three organs of government i.e. executive, legislature and judiciary .When the other two organs of state failed to secure the fundamental rights of common man than judiciary takes on a proactive role in restoring the fundamental rights of common man, this proactive role is termed as 'judicial activism' or commonly known as 'Suo Moto'.

Judicial activism defined in Black's Law Dictionary, a process of the formulation of law where judges resort to their own reasoning while deciding the matters of interest litigation.

According to this definition under judicial activism, judges use their own wisdom and personal views. Undoubtedly several arguments can be made in the favor of judicial activism and its usages. It can be contended that simple application of law in its literal meaning in complicated legal matters would not preserve the justice. So in order to address the legal complications judges are asked to apply their judicial wisdom. The judges take into account the events as happening around and take subjective and objective test of the events as happened. Therefore vigilant, active and influential judiciary seems essential to address peculiar issues in a society where privileged class manipulate the laws in its own favor by taking the advantage of their lack of awareness about their rights. They are benefited by using corrupt practices which prompt the judiciary to come with an assertive role by filling the vacuum created by executive. The judiciary protects the fundamental rights of the citizens by assuming the proactive role.

Review of the literature

Authors develop different interpretation on boundaries of judicial activism. Ely (1980) discourses upon the most crucial issues of America and we can relate it to the present scenario of Pakistan. It provides guidelines within what shall the Apex Court apply the restriction of the Constitution to the intricacies of contemporary life? He discusses the two basic approaches proposed by legal experts. The first, "interpretivism's," which states that judges while making decisions should consider only what is clear in the document itself. The second, non-interpretivism's, maintains that the courts should upheld the basic ideals of society. Both approaches are essentially half-finished and insufficient and Ely's suggestions are centered on the view that the court while formulating decisions makes sure that everyone's interests will be safeguarded and the solicitation of decisions will not be influenced. For Ely the protection of governmental structure is more important than the social values practiced by society. On the other hand, Ahron (2006) argues that judge played the role of interpreter, for the application of law it need to be interpreted first and a judge can interpret law in order to fill the gap between law and changing societal reality without changing its statue. By interpreting, judges add new meaning to law and bridging the gap between law and life. Further he discuss that a law passed according to a social reality may become unconstitutional due to new social reality. The courts interpret the old statue by giving new meaning to it. But if it fails to give new meaning then the question arises about its constitutionality. The Judge has to balance with the need of change with stability .To achieve this, the judge has to take into account three consideration i.e. the rationality of the system in which he operates secondly the powers and limitations of the institution of the judiciary as defined within that system and lastly the way in which its role is perceived. Judge decision must not

reflect that it is personal, while formulating law; he needs to be careful that it maintains coherence within legal system must take into account by formulating decisions the institutional limits of judiciary. Interpretation of law the central role of judiciary, it is to decide dispute, the striking difference between enacted law and law made by judge. Judicial law making must be so that fill or bridge the gap between society and law as Montesquieu said that judge is the mouth piece of society. But there are certainty limitation upon judges so public does not accept from judiciary to fill every gap between law and life, and not accept the claim that judiciary is over powerful. One must be realist about its power and as well as limitations. Newberg (1995) & Dawood (1994) discussed Pakistan constitutional history and the historic role which our superior judiciary played through its judgment and that how the judiciary made to intervene and render its opinion on purely political situation in the country which in turn bound to be controversial. By investigating judicial decisions happened during political crisis, writers examined how tension within the judiciary and between the courts and other state institutions have affected the whole society and that laid the foundation of the doctrine of necessity and revolutionary legality which paved the way for further undemocratic rules.

Waseem (2012) describes that the practice of judicial review is increasing in working of government. Initially this interference was limited to the constitutional matters but now days this is increasing in public affairs. In the name of judicial review, judiciary sometimes forces executive to undo its decisions. And in few cases judiciary supports some unconstitutional act to legalize the act of dictators. Kumar (2014) discusses the judicial activism in the context of Indian democracy. The writer contends that the courts ensure the limits of governmental actions under constitutional democracy and issue within different government institutions. The writer contends that no doubt judicial activism contributed a lot for Indian democracy but governance cannot be replaced by judicial institutions. The exhaustive literature on judicial activism acknowledges the positive contribution of the phenomenon but asserts along that it is not the alternate of governing body i.e. executive.

Research objectives

- To investigate that how far 18th amendment improve the work ability, efficiency and transparency of Pakistan's judicial system.
- To know whether the current wave of judicial activism is threatening for democratic process of Pakistan.
- To investigate reasons and relevance behind current hyper activism in Pakistan.

Origin of judicial activism

Judicial Activism is not a new phenomenon; it dates back to *Marbury vs. Madison*. The US Supreme Court held in this case that any act which is conflicting to the constitution is invalid. The court asserts in this very case the supremacy of constitution over all other institutions as all derives their powers from judiciary. This was such an important case that even today it could not be ignored despite the fact that 200 years elapsed to this case. This case had been used as a precedent all over the world whenever a controversy occurs between parliament and courts. Another significance case is *McCullough vs. Maryland*; in which Supreme Court declared that supremacy of the constitution is paramount and rejected its assertion of being sovereign. The SC overturned the tax imposed by state of Maryland on federal bank. The US Supreme Court followed the tradition by re-examining the constitutional matters even in 20th and 21st century.

The above mentioned cases show that, the SC of US exercised its power of judicial review only on the formally filed petition by the party concerned. It uses the power of judicial review to review the acts of congress and executive on the constitutional petition and thus performed a constructive role in flustering the constitutional matters between Federal and federating units.

Judicial activism in developed democratic countries

Judicial activism is increasingly grown phenomenon in recent past. People in a fast changing world increasingly becoming conscious of their rights due to the failure of executive to solve their problems and to come up to the people's aspirations. The first instance of this phenomenon found its expression about two hundred years ago. The supreme court of US issued a verdict in a case the landmark *Brown v. Board of Education* which ultimately stops segregation in schools. The Supreme Court through its decision provided an opportunity to the politicians who are afraid of political backlash from white community. Likewise the European courts ensure the equality for women in workplace by enacting law which previously governments were not willing to enforce. Politicians all over the world have a mixed attitude towards judicial activism; they use to support it when it helps them in getting their political objectives and opposed it when it doesn't.

Judicial activism under suo moto

In law, *Suo Motu* is a term which referred to the action taken by any authority without formal request of the concerned person. Mostly, the term applied to the action taken by a judge at its own even without the formal petition or request made to the court by the aggrieved person.

The Supreme Court can take *Suo Moto* under the article 184 (3) if it finds the violation of fundamental rights enlisted in the Chapter one of the constitution. Any individual can also approach the court and can file a petition to draw its attention

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about the violation of any fundamental rights. The court in these matters converts the simple application into a petition. Thus by doing so it ignored all the procedural requirements, the courts can summoned the concerned authorities while responding to the said application. The SCP regularly uses its power of *Suo Motu* as well as its original jurisdiction to hear the cases involving social, political and human rights issues.

The use of *suo motu* powers by the courts in Public PIL cases started in Pakistan with the *Darshan Alias Rehmatay and others VS the State*. The CJP took notice on telegram message in which applicant asked CJP getting them released from illegal detention and consider it as matter of PIL. The SC by relaxing the procedural requirements declare the bonded labor illegal and thus provided the relief by declaring it matter of public interest under the article 184(3). The SC takes frequent notices resorting to *suo moto* jurisdiction on the matter of PI and protracted the relief by enforcing the fundamental relief which increase the people's expectation with the judiciary. The Lawyers movement for the restoration of judges which was greatly supported by all segments of the society e.g. doctors, engineers and teachers etc., showed their trust in judiciary. The restoration of judges was the significant jiffy for the independence of judiciary in Pakistan.

After the restoration of judges both from Supreme and High Courts, judicial activism is at its highest peak than ever before. Before the restoration of judges of the higher court, the HRC received approximately 500 applications every day. It shows that people seeking relief directly from the SCP for their problems. But in 2009, after the restoration of superior judges the number of applicants touched the 139906 in just two years 2009-2011.

The SCP since the restoration of the judges regularly exercising its powers of *suo motu*, shows that the in this period judiciary is enjoying height of judicial activism. In just few years, there is an exhaustive list of the cases taken up by the higher courts, indicated the extreme use of its *suo moto* as well as original jurisdiction.

Privatization of Pakistan steel mill (psm) case and its impact

In 2005 process of privatization started in Pakistan under privatization order 2005. Pakistan Steel Mill was also privatized under this plan which was challenged by Steel Mill workers union who filled the petition against the government on charge of corruption. The main points of petition includes i.e. the privatization process was not transparent, the share price was low, certain provisions of privatization ordinance 2000 were *ultra vires* to the article 153 and 154 of the constitution there fore had no legal binding, the process of privatization violated the Article 2A, 3, 4, 5, 9, 23, and 38 of the constitution, the process of privatization adopted by the government was illegal.

The PSM case in 2006 came into limelight for the first time. After that there is the list of cases taken up by SC against executive. The PSM opened up a new

epoch judicial hyper activism in Pakistan. The court takes the petition on the basis of its power of suo moto and established a nine bench for hearing and take into account all points raised by petitioner. The larger bench of SCP annulled the \$362 million bid for the privatization of PSM and held that the sale of PSM was invalid and declared the sale null and void (Khan, 2012).

The Steel Mill case reflected the haste of the executive authorities who sold the state assets on cheap rates and improper manner to provide benefits to few people. Steel Mill case provides a ground on which the executive General Pervez Musharraf came into conflict with judiciary. However, the perceived saving becomes useless when government that during its first financial year it had loss of 23 billion Rs. The daily news published a report that obligation of payable debt of steel mill surpassed to more than 80 billion despite the bailout package of 14.6 given by the federal government. According to the report it will be the barrier of 100 billion in next year. The PSM earned the profit of 2.3 billion rupees in 2007-2008 having the debt of 7 billion rupees. The report shows that after the annulment of the privatization deal by SC, the PSM has suffered the loss of 79 billion rupees. The SC has taken the suo moto on reports of corruption and losses in PSM but it suffered more after the cancellation of the privatization deal by SC. The FDI also suffered due to the judgment.

The rental power plant (RPP) case and its impact

“RPP” project was initiated during Musharraf’s era, the cabinet committee of economic co-ordination sanctioned a plan. It introduces rental power project in national electricity grid. Cabinet committee approved two projects. These projects were given to two US based companies GE and PPR of 136MW plant at Bhiki and another plant of 150MW at Sharqpur. At that time these projects were considered as best option to fulfill the electricity demand of Pakistan. The caretaker government in 2008 allowed the Pakistan electric power company (PEPCO) to install rental power plants with bigger capacity of 800MW and 1200MW. Zardari government continued the project and approve 19 projects but only one was made operational till June 2011 despite the advance payments to the companies and just added 62MW electricity to the system.

The SC in its judgment in RPP declared that project is not transparent and found massive corruption of approximately \$ 5 billion. The SCP found the RPP’s contrary to the Article 9 & 24 of the constitution. It held that it violates the terms of the Transmission and Distribution of Power Act “TDPA” 1997. All government’s officials (2006-2008) who were involved in RPP’s agreement were held responsible for not taking recourse to the transparency and SC ordered National Accountability Bureau “NAB” to take action against those who are involved in this deal. All the officials of PEPCO, GENCO, NEPRA and their sponsors who were involved in it were held accountable for deal. The SCP found NAB guilty of contempt of court as it is not following SC orders therefore issued notice to NAB chairman and others. The SCP also issued orders against a Turkish

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company refraining it from sailing out of Pakistan waters and asked it to clear the dues.

In the RPP's case Supreme Court brought into light the corruption and misuse of authorities by executives and saved foreign exchange and money through its judgment. The price of electricity will reach at height due to this deal. As a result the small industries would suffer. It will bring negative impacts on our already suffering economy. This is the one side of the judgments; it had certain negative point as well. The SC intervened in the investigation matters which were questioned by the senior judicial officers. They questioned the SC power of suo moto in this matter. They show their concern over the extreme use of this power by judiciary can hamper the investigation process.

Table 1: overview of the Suo Motu cases taken in this period and their impact

Case	Main Issue	Decisions	Impact
Import of poultry feed	contain pig meet	destroy all consignment & action against responsible	positive
Margala Housing Society scheme	fatal for environment	cancellation of scheme	positive
Islamabad chalet & Pir Sohawa valley villa scheme	Cutting of trees in Vast area	Banned the Scheme	Positive
Macdonald Restaurant Case	CDA leased out a Plot in a park	cancel the lease	positive
NICL scam	corruption	Order to register case against NAB Chairman & others	Positive
Hajj scam case	corruption	order to pay 700 Saudi riyal to each of 26,000 pilgrims	Positive
The RPP's case	corruption	Order the action against all responsible and recover the money	Positive/negative Negative
The Steel Mill Case	corruption	Cancelled the Privatization	Positive/Negative
Ephedrine Quota case	Illegal smuggling of Ephedrine in	Hanif Abbasi sentenced to life	Positive/Negative

	huge quantity	imprisonmen	
National Reconciliation Order (NRO)	Majority of Criminal case of Politicians were withdrawn	Declare it Null & Void and ordered to reopen the cases of all beneficiaries	positive

Source: Compiled by researcher from internet and newspaper

The main source for the protection of fundamental rights in Pakistan is the courts especially the superior courts. The SCP exercised its original jurisdiction as enumerated in Article 184 (3) of the constitution to protect the fundamental legal rights of the citizens. The former Chief Justice Iftikhar Mohammad of Pakistan have regularly invoked this power of suo moto, the court issue notices in the cases related to the interest litigation and issued directions in order to protect such rights.

Table 2: Cases protecting human rights (compiled by researcher)

Cases	about	Decision under constitution
Darshan Masih Case (PLD 1990 SC 513)	Bonded Labor	declare illegal & unconstitutional
Environmental pollution (PLD 1994 SC102)	dumping of nuclear & industrial waste	declared violation of Article 9 of the constitution
M.Ghulam Sarwar Naqvi (PLD 1990 SC 1)	illiterate female's right of inheritance & property	property and inheritance must be protected
Shrin Munir (PLD 1990 SC 295)	admission in medical college on the basis of sex	declared unconstitutional

The researcher's atnational and international level show their concern over the proactive role of SCP .The Asian Human Rights commission (AHRC) reacted to the SCP decision to arrest the prime minister and others and showed its apprehension about the investigating authority of the apex court to oversee the investigation. AHRC is of the view that such an extreme use of the power of judicial review by SC would be dangerous to Pakistan. It can create political fraction and widened the gap in rich and poor in the country which is already a divided society on different lines. It will harm Pakistan as well as its people in longer perspective. Markandev Katju a former judge of Indian Supreme Court said that the judges of Pakistan's SC have been showing utter lack of restraint which is

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not expectable from the SC. He further held that almost every constitution in the world taking the cue from British constitutional law has given the protection to Governors and Presidents from criminal prosecution.

Table 3: Cases in which judiciary exceed its jurisdiction

Constitutional cases	Legislative cases	Executive Cases
National Reconciliation case	Levy of carbon & General Sales tax	Law & order situation in Karachi & Baluchistan
Proclamation of emergency Order (PCO) 3 rd Nov 2007	Struck down the contempt law passed by parliament	fixing price of sugar, gas and electricity
18 th constitutional amendment		appointment & removal of bureaucrats and police officers
High Treason case against Former chief of army (CDA)		Annul the contract made by government bodies

Source: Compiled by researcher from internet, television and news paper

In the above mentioned cases judiciary take up the matters which are the prerogative of legislature and executive. Iftikhar Muhammad Chaudry during his period takes up various cases via suo moto but most of them were discussed and sensitized by media, which led to the perception that it is the lust for popularity.

Original jurisdiction of SC & constitutionality of suo moto and its impact on the democratic process in Pakistan

The Constitution of Pakistan provides for separation of powers with in-built mechanism of “checks and balances” between the three organs of the state i.e. legislative, executive and judiciary. The legislature has the prerogative of legislature and the apex courts have the powers to interpret the statutes and constitutional provision. The Article 2-A, 175 clauses 3 of the constitution provides for independence of the judiciary and ordains its separation from the executive. To complement the doctrine of judicial independence, the Constitution has detailed provisions for the qualifications and procedure of appointment of judges of superior judiciary. However, this judicial independence was restricted by successive amendments in the constitution. During the Zulfikar Ali Bhutto’s era

the procedure of judge’s appointment was politicized. Several amendments were incorporated in 1973 constitution related to judiciary.

The 18th constitutional amendments have made fundamental changes in the method of appointment of the judges of the apex courts. The SC examined the 18th amendment and returned to the parliament with purposed suggestions which is later enacted by the parliament through 19th amendment.

The Supreme Court, through consecutive rulings, further multiplied the scope and strengthened the doctrine of judicial independence. It issued directions for complete separation of judiciary from the executive at all levels of judicial hierarchy. Slowly and gradually the judiciary has attained the institutional, administrative and functional independence as a state institution. Judiciary tries to put some breaks on unchecked powers of the executive and executive tries to have free hand in in governmental affairs.

Table 4:
The Jurisdiction of Supreme Court under the constitution of 1973, the Article 184 to 194 deals with jurisdiction of courts.

Original Jurisdiction	Appellate Jurisdiction	Advisory Jurisdiction	Other powers
The SC under the article 184,1 has original jurisdiction in reference to clash between governments and regarding the enforcement of fundamental rights.(Article 184,3). It can be approached directly in such matters without approaching any other court.	Under the article 185 the SC can hear from appeals from lower courts.	The President can seek opinion from SC on matters of public importance but it is on its personal discretion that he accept it or not.(article 186)	The SC is empowered to interpret the constitution. (Article 185, 2) and has the power to issue direction on any matter pending before it (article 187). The supreme court has the power to review any order or judgments made by it

			earlier (article 188).The SC can make rules relating to the courts procedure & practice.
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There exists two schools of thought on suo moto in Pakistan, those who support the suo moto is of the view that traditional legal system of Pakistan failed to cope up the demands of the day and the gap between rich and poor is widening. In such situation the use of suo moto in IL matters helps to minimize the gap. They argued furthermore that the other institutions had lost the credibility, reliability; trust in the eyes of the public. The only institution which had that faith is judiciary who had earned it through PIL. It also prevents the executive from misusing its authority and it is authorized by constitution.

The opponents of judicial activism holds that judiciary in the pursuit of its power sometimes interfere in the matters which are the prerogative of executive and legislature. The Principle of Separation of Powers in a democratic set up justifies the presence of judiciary that there should be separation of powers between those who make, translate and implement the laws. This principle will leads to good governance and prevent from authoritarianism (Abdul Hameed). The separation of powers under the system of checks of balance prevents any institution from gaining too much power .The extreme use of judicial activism can disturb the balance of powers between the three organs of the state as enumerated in the constitution. Therefore judiciary should adopt the policy of self-restraint and the issues pertaining to governance should be handled by executive and legislature.

Pakistan is known for weak political institutions, powerful army, several military coups and the article 58(2) B that has been used to send elected prime minister to home or jail. Pakistan apart from India is the country where the suo moto has been invoked frequently by the courts. Iftikhar Muhammad Chaudry during his period takes up various cases via suo moto but most of them were discussed and sensitized by media, which led to the perception that it is the lust for popularity.

Assessment

Judicial activism found its footing easily on those societies where the governments are week. Pakistan judicial history is marked with another feature i.e. judicial activism. The Suo Motu is helpful in the societies where the government

machinery is largely dysfunctional or unresponsive to public demands. That is the reason; people in Pakistan had admired the Supreme Court whenever it took up the cases of interest litigation under *Suo motto*. The people welcomed the SC judgments in the cases where they directly get the relief such as the cases of bonded labor, inhuman treatment in jails, NICL scam, kite flying, Hajj corruption, Ephedrine scam and cases of missing persons etc.

The Supreme Court, however, at times exceeds its limits by intervening in matters that are beyond its jurisdiction. This wasted the valuable time of the courts as they failed to produce the desired results. The court's attempt to fix the prices of sugar, petroleum and electricity met with no success. There are the apprehensions regarding the Supreme Court's priority of the cases for hearing. For example, the Asghar Khan's petition of ISI funding has been ignored by the court for years. In the course of this research, no judicial precedent found before the current wave of judicial activism which vindicates the extension of IL by bringing the political and legislature matters within their ambit. The current political and bureaucratic environment of Pakistan is well toned with judicial activism.

Historically, political parties and politicians in Pakistan supported SC's decisions when it serves their political interest and opposed when finds their interest threatened and same has been witnessed now a days in current judicial activism against PML-N. The restoration movement of the judges provided an opportunity to judiciary to make up for past mistake and grow as an independent. The use of the *suo moto* by the courts has arguably helped bring forward issues that have been at times ignored by elected institutions on the one hand. On the other hand an incongruous use of *suo moto* can negatively impact the due process which is important for the development of a truly democratic society. Judiciary should exercise its power sparingly when it require, not in every matter. The judiciary should avoid indulging in the matters of legislature nature. The strong and liberal judiciary is the need of the time but not powerful and self-indulgent. In the course of this research, no judicial precedent found before the current wave of judicial activism which vindicates the extension of IL by bringing the political and legislature matters within their ambit. The current political and bureaucratic environment of Pakistan is well toned with judicial activism. It is in the best interest of Pakistan that all three pillars of the government should work within the constitutional framework. The aforesaid research reveals that people's trust in courts makes them courts of justice rather than courts of law which consequently create gaps for judiciary to fill in the case of misuse of powers by legislature and executive.

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