

CONSTITUTIONALISM AND JUDICIAL ACTIVISM: TRANSFORMING AUTHORITY IN PAKISTAN

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Abstract

Constitutionalism is examined here as a system for directing state operations in accordance with a supreme law known as a constitution. Constitutionalism, in contrast to authoritarian regimes, seeks to limit and restrain governmental power, laying the groundwork for democratic administration and the expression of the will of the people. Different kinds of constitutionalism are examined, including those that are explicit and others that aren't. Thomas Hobbes's view of absolute sovereignty, John Locke's idea of sovereignty as constrained by social agreement, and the Islamic view of sovereignty as ultimately belonging to Allah and transferred to the people through a sacred trust represented by a constitution are all discussed in this paper. The importance of judicial activism in upholding the rule of law and filling legislative gaps is discussed as a hallmark of a truly independent judiciary. The function of the judiciary in Pakistan is also examined, along with how it was affected by the Islamization of legislation. It also examines the connection between political regimes and the judicial system, shedding insight on how the latter might serve as an agent of the former under authoritarian regimes. To better comprehend the processes of authority, shift from regime legitimization to political liberalization, we examine the instance of Chief Justice Iftikhar Chaudhry's struggle with the government after his appointment and subsequent suspension. This research sheds light on the development of constitutionalism and judicial activism in Pakistan by pinpointing a number of influential factors.

Keywords: Judicial Activism, Constitutionalism, Pakistan, Fundamental Law, Constitution, Authoritarian Government, State Authority, Democratic Governance,

1. THE CONCEPT AND PHILOSOPHY OF JUDICIAL ACTIVISM

Judicial activism is considered to be the enhancements of jurisdictional circle of judiciary, in order to take over an area of the legislative vacuum. Judiciary is expected to dispense with justice in a fair and just manner without any discrimination as government's efficiency is subject to impartial, independent and positive administration of justice. Both executive and legislature are expected to perform their functioning according to the inspiration of the people. Nonetheless, where these organs fail to come up with the expectations of the people, judiciary is compelled to takeover to the executive domain so that to ensure justice to the citizens. (M. A. Waseem, 2019) In a democratic system, good government is inevitable for any state wherein three organs of the government constitute three pillars for good and effective governance and lack of harmony amongst them can lead to administrative chaos. In like circumstance, impartial, independent, and fearless judiciary



forms the core of democracy. To secure the right of dispensation of justice to every citizen, the judiciary works as an active catalyst.

1.1. Judicial Activism: The Concept

The concept of judicial activism has been around for longer than the term itself. The term “judicial activism” was first used in 1947. In the 1950s, the term “judicial activism” appeared twice in the judicial opinions. In the 1960s, it had been reported fourteen times. In the 1990s, judicial activism and judicial activist have been reported dramatically. In judicial opinions, it has been reported 262 times whereas, in law journals and law review articles, it has been reported 3815 times. (Soomro & Masudi, 2023) Unlike the previous decades, the modern-day judges are more likely to accuse their colleagues of judicial activism. Astonishingly, this term has become more ambiguous despite of its increasing use, due to its definition in different and contradictory ways. The scholars as well as judges recognize this problem and continued to speak about the concept without defining it.

From the very beginning, judicial activism lacked any accepted definition rather it encompasses a variety of concepts. The idea of judicial activism is older than the term. Till twentieth century, there were debates in legal fraternity regarding the conceptualization of judicial legislation that referred to making of law by the judges. (Siddique, 2021)

Blackstone regarded it as important feature of common law, whereas Bentham considered it as an encroachment to the legislative functions. Judicial legislation got impetus and scholars richly contributed to the merits of judicial legislation in the 1950s. However, it received intense criticism during Lochner’s era which modern day scholars corresponded with judicial activism. Nonetheless, judicial activism was not used in legal discourse by name until the justices consented that the New Deal was on firm constitutional grounds.

In January 1947, Arthur Schlesinger Jr. was the first to introduce the term judicial activism. His article profiled all the nine justices of the US Supreme Court and elaborated alliances and divisions among them: four judges were placed as judicial activists, three were placed as champions of self-restraint, and the remaining two were placed as a middle group. Schlesinger referred to a number of meanings that are reasonably similar to the present-day definitions of judicial activism, such as judicial activism is the overturning of democratically enacted statutes. Similarly, Mc Whinney is credited with writing two specific articles which advanced a more sophisticated theory of judicial activism. In the same parlance, the first use of “judicial activism” was evident in *Theriot v. Mercer* by C. Hutcheson, Jr. in a judicial opinion overruling a trial court decision.

Legal fraternity describes judicial invalidation of the legislative enactment as judicial activism. Broadly, judicial activism is court’s intervention to strike down a duly enacted legislation. It is a practice of disallowing policy, made by the public officials or institutions, which is not explicitly prohibited by the Constitution.

Judicial activism is a step forward to its traditional performance of settling disputes in accordance with the constitution or statutes. As a matter of fact, judicial activism is the adoption of pro-active approach by judiciary. It reflects the situation when judiciary comes out of its domain of traditional role and becomes active in its working while lying down the policies and performs functions which



otherwise is within the exclusive authority of the executive and the legislature. Another heated debate is to test the extent of judicial activism, whether or not such pro-active judicial functioning is overstepping its circle of authority, assigned by the constitutional framework, which could consequently create judicial anarchy, judicial over activism, or judicial despotism. Like the Indian Constitution, the Constitution of Pakistan does not contain the term judicial activism, however, it has become an integral part of the present-day functioning of judiciary. (Shamshad, Sarwar, & Arshad, 2022)

In *Kesavanada Bharti v. State of Kerala*, the Court held that there are some absolute or basic features of the constitution which shall not be amended: democracy, rule of law, federalism, secularism, and judicial impartiality. The Court further empowered itself to declare such laws, amending the basic structure of the Constitution, to be unconstitutional. The same rule was reiterated in the *Minerva Mill* case. The enunciation of such doctrine, which is not mentioned in the Constitution, is nothing but judicial activism. As a matter of fact, it is an active role judiciary that adjudicates policies enacted by the legislature or the executive. In modern political system, with the development of the concept of constitutionalism, it is considered to be an upshot of democracy. Presently, jurisdictional sphere of 1463. judiciary is enlarged to a great extent so that to safeguard individual liberty and social cohesion against undue institutional encroachment.

Judiciary is not confined to interpret the law rather it is empowered to imaginatively share the provision of the constitution, in order to meet the ends of social justice. Judicial activism had its origin in the United States of America at the hands of Justice Marshall in *Marbury v. Madison*, where the Court formed the very basis for judicial review and gave the concept of judicial activism. According to justice Marshall, the Constitution is basic and supreme law of the land and courts are empowered to declare what the law is. He observed that any enactment which is contrary to the Constitution or competing any provision thereof is invalid and all state organs including courts are required to comply with the Constitution. Where a law made by the congress is conflicting with the Constitution or any part thereof, the Supreme Court shall come forward to declare such law void and to uphold the Constitution. (Shamim, 2018)

Justice *Bhagwat* of India observed that in every political system, judicial activism is an essential attribute of an impartial judiciary. Public Interest Litigations in India and *suo motu* actions in Pakistan has further enlarged the scope of judiciary. Judicial activism is the expanded role of judiciary encompassing an area of the legislative vacuum in the domain of human rights. Since the inception of Pakistan, judiciary has undergone an incredible transformation and is being identified by itself as well as by the people as a last resort.

1.2. The Concept of Judicial Activism in the USA

As discussed above, the concept of judicial activism is much older than the term itself. In the USA, its origin can be traced back in the leading case of *Marbury v. Madison* In December 1800, the third Chief Justice of the USA, Oliver Ellsworth, resigned his office. The President, Adams, who held office till March 4th, 1801, nominated his Sectary of State, John Marshall as the chief justice just before a month of his descending from the presidential office. On February 27th, 1801, the congress



authorized forty-two Justices of Peace for five years. The Senate confirmed those appointments on March 3rd, a day before the republicans to take the office. The appointments were made by delivery of the sealed commissions by the Secretary. However, few of those appointments remained undelivered. With the new executive configuration, Jefferson's Secretary of State, refused delivery of the remaining commissions. William Marbury, one of the Justices of Peace whose commission remained undelivered, filed an original action in the Court contending for the mandamus order to compel Madison to deliver the commission, asserted jurisdiction through Section 13 of the Judiciary Act, 1789.(Shahid, 2021)

1.2.1. The US Supreme Court's Observations

The court held that Marbury has the right to the commission. Nevertheless, the law under which relief was sought is unconstitutional so the Court would not confer the right. The Court observed that even executive actions are subject to constitutional restraints, which could be enforced by judiciary. Justice Marshall gave his opinion in terms of three issues: firstly, Marbury's right to have the commission after it was executed and thereby criticized the new administration and the President Jefferson.

The court might have avoided constitutional issues that the right did not vest until the delivery of the commission. Secondly, the US government being government of laws not of men required a legal remedy for a legal wrong. Marshall further highlighted that individual remedy would be left to political process where the alleged matter is exclusively of political nature or within the exclusive jurisdiction of the executive. Nevertheless, where individual rights are dependent on a duty established by law, there was a remedy which must be enforced judiciously. This argument laid the foundation of judicial review and scope of judicial activism. Thirdly, whether or not Marbury was entitled to the remedy he had applied to the Supreme Court.(Reayat, Farid, Khan, & Shah, 2021) Justice Marshall further divided the last issue into two questions concerning the nature of the writ of mandamus and the Court's authority: to the nature of the writ, the Court asserted power of judicial review to the executive branch. The Court inquired as to whether or not mandamus could be enforced against the executive. Marshall founded two categories of the executive actions not subject to judicial review: where the presidential or executive action is purely political or where the matter is within the sole discretion of the executive. Nevertheless, the executive itself cannot limit the power of judicial review. Moreover, where a duty is imposed on the executive by virtue of any federal law or the Constitution, the court can impose and make sure application of that function. In like circumstance, judicial review is not a transgression to the executive branch, rather an inquiry into the alleged illegality.

The Court further analyzed that whether or not the mandamus should be issued in the given case. Marshall founded a conflict between the Court's statutory jurisdiction under the Judiciary Act of 1789 and Article III of the US Constitution. Marshall concluded that the congress might have the authority to alter court's jurisdiction, but Article III intended to fix original jurisdiction of the court. This conflict led Marshall to the essential question: status of the conflicting laws with the Constitution and the Supreme Court's authority to invalidate such laws. Marshall observed that the Constitution represents the will of people, coupled with fundamental rule of compelling the



government to act according to the spirit of the Constitution, which means that the Constitutional law is the paramount law and any contrary act to the letter and spirit of the Constitution must be held invalid. Judiciary is conferred with responsibility to interpret the law, which is the foundation of judicial review. (Ranjah, 2021)

Marshall advanced several other points in support of judicial power to declare laws invalid if found inconsistent with the constitution. In the given case, the court was either required to follow statute or the constitution. An inability to reject statute in favour of the constitution would subvert the essence of the written Constitution. The judges' oath also required them to uphold the Constitution. Marshall concluded the case with observations that the Constitution is superior law as envisaged in Article VI, which explicitly declares the Constitution to be the ultimate law and the statutes must be consistent with it. The judges must uphold the laws which are in consonance with the constitution. The Court while refusing the commission to Marbury held that the original action for mandamus was conflicting with Article III of the Constitution as Section 13 of the Judiciary Act incorporated an unconstitutional provision, hence declared void. (Policy, 2018)

1.2.2. Review of the State Laws: Development towards Judicial Activism

Historically, three decisions of the US Supreme Court are of particular significance that established the federal judicial power over the state laws, and had further advanced the concept of judicial activism: in *Fletcher v. Peck*, the Court for the first time invalidated a state law under the US Constitution. This case involved a Georgia's statute that sought to annul earlier transfer of land against the bona fide private purchasers who sought enforcement of the contract and ownership rights. A corrupt legislature had authorized these transfers and the state contended to cancel what seemed to be fraudulent acts. The Court held that within the meanings of Article I, the repealing statute was unconstitutional and it was immaterial that the state was grantor. The Court found no distinction between obligation of contracts where it was between private individuals or between the state and an individual. (Naseer et al., 2023)

In *Martin v. Hunter's Lessee*, a former British US citizen, Lord Fairfax, willed his land to his nephew in England, Denny Martin. Later on, Virginia, through an enactment, confiscated land of those who had been the British citizens or their loyal during the war of Revolution. A portion of the alleged land was granted to David Hunter. The representatives of Martin and Hunter contested this case. The highest Court of Virginia and Court of Appeal decided in favour of Hunter and the state. Nevertheless, the US Supreme Court decided in favour of Martin on the ground that the state law is subordinate to federal treaties under the supremacy clause. As contested by Martin's representative on the pretext of the Anti-Confiscated clauses of treaties between the USA and the Great Britain.

In *Cohens v. Virginia*, the state prosecuted persons for the sale of lottery ticket in violation of the state's law. The appellant contended that the act was permitted by a federal statute authorizing a lottery in the District of Columbia. The Court held that the federal act did not protect the accused, but the Court asserted its authority to review state's acts in criminal proceedings. The Court observed that the Constitution is paramount and enduring law, often requires enforcement against outside challenges, and federal courts were proper forums for this purpose. (Munir & Khalid, 2020)



Generally speaking, the state courts are authorized to review the constitutionality of either state laws or federal laws. These courts are bound to enforce and give preference to federal laws over state's acts. Similarly, the US Supreme Court is empowered by the virtue of Article III of the Constitution to reverse the state courts' decisions and the Supreme Court has to be followed even to review the state laws. The Supreme Court is free to interpret state's laws or state constitution in any way not violating principles of federal laws or the US Constitution; in that case, the US Supreme Court must defer to state high court. Further, Article III provides constitutional protection to the judges with lifetime tenure with no diminution of salary, in order to ensure independence of judiciary. The basic statutes governing SC jurisdiction are found in the Title 28 of the US Code. Section 1215 governs original jurisdiction and provides that the US Supreme Court shall hear controversies between two or more states, or where Ambassadors, public ministers, or counsels or vice- counsels of foreign states are parties. (Kennedy, 2019)

In the US system of government, judiciary's role remained quite controversial. The proponents of judicial activism argue that courts are only insulated from the matters which are exclusively of political nature. In the constitutional context, courts should generally exercise its authority so as to ensure that legislation is in consonance with the constitutional norms. Contrary to this approach, the opponents of this doctrine, proponent of judicial restraints, argue that broad use of judicial power is detrimental to the democratic principles. According to this approach, the judicial restraint prevents courts from encroaching upon the policy-making functions of political branches of the government.

1.3. Islamization and Judicial Activism in Pakistan

Several Muslim countries initiated Islamic reforms in 1970s and 1980s. By that time, the legislature have to face so many challenges: establishment of the content of Shariah norms, which by implication is giving precedence to one sources over another and choosing among differing interpretations of these sources. In Pakistan, the Islamization of Shariah law started its roots in the end of 1970s through motivation of the executive and followed in the subsequent decades mainly through judiciary. Some of the Islamic reforms were introduced by the then Prime Minister Zulfikar Ali Bhutto in the second half of the 1970s. This process was accelerated when General Zia-ul-Haq acceded to power. (Kennedy, 2019)

Throughout the 19th century, Shariah courts were stripped of their jurisdiction by colonial imperialist powers and were replaced with the western judicial system. However, in most of the countries where Islamic laws have been reintroduced, western courts remained functional. While in some cases, new Islamic courts have been setup which continues to function according to the western procedures. Additionally, in exceptional cases their composition remained mixed wherein judges are sitting along with the *ulema* due to an uneasy division of functions. The reforms brought forth by Zia-ul-Haq were very complex and may be categorized into the following three kinds: Structural Reforms, Procedural Reforms, and Criminal Law Reforms. In 1978, High Courts were granted with the original jurisdiction of the Appellate Shariat Benches and were conferred with the authority to entertain Shariat petitions and appeals against Hudood cases. (Giunchi, 2013)



However, in 1980 the Federal Shariat Court (FSC) was established and the High Court benches were disbanded. Till 1985, provisions regarding the Federal Shariat Court were changed twenty-eight times via twelve distinct Ordinances, in order to make sure that laws are complying with the Islamic injunctions. The FSC was also conferred with limited *suo motu* jurisdiction. In the Procedural Reforms, law of evidence, 1872 was replaced with Qanoon-i-Shahadat Order, 1984. In the Criminal Law Reforms, the President Zia promulgated four Ordinances on 10th February 1979 that was collectively termed as Hudood Ordinances: The Zina Ordinance deals with penalty for sex related crimes such as rape, adultery, and prostitution. The Qazaf Ordinance deals with the false allegation of Zina and penalty thereof. The Prohibition Ordinance deals with intoxication and its penalties. The Property Ordinance deals with theft related offences and provides penalties for such crimes. In mid 1980s, following a brief account of the adoption of Shariah in Pakistan, it is significantly important to examine how Islamization of legal system shifted to judiciary. Due to Zia-ul-Haq's death, Islamization was temporarily interrupted but resumed by Nawaz Sharif who remind the Prime Minister of Pakistan from 1990 - 1993, from 1997 - 1999, and then from 2013 - 2017. In 1991, the enforcement of Shariah Act prescribed that Shariah which defined as the injunctions of Islam was the supreme law of Pakistan. It implies that every law has to be construed by the courts in the light of Shariah and that all Muslim citizens should observe it. (Giunchi, 2013)

1.4. Application of Islamic Law through Judiciary

Despite the fact that the concept of Islamization was backed by the executive, it was overwhelmingly continued beyond the government control. In plethora of cases, the Provincial High Courts referred to un-codified principles contained in the Quran, Sunnah, and *fiqh* so as to clarify vague statutory norms. The Courts went to the extent of replacing the codified norms with that of the un-codified Islamic principles. Apparently, it was paradoxical view that judicial activism started in High Courts rather than the newly established Islamic Courts. In fact, judges of the High Courts were younger having more orientation to Islam than those sitting in the appellate Islamic Courts.

In 1970s some judges of the High Courts had claimed that the issues not been dealt with by the statutory law should be decided according to the Shariah Principles rather than referring it to the British precedents. Furthermore, the Objectives Resolution was more than a conventional preface as it embodies the fundamental concepts of the Constitution. Nevertheless, the Supreme Court asserted that technically the Objectives Resolution cannot be considered as an active part of the Constitution. In any case, Islamization of laws could be carried out only by the executive and not by judiciary. In 1985, the situation changed with the adoption of the constitutional amendment whereby Article 2-A made Objective Resolution as a substantive part of the Constitution. (Gazdar, 2009)

Article 2-A made the Shariah a normative system superior to the statutory system and required that the courts should apply it directly. It was decided that both the High Courts and the Supreme Court could strike down any law as un-Islamic if it is not reserved to the Federal Shariat Court and matters excluded from its jurisdiction would now fall under the jurisdiction of the other courts. This competence was implemented in 1980s in numerous cases heard by the High Courts, pertaining mainly to *Riba* and family laws. The MFLO was one of the main targets of this religiously-oriented



judicial activism. In 1988, the Supreme Court for the first time asserted that after incorporation of Article 2-A to the Constitution, no law could prevail over Islamic percepts. However, the areas excluded from its competence could be judged by the High Courts and the Supreme Court. In such cases, their interpretation would have binding effect on the Federal Shariat Court.

The Federal Shariat Court itself has progressively referred to un-codified Shariah principles, especially in cases not covered by the statutory laws. This change contributed entrance of Islamic judges along the judges of modest background. For instance, Tanzil-ur-Rahman, the head of Islamic Ideology Council who was nominated judge of the Sindh High Court in 1986 and after five years alleviated as a judge of the Federal Shariat Court. He actively promoted the idea that the Objectives Resolution had become a supra constitutional norm and that the MFLO was un-Islamic. It was observed that courts could only have a judicial role and the Objectives Resolution could not be considered supra constitutional document nor was itself executory, the judges could directly apply Islamic percepts in subjects not covered by statutory laws. However, in a landmark case of *Zaheer-ud-din v. the State*, the Supreme Court held that Objectives Resolution is effective and operative even with the suspension of fundamental rights. (Bazmi, 2022)

Article 2-A has had far reaching effects. Firstly, it has expanded the authority of judiciary vis-à-vis the legislative and the executive bodies. The state having assumed a legislative function unknown to pre-colonial India had to retreat when faced with judicial activism of judges. Secondly, the proactive judiciary eroded the economic interests and ideology against one another, as evident in the case of *riba*. In the instant case, the FSC and the Appellate Shariat Bench of the Supreme Court (ASBSC), following the examples of the High Court rulings, directed the government in 1991 and 1999 respectively to completely revamp the traditional banking and insurance system and thereby to replace all transactions involving *riba* with other instruments. However, the government was reluctant to implement the judgment of the Court for its application could isolate the economy of Pakistan and could discourage foreign investment and capital that consequently could push the fragile economic system of the country to collapse. In 2002, the government filed review petition against the impugned judgment of *riba* in the Supreme Court. Meanwhile, the government also partially changed composition of the judges of the Supreme Court. The Court set aside its previous judgment and remanded the case to the Federal Shariat Court for further examination. (Akbar & Malik, 2019)

1.5. The Constitutionality of *Suo Motu* Actions

In modern democracies, active and impartial Judiciary is imperative to ensure proper functioning of the state organs. In the Mughal era, Diwan-e-Mazalim was considered to be the highest office in judicial fabric. During the British Raj (1858 -1947), new judicial configuration was devised in the Subcontinent. After partition in 1947, both India and Pakistan established their own constitutional schemes on the basis of the Government of India Act, 1935. This Act empowered the courts to check constitutionality of the enactments by virtue of Section 223-A. In Pakistan, the Constitution envisages trichotomy of powers whereby every state organ is required to work within its constitutional limits. (Ahmed, 2015)



The Superior Courts entrenched power of judicial review by virtue of Section 223, 223-A and 204 of 1935 Act. Later on, the Indian Act of 1935 was replaced by the Constitution of 1956 that conferred power of judicial review to the High Courts and the Supreme Court by virtue of Article 170 and Article 22 respectively. In 1958, the Constitution was abrogated by the Chief Martial Law Administrator. Afterwards, the Constitution of 1962 introduced presidential form of government and its Article 98 articulated about judicial review. However, the Constitution of 1962 was replaced with an interim constitution by military dictator. With the consensus of all political parties, the Constitution of Pakistan, 1973 was passed without any substantial lingual changes. In this Constitution, power of judicial review was conferred to the High Courts and the Supreme Court by virtue of Article 199 and 184(3) respectively. The SC in various cases assumed its authority where question of public importance or protection of fundamental rights was involved.

The Supreme Court by invoking its *suo motu* jurisdiction has broad powers to review an administrative action on various grounds such as if the act is discriminatory, mala fide, or unreasonable. The Court has also been empowered to strike down any legislative enactment or any part thereof if that is repugnant to any provision of the Constitution. Article 184(3) articulated essential conditions for invoking jurisdiction of the Court: question of public importance and matter is associated with the protection and enforcement of fundamental rights. (Giunchi, 2013)

1.6. Test of Judicial Activism: Pakistan a Case Law Study

This segment of the research examines the extent to which judicial activism is a negative element in the constitutional development of Pakistan. Generally speaking, primary function of the state is dispensation of justice. An effective judiciary is subject to its impartiality. The judicial autonomy got international recognition through various conventions such as the UDHR, 1948, the ICCPR, 1976, and 1985 the UN Convention on Prevention of Crimes and Treatment of Offenders. The supremacy of the Constitution is guaranteed through the courts. The Constitution also bestows impartiality of the judiciary. Independent judiciary helps keep every organ working in its constitutionally defined jurisdictional circle. In the US history, *Marbury v. Madison*¹³⁷ is an important milestone that created the foundation for Judicial Review. It established the authority for Judicial Review of Congressional and Presidential actions. Further, it declared supremacy of law that even the President is subject to the law. It also articulated that judiciary can award remedy against the executive when a particular duty is imposed on it, but not when a matter of political nature is left on its discretion. A lame and weak judiciary shall be mere a façade as it will be subject to political exploitation and rule of law will be undermined in its absence. (Siddique, 2021)

The Constitution of Pakistan envisages trichotomy of powers, which enables every state organ to work in its respective sphere. In a federal system of government, judicial review is far more important because it keeps a federation and its units in their limits and does not let them overstep beyond the powers granted under Constitution. A constitutional mechanism is regulated to ensure the impartiality of courts and dignity of its officers. The preamble to the Constitution envisages autonomy of judiciary and disqualifies a Parliamentarian if he/ she defames or ridicules judiciary. Furthermore, the Constitution of Pakistan, 1973 articulated certain provisions in order to ensure the impartiality of courts. These Articles include appointment of the Superior Courts'



judges, term of their office, removal from office, Judicial immunity, freedom from Parliamentary criticism, exclusiveness of authority and original jurisdiction of the Supreme Court regarding any dispute between two or more Governments, advisory jurisdiction of the Supreme Court, issuance of decrees, orders, or directions as may be essential for doing complete justice, finality and binding authority of decisions and rules of procedure whereby Superior Courts are authorized to make rules so as to regulate practice and procedure of the Courts.

Similarly, state functionaries derived their authority from the Constitution and are expected to use their power within the limits prescribed by the Constitution. Public authorities are required to act rationally, independently, and without arbitrariness within the prescribed authority. In case where a person is aggrieved of any administrative action or where protection of fundamental rights is concerned, such person can approach the Superior Courts in order to review the impugned order.

In case titled, *Munir Hussain Bhatti v. Federation of Pakistan*, where the Parliamentary Committee refused recommendations of the Judicial Commission regarding the appointment and extension of the four judges of LHC and two judges of the SHC on the pretext that the former represents will of the Parliament. Hence, decision of the Parliamentary Committee cannot be reviewed. It was held that appointment, removal, and term of judges ensure judicial impartiality. The Court observed that it has constitutional right to review decision of the Parliamentary Committee which is working as an executive body and to ensure independence of state organs with a reasonable control. (Shahid, 2021)

In case of *Musammat Badshah Begum v. Additional Commissioner Lahore Division*, the Supreme Court observed that the Court has ample power of judicial review in order to make sure just, fair, and reasonable application of law. Further, courts are not bound by the letters of law rather bound by the spirit of law. The rationale behind power of judicial review can be contemplated briefly in the following points:

- a. In order to secure supremacy of the Constitution, power of judicial review has been granted. Courts are guardians of the constitution and do not allow even themselves to override the provisions of the Constitution. Further, courts are considered to be the first hand machinery for the implementation and enforcement of the Constitution. Moreover, if there is conflict of ordinary law and the constitution, the constitution stands upright and the law is declared void. In case of *Sayed Abul Ala Maudoodi v. Government of West Pakistan*, the Supreme Court held that the Constitution is supreme and it has to prevail over the ordinary law. This is possible only when the authority of judicial review is admitted.
- b. It is a tool to uphold rule of law by interpreting the Constitution and ordinary laws as well as it ensures protection of rights and liberties to all individuals against undue interference. It means that judicial review stands for equal protection of law and equality before law as provided by Article 4 and 25 of the Constitution of Pakistan, 1973 respectively.
- c. Judicial Review is meant to secure rights of people and has come to play a vital role to rescue people from the abuse of authority being exercised by public functionaries. The underlying objectives of Article 199 are summed up in the case of *Muhammad Basher v. Abdul Kareem*. The



Court observed that it is duty of the Court to protect fundamental rights of the people, to act and aid the law, and to protect the law and Constitution against exploitation by the state functionaries. Further, it is duty of the Court to strike a fair balance so as to create a rational compromise of state functionaries with the rights of citizens. (Policy, 2018)

1.6.1. Authoritarian Regimes and Judicial Functioning

Generally speaking, courts are expected to independently and impartially perform its functions with the limits prescribed by the Constitution. In certain exceptional circumstances, such as military regimes, courts are required to expand its jurisdictional sphere. Despite the independent status of judiciary, the political regime holds control on it by various means such as judicial appointments, financial incentives, and in the matters of legal and constitutional changes. The courts are, therefore, considered to be the agents of political regimes. In authoritarian pretext, focus is made on the expansion of courts' power and their independence. *Ginsburg and Mustafa* articulated five essential functions of the courts in dictatorial regimes: firstly, administrative control over executive for addressing low-level corruption. Judges allow investigation into bureaucratic misdeeds that otherwise cannot be discovered by the regime.

Secondly, application of controversial policy measures, especially in the economic realm. Thirdly, for the economic survival of the authoritarian regime, foreign and domestic investments are encouraged but due to fluctuation in property rights investors rarely take the risk of the investment. Fourthly, courts are being used in the authoritarian regimes in order to regulate a social control over the political opponents. Fifthly, courts are employed for providing legal cover to the extra-legal activities of the regime. In order to provide justification to the regime, courts develop justification for constitutional deviations. (Jatoi, Mustafa, & Kataria, 2022)

The next segment examined the extent to which the courts followed the above mentioned functions and to which extent the courts diverged from them while expanding judicial powers. The Supreme Court in the exercise of its *suo motu* jurisdiction cancelled the agreements and process of privatization of public enterprises instead of endorsing them. The Court directed investigation of missing persons instead of supporting and upholding the regime. Once the Court assumed maximum power, jeopardizes the legitimacy of the regime instead of its reinforcement. The SC has constitutional authority to review matters of public importance concerning the protection of fundamental rights. The Parliament determines numbers of the Supreme Court judges. In Musharraf reign, it was set to be seventeen.

Before 18th amendment to the Constitution, the Supreme Court judges were appointed by the President on recommendations of the Chief Justice. Whereas, the most senior judge among the Supreme Court judges was elevated to the office of the Chief Justice. The President had constitutional authority to remove a judge either on account of misconduct or where a judge was otherwise incompetent to continue his duty. Nonetheless, the President has not been expressly empowered by the Constitution to suspend a judge before the conclusion of the inquiry. The Chief Justice plays a significant role in the Court's jurisprudential development and approves *suo motu* actions. (Munir & Khalid, 2020)



After the Military takeover in 1999, Iftikhar Muhammad Chaudhry was among the handpicked judges of Musharraf by replacing six judges who refused to take oath under the PCO. Iftikhar Muhammad Chaudhry was one of the twelve judges who validated the coup on the ground of necessity. He was one of the nine members bench upholding extra-constitutional referendum in order to become a President. He was a member of the bench upholding Musharraf's amendment to the Constitution. He was also among five members bench whereby Musharraf was allowed to hold office of the Army Chief in his first Presidential term. In June 2005, Iftikhar Chaudhry was promoted as the Chief Justice of Pakistan who performed functions in authoritarian context.

1.6.2. Judicialization of Governance

The first and foremost question that how did a pro-regime judiciary expanded authority that led to the confrontation with the regime. Typically, as discussed, in authoritarian situations the Supreme Court legitimized the military regimes. In the present context, the economic liberalization and privatization created room for public interest litigations. The Supreme Court enhanced its jurisdictional circle of authority and impartiality that consequently created backlash to Musharraf's interests. Invoking original jurisdiction in matters of public interest litigations was not a novel concept, but the Court provided some additional measures, in order to make some unprecedented developments towards its autonomy. By expanding its authority, the Human Rights Cell was also established in the SC. A chronological analysis of public interest litigations helps understand how the Supreme Court diverged from the anticipated judicial role in dictatorial regimes. (Reayat et al., 2021)

In Musharraf's era, economic growth was evident that required high rise office space and housing. Nonetheless, urban planning and safety measures had not been advanced accordingly. After catastrophic earthquake of October 2005, the inhabitants of a collapsed building, which was located in Islamabad, filed a petition against the construction company and the CDA. The applicants contended that the CDA could not protect their lives and properties despite repeated complains about material defect in the tower. The CDA was directed by the Court to investigate the responsible persons for defective construction and further directed to provide accommodation to the concerned residents. ((Naseer et al., 2023) NASEER, AMAN, & KHAN, 2023)

After two months, the Court while converting the same petition into a high level of judicial investigation directed the Provincial officials to submit a report regarding damage to the schools, colleges, and universities due to earthquake. The authorities were further directed to provide details of any action so far taken against the responsible persons for defective construction. In another case, the Supreme Court, in April 2006, heard an appeal against the order of the Lahore High Court, which had forbear the LDA for permitting construction of buildings without meeting the required safety standards. The Court unveiled that the LDA had no structural engineer for ensuring structural safety. (Akbar & Malik, 2019)

Similarly in February 2006, the Court took a petition against the CDA. The Petition moved the Court to prevent the CDA from making a lease agreement for golf course that was to be constructed in a public park. The Court observed that the proposed agreement violated fundamental right of access to public places as guaranteed by Article 26 of the Constitution of Pakistan, 1973.



On the same grounds, the SC took *suo motu* in number of cases with reference to commercial projects and public spaces in Lahore and Karachi. These were some of the examples that how the Court kept surveillance and control over high level corruption that created room for the judicial intervention, while expanding its authority in the context of fundamental rights.

After urban planning, the Court expanded its jurisdictional circle in deregulation of price control. The Court intervened in price control of oil and sugar. In order to set price of petroleum, the Ministry of Petroleum had authorized a group of oil companies, which was termed as the Oil Companies Advisory Committee (OCAC), without any parliamentary oversight. With the escalation of oil price to US\$70/ per barrel in international market, the OCAC increased the prices accordingly. However, when the oil price decreased to US \$62 the OCAC didn't reduce the prices correspondingly. In May 2006, the Supreme Court took the petition and directed the National Accountability Bureau to probe into the matter. After initial hearing, this case was referred to a larger bench to investigate the involvement of officers from the Ministry of Petroleum for having collaboration with the OCAC in order to fix an unfair rate. (Policy, 2018)

Likewise, the Court took cognizance of sugar price hike, which was recorded double in less than a year. The Supreme Court directed the NAB to investigate the matter properly. In its report, after conclusion of the investigation, the NAB implicated the involvement of eight Ministers and further declared that governmental soft policy was claimed to be the reason for sugar crisis. These price control cases targeted high level corruption that further exposed the despotic regime. This initiative of price control got motivation from media and the NAB's compliance to the orders gave confidence to the Supreme Court for expansion of its authority.

After price control, the Court took an account of privatization of public enterprises. In 2005, keeping in view the economic liberalization policy, the government privatized public enterprises mainly with the support of Citibank. These enterprises included Pakistan State Oil (PSO), Pakistan Telecommunication Ltd. (PTCL), and Pakistan Steel Mills (PSM). The Labor Union threatened to destroy the telecom facility when their demands were not considered by the government. Consequently, Army had to be involved for security of infrastructure. Likewise, in April 2006, the PSM was privatized on the same political grounds. The opposition and the Labor Union leveled corruption charges against the Privatization Commission. In August 2007, the Court while reversing the sale agreement annulled the agreement regarding share purchase and acceptance of the deal. Subsequently, the Court took an account of the PTCL and the PSO despite its accepted position. Considering the vitality of the nature of the cases, the PSM case is considered to be the turning point and principal factor of regime conflict with the Court. The Supreme Court was expanding its ambit of authority by terminating the contracts on the ground of corruption charges instead of enforcing the contracts and supporting the FDI. (Munir & Khalid, 2020)

After taking an account of privatization of public enterprises, the Supreme Court took *suo motu* against missing persons. In November 2006, the Court while taking notice of the forty-one disappearances directed the Ministry of Interior to produce them. After a month, the Supreme Court was informed by the officials that twenty persons have been recovered. The Court gave directions to trace rest of the missing persons. In November 2007, the Human Rights Commission



of Pakistan provided another list of 148 missing persons to the Supreme Court and alleged that the agencies are behind those disappearances. A Bench of the Supreme Court, headed by the Chief Justice, took the petition and sent notices thereof to Federal and Provincial Governments. Nevertheless, by the very next day Chief Justice was suspended from his office. Conceivably, the Court had gone too far by expanding its ambit of authority to intelligence agencies. The Court was enhancing its authority by taking an account of disappearances. Civil society and media were encouraging the Court.

The most challenging task for the Supreme Court was regarding eligibility of Musharraf for contesting the Presidential election while serving the military. For dual office, Musharraf has already got one time exception in 2002 by amending the Constitution, which was upheld by the Supreme Court. Keeping in view activist posture of the Supreme Court, Musharraf could hardly rely on the Court for making constitutional arrangements so that to legitimize his ability for contesting presidential election of October 2007. The Supreme Court had evidently confronted essential regime policies and thereby challenged the high officers of the regime in every consecutive case. Also, there were reports regarding the Court moving ahead as per anticipations of civil society and media, in order to decide Musharraf's eligibility. On this apprehension, the Chief Justice was suspended on March 9, 2007 on the corruption charges and was manhandled by police officials. These incidents created an extraordinary mobilization of the legal fraternity to reinstate the deposed Chief Justice to his office. After struggle of four months, Iftikhar Chaudhry was reinstated. In October 2007, when Musharraf stood for Presidential elections, the Court withheld the results to review the fact of his being a Presidential contestant while serving the army. Nevertheless, the Constitution was suspended prior to the decision and emergency was proclaimed. (Gazdar, 2009)

1.7. The Determinants of Judicial Power

The economic liberalization and its discontents are considered to be the primary factor that allowed the Court to expand its authority by challenging the economic policies of the regime. After September 11, 2001, Pakistan underwent a rapid economic growth mainly due to FDI and the US military funding. In order to get the economic goals, the economic liberalization policies were aggressively implemented. These policies have consequently created new avenues and techniques for corruption that created new governance challenges. The privatization of public enterprises such as the PSO, the PTCL, and the PSM were creating corruption scandals. This economic growth, which was coupled with corruption, ultimately provided an opportunity to the Court for expansion of its authority since impartial courts are meaningful for combating ground-level corruption. The Court working on the same line, kept a check on the investors, cancelled their contracts, and unveiled the regime for its unexpected financial outcomes. Initially, the Court was tolerated by the regime for its political functions in favor of the latter. On the contrary, once the Court empowered itself, it began to dismantle social control of the regime and created a threat for the legitimization of the regime.

Supportive media was another factor for confrontation with the regime. Throughout the political history of Pakistan, the Supreme Court has mostly legitimized political authority of the regime that resultantly failed to repose a positive



public image in judiciary. With the expanding scope of the *suo motu* cases, people and media started trusting judiciary. The Chief justice also showed deep concerns in this regard. In 2006, the Court incorporated a section named as “Supreme Court and Media”, comprising eighteen reports on the Court’s achievements. Nevertheless, the critics to such judicial activism considered this tactics as a “Media Circus” by alleging that the Chief Justice is utilizing *suo motu* action for self-aggrandizement.

Strategic judge and regional influence are other important factors. For materialization of public interest litigations cases, the role of the Chief Justice was perhaps necessary condition in this regard. In India, public interest litigations have a long standing tradition that might have inspired the Supreme Court of Pakistan as well. Additionally, petitioners were referring to Indian case law in the domain of public interest litigation to further scope of its jurisprudence. In 2005, Y.K. Sabharwal, the Chief Justice of India, also hosted a delegation of the High Court judges from Pakistan. Pakistani media also reported superior judiciary’s role in urban issues and Pakistan print media also started comparison of India and Pakistan in the domain of public interest litigation.(CHEEMA & RIAZ)

Regime compliance is one of the significant factors in expanding judicial powers. Despite the fact, primary function of the Court during the authoritarian regime is to provide legality to the ruling regime. Nevertheless, in this process of legalism, the Courts also carve out some judicial powers. Furthermore, the regime was not oblivious of the fact that the Court validating everything legalizes nothing.

For enhancing credibility of the Court and reposing public trust in the regime as well as in judiciary, the regime complies with the Orders of the Court. Moreover, judicial credibility was significantly important for Musharraf in order to get license for the upcoming Presidential election. Most importantly, Musharraf couldn’t realize this threat of judicial activism until implication of his Prime Minister in the PSM case and involvement of the director of intelligence in missing persons’ case. Musharraf was overly confident to the extent that he could compel the Chief Justice to resign from his office.(Nabi, 2015)

1.8. The Virtuous Cycle of Judicial Power

This segment investigates that how a handpicked court of Musharraf that served with loyalty till 2005 in legalizing every extra-constitutional measure, turned into a threat to the very existence of the regime. The judicial empowerment that resulted in confrontation with the regime can be analyzed with the sequential examination of the Supreme Court cases and persons implicated therein. The Court encountered the authoritarian regime in a very systematic way. In late 2005, the Court started with implication of Provincial Officers in the urban planning cases. Subsequently, in early 2006 Federal Ministers were implicated in price regulation cases. Another blow was given to the regime in privatization cases whereby the sitting Prime Minister, Shaukat Aziz, was implicated in the mid of 2006. Likewise, in the missing persons and illegal detention cases the army and the intelligence agencies were implicated in late 2006. Finally, Musharraf was implicated in the issue with reference to Presidential elections that came to fore in 2007. In every case, the Court was deciding against the more powerful officer than the previous case. The Court strategically



moved from provincial officers to federal ministers, then Pak army as well as intelligence agencies and finally challenged office of the president. With each step, the Court was encouraged by media and civil society. (Amir, Muhammad, & Jan, 2022)

Constitutionally, as envisaged through the trichotomy of powers, judiciary is expected to exercise its authority within its jurisdictional sphere and not to interfere in the affairs of the other organs. In case titled, *Dr. Mubashar Hussain v. Federation*, the Court has observed that the Constitution provides trichotomy of powers. The legislature is conferred with the authority to enact laws. The execution and interpretation of these laws have been assigned to the executive and the judiciary respectively. Further, no state organ is expected to transgress in the others' field. Particularly, the courts have been reluctant to interfere in the matters relevant to structure and organization of the political institutions. The Court further held that courts should strictly comply with the limits imposed on them by the Constitution as envisaged by Article 175 of the Constitution: establishment of the courts, its jurisdiction, and its separation from the executive. The Judges are considered to be the custodians of the Constitution. (Awan, 2014)

A constitutional judge must ensure that the Court does not assume political authority and must show regard to the modern trends of the welfare state. A constitutional judge must restrain himself as illustrated by *Mr. Justice Stone* that the only control on our authority is our own sense of self-restraint. *Mr. Justice Frank* elucidated that the indispensable judicial requisite is intellectual humility.

Moreover, in *Fazlul Qadir Cahduhary v. Abdul Haq*, the Supreme Court elaborated that judges of the Superior Courts declare in their oath that they shall preserve, protect, and defend the Constitution. The same view was reiterated in the case of *State v. Zia ur Rahman*, the Court observed that the SC is created by the Constitution. It is neither above the Constitution nor can invalidate or challenge any of its provisions. The Court obtained its jurisdictional authority from the Constitution so it will circumscribe itself to its defined limits. Further, the judges while taking oath, undertake to protect, preserve, and interpret the Constitution so as to elaborate what does or what does not a particular provision means even if it oust jurisdiction of this Court. The ultimate purpose of judiciary is to resolve disputes not to create disputes. Hence, the line between the use and misuse of power must be kept widened and much cleared. (M. Waseem, 2012)

CONCLUSION

To conclude with, constitutionalism is a mechanism whereby the state affairs are governed by a fundamental law that may be referred to as a constitution. Contrary to the concept of authoritarian government, where powers are concentrated in a single body and there always exists the apprehension of the authority being misused. The constitutionalism deals not only with the kinds and procedure of the governance, rather it provides a platform for regulating, constraining, and transferring of the state's authority. In a democratic form of government, the will of people is represented by constitution that creates, organizes, and elaborates jurisdictional authority of the government.



In order to conceptualize the idea of constitutionalism, it has been divided into particular and general constitutionalism and explicit and implicit constitutionalism. Constitutionalists often believe on proper and improper use of authority, expecting the state authority to confine to the former one. Conversely, the actions may be prohibited, permitted, or required. So, a constitution must provide arrangements to make sure that the government performs what it is required to do so that to ensure that it is restrained from prohibited acts. In democratic configuration of government where state affairs are evenly distributed among the state organs ensures constitutionalism which establishes a state governed by rule of law.

Thomas Hobbes and John Locke promoted the ideas of unlimited sovereignty and sovereignty limited by social agreement respectively. Austin supported the idea of unlimited sovereignty. For Muslims, the ultimate sovereignty belongs to Allah and transferred to the people as a sacred trust. People surrendered their will in the form of a social agreement commonly known as constitution. For western community, the concept of sovereignty is as old as the concept of cavemen. Judicial activism is an essential attribute of impartial judiciary. It is the expansion of authority to the area of legislative vacuum. In the USA, this concept can be referred to *Marbury v. Madison* case where the US Supreme Court formed basis for judicial review and also gave the concept of judicial activism. In Pakistan, this concept can be traced back to the Indian Act, 1935 that was adopted by Pakistan. Section 223, 223-A, and 204 of the Act were about judicial review. Similarly, Article 170 and 22 of the 1956 Constitution, Article 98 of the 1962 Constitution and Article 199 and Article 184(3) of the Constitution of 1973 conferred power of judicial review to the High Courts and the Supreme Court respectively. Islamization of laws played a significant role in this regard. The ASBSC was entrusted with limited *suo motu* jurisdiction for ensuring conformity of laws with the Islamic injunctions. Later on, High Courts went to the extent of replacing codified laws with that of un-codified Islamic principles. Before Article 2-A, the Court developed a consensus that the executive only could carried out Islamization of laws. However, Article 2-A made Shariah superior as compare to statutory system and required the courts to apply this directly.

Despite the independent status of judiciary, political regimes hold control on judiciary by various means such as appointment and financial interests so judiciary is considered to be the agent of the political regime. In like circumstances, judiciary may tend to work in the authoritarian context because in regime control judicial authority is expanded and relatively impartial. After military takeover of 1999, Iftikhar Chaudhry was one of Musharraf's favorite judges who validated every extra-constitutional act of the regime until June 2000 when he assumed office of the Chief Justice. By judicialization of governance, a pro-authoritarian regime started confrontation with the regime.

Finally, the court implicated Musharraf for contesting presidential election while serving the Army. However, the Chief Justice, Iftikhar Chaudhry, was suspended in March 2007. In October 2007, the Court withheld results of the Presidential election so that to review fate of Musharraf for the presidential election, but emergency was imposed before the decision of the Court. To all this transformation of authority from regime legitimization to political liberalization, there were so many contributing determinants.

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