Judicial Activism Under Article 184(3) of the Constitution of Pakistan-1973

Noman Khalil[*], Hidayat Ur Rehman[†], Sajjad Ali Shah[‡]

Abstract

The aim of this research work was deemed to study about the role of judiciary in the prospective of Article 184(3) of the constitution in the eyes of Jurists and other legal bodies. Additionally, this research study presents the variables that set off judicial activism in Pakistan and also to evaluate the pros & cons on the part of the Executive and Legislature. The term Judicial Activism is used for the dynamic interference of judiciary in the state affairs. Article 184(3) of the Constitution empowers the Supreme Court of Pakistan to take "suo-motu" notices on issues related to the public interest and review any enactment which is repugnant to the Constitution. For this purpose, analytical research methodology was adopted and therefore different case laws, articles, journals and newspapers were studied and critically analyzed during the instant research in order to evaluate the significance of judicial activism in Pakistan? And also, to know that why the term "judicial activism" is judgmental when called in political paradigm. During this study it was transpired that judicial Activism is if excessively used can harm the norms & prestige of judiciary and also detrimental to the democratic setup of a state. It was therefore recommended that the parliament should specifically define the terms Judicial Activism and Public Interest Litigation. Similarly, it was also recommended that the Supreme Court of Pakistan should enquire the matter before taking cognizance in terms of Suo-Moto. Media should also avoid yellow journalism by highlighting every petty issue on political grounds.

Keywords: judicial activism, Suo-motu, Article 184(3), Constitution of Pakistan 1973, proactive judiciary, Supreme Court of Pakistan.

Introduction

The powers exercised by the Supreme Court of Pakistan, under Article 184(3) of the constitution, and its active interference in the state affairs in generally termed as Judicial Activism (Rauf 2019). Actually, Judicial activism is the active involvement of judiciary not

[*]LLM SCHOLAR, Department of Law, AWKUM. **Email:** nomankhalil888@gmail.com

[†]Assistant Professor, Department of Law, AWKUM.**Email:** hidayat@awkum.edu.pk

[‡]LLM SCHOLAR, Department of Law, AWKUM.**Email:** shahlawassociates61@gmail.com

only in the state affairs but also to question such laws which are repugnant to the fundamental rights of the citizens of Pakistan or which does not fall in the ambit of the constitutional skeleton whereby the Apex Judiciary step in and declare the Acts, laws and rules as null & void. Jurists of different school of thoughts are at par at this issue as some favors the pro-active role of judiciary while some criticize it and consider the same as over-looping the powers of the other pillars of the state.

Upon Peeping into the Pakistan judicial history it transpires that number of Suo Moto notices were issued on public Interest Issues but, unfortunately, so far the phrase "Public Interest" has never been defined in any enactment which is one of the reason for the misuse or ultra-vires of Judicial powers by the judiciary who exercises its authority arbitrarily. Judicial activism is a powerful tool in the hands of the judiciary through which all extra-constitutional acts and laws/ ordinances could be invalidated. Judicial activism and Judicial Review are usually considered as same phenomenon but there is huge difference between the two phrases. The former refers to a decision based entirely on the judge's personal considerations rather than persisting legal rulings while the later requires judges to limit and restrain their (judicial review) powers and to declare laws unconstitutional with great care and wisdom (Zaidi 2009). Although this method of dealing with issues related to the public interest has faced different reactions from the media, civil society, international community and politicians. According to Black's Law Dictionary "judicial decision-making philosophy in which judges allow their personal views on public policy to guide their decisions." Spitzer defines that "This term refers to a situation in which a judge issues a ruling while ignoring legal precedents or past constitutional interpretations in support of a particular political opinion" (Spitzer 2020).

Judicial restraint is a theory of judicial analysis that encourages judges to minimize the exercise of their own powers. It attests that judges whether or not to strike down certain laws which are deemed to be inconsistent with the Constitutional injunctions (Mason 1966). Judicially bound judges respect the principle of "eye-catching", which is the principle of upholding the precedents set by judges in the past. There are many different definitions of the term 'judicial restraint'. Some of them read as follows: "It is considered that the Supreme Court (and other subordinate judiciary) should not incorporate the judges' own philosophical or policy preferences into the Constitution or any other law, and that the law should be interpreted as reasonably as possible to avoid speculation about policy decisions made by Congress, the President and the State Government

within their constitutional powers" (Roosevelt 2010). Based on this view, judges do not have a universal mandate as decision makers, who, as long as they remain within the powers enshrining in the U.S. Constitution and several state constitutions, should be subject to decision-making by the federal government and the elected "political" departments of the states. Judicial restraints a procedural or substantive approach to judicial review. As a procedural doctrine, the principle of restraint urges judges not to decide on legal issues, particularly constitutional ones, unless necessary decisions are taken to resolve specific disputes between the litigants. As a matter of substance, it urged judges while considering constitutional issues to give substantive respect to the views of the elected governments and to declare their actions devoid of law only in cases of manifest violation of constitutional restrictions.

The research aimed to develop a wider understanding of judicial activism also to encompass the pros and cons of judicial activism in Pakistan.

The objectives of the research are as follows:

- *to determine the factors that trigger the Judiciary to play a pro-active role in Pakistan?*
- *To determine the impacts of judicial activism in Pakistan.*
- *To determine and analyze the failures of the executive and legislative branches which paved the way for judicial activism in Pakistan.*
- *To determine the possible solutions through which the pro-active role of judiciary could be curtailed.*

Research Question

The current research aims to answer the following questions:

1. What are the factors which triggered the Judiciary to play pro-active role in Pakistan?
2. What are the impacts of Judicial Activism in Pakistan?
3. What are the reasons for the failure of executive & legislature which paved the way for Judicial Activism in Pakistan?
4. What are the possible solutions through which the pro-active role of judiciary could be curtailed?

Significance of Research

The significance of the study is to determine the original jurisdiction of the Supreme Court of Pakistan in light of Article 184(3) and also to determine the judiciary pro-active role in the absence of executive and legislative authorities to fulfill its constitutional responsibilities. This study would abridge all the pillars of the state to

work in a smooth atmosphere and also to minimize the over-looping of powers.

Literature Review

In 1947, Arthur Schlesinger, in an article published in the popular magazine "Fortune "for the first time used the term "judicial activism" (D.Kmiec 2004). Schlesinger's article dissects all 09 judges of Supreme Court into two groups based on judicial activism and self-restraint. Schlesinger argues that the courts are at odds over legislative interpretation and the functions of the legislature. The Justices Black, Douglas group, believes that the Supreme Court can play an active role in promoting social welfare, while the Frankfurt-Jackson Group of Judges supports a policy of judicial self-restraint. One group sees the courts as a tool for guaranteeing people social and fundamental rights, while another argues that the elected government of the day should have final say in the affairs of the state as they are the true representatives of the people. He defended his argument with the help of popular case law (United States Vs Carolene products 1938), which became the basis of john Hart Elie's seminal book " Democracy and District" more than 30 years later. Schlesinger propagates the layers of the clash between the unelected judges versus democratically enacted laws and statute.

In the early days, the phrase judicial activism had an affirmative connotation mostly related to civil rights rather than judges overstepping his authority. For example, "Justice Frank Murphy's votes in civil rights cases reflect not only his objectivity and independence as a judge, but also his position as an outstanding judicial activist". Edward Mc Winey, a barrister and law professor at the University of Toronto, also praised the issue, offering a comparative legal perspective on the subject and wrote two popular articles on the subject in 1950s, (Kmiec 2004).

In Pakistan legal purview, especially in 2009, the scale has changed from one extreme "judicial restraint" to another extreme "judicial activism". Under the leadership of the former Chief Justice Iftikhar Muhammad Chaudhry, after four years of judicial activism, his two successors adopted a policy of judicial restraint and paid more attention in solving the long-standing backlog cases. But during the tenure of Chief Justice Mian Saqib Nisar, it once again touched the sky of judicial activism, because he took Suo-Motu notices of almost each and every issue which counts from the dam Funds generation campaign to population control, similarly mineral water bottle manufacturing to road construction and hospitals etc. (Tanveer 2019). During his tenure, the judiciary has triggered a wave of petitions with contempt for politicians, bureaucrats and journalists, and the trial of

ordinary citizens' cases has been seriously affected due to daily hearing of Suo Moto cases. This state of affairs was termed as judicial adventurism by some renowned writers like Waseem Abbasi; THE NEWS, Ameena Tanveer; THE PRINT.IN a PhD Scholar in Punjab University, Saroop Ijaz; HERALD Magazine, Mehreen Zahra Malik; ARAB-NEWS etc.

From March 2009 to the end of 2013, and from January 2017 to January 2019, the sudden confrontation between the superior judiciary and other state organs (including the executive, legislative, election commission, and other government agencies) triggered judicial activism manifold. However, during the tenure of these Chief Justices and after Justice Saqib Nisar retirement, the present judiciary refused to interfere in political governance, and economic decision-making and as such the Apex Judiciary again switched back to Judicial restraint.

Theories of Judicial Activism

There are two main theories of judicial activism.

Theory of Vacuum Filling

The theory of vacuum filling holds that the power vacuum in the governance system is caused by the incompetence, favoritisms and laziness of the two state organs i.e. Legislature & Executive. This vacuum, when created, is detrimental to the well-being of the state and could bring disaster to the country's democratic institutions. Thus, the judiciary had to broaden its horizons to fill such a vacuum. For example, the Indian Divorce Act of 1869 provides that courts should follow the rules and principles of fairness as is followed by English courts in the conduct of divorce proceedings. As a result of this policy, the courts have applied English law while filling the vacuum. Similarly, the Decision of the Privy Council in 1904 apply British law to religious groups covering the Muslim Personal Law which was an embarrassment to the Government, hence widely criticized by the Muslims and was seen as sheer interference in their religious affairs. Therefore, legislation must be passed to correct this hoax. After independence, the Pakistan judiciary has been pursuing this trend more actively. Justice Muhammad Afzal Zullah of the Lahore High Court pointed out that while filling the vacuum the court must not follow any foreign concepts of justice, fairness, conscience and took precedence over Islamic norms. In this case, the vacuum is caused by incompetence, ignorance, negligence, corruption, total lack of discipline, favoritism and personal interests between the two governing bodies i.e. legislature and executive. Therefore, the remaining state organ; the judiciary, can only broaden its horizons and

fill the vacuum created by the executive and legislature. Therefore, according to this theory, the so-called judicial activism is the result of filling the vacuum or gap caused by the incompetence of legislature and executive.

Theory of Social Want

The Theory of Social Want points out that the emergence of judicial activism is due to the failure of legislation to deal with the existing conditions and problems of the country. When legislature do not provide any solutions to these problems then the judiciary came to the fore and tackle these issues on its own and find its solutions. The only way for them to achieve this goal within the governance framework is to provide unconventional interpretations of existing legislation for the benefit of the people and as such judicial activism came into being. Supporters of this theory believe that judicial activism plays a vital role in bringing about social change. It is Judiciary that injects vitality into the law and supplements the missing links in legislation (Rodríguez-Garavito 2011). With the right to review, the judiciary began to gain the status of a catalyst for change. Similarly, we have seen in many cases that the other two state institutions were unable or unwilling to respond due to their inability and laziness.

CASE LAW: (Marbury v. Madison 1803)

Before elections of 1801, the then President John Adams passed bill thereby appointed William Marbury and more than 40 other judges to serve as peace judges for the District of Columbia. Although the bill has been passed by the Senate, the committee has not passed on it to the Secretary of State. James Adam was defeated by Thomas Jefferson in the next elections, and the new Secretary of State James Madison was unwilling to issue a committee of justices of the peace appointed through the Act of 1801. William Marbury submitted a Mandamus Writ to direct the new Secretary of State (James Madison) to issue the appointment Orders by the committee. According to the Judicial Act of 1789, the writ was declared unconstitutional. However, the Supreme Court claimed that the court went beyond its original jurisdiction conveyed in Article 3. Marshal expounded that the writ is the right way to seek remedy, and concluded that the Judicial Act of 1789 is in conflict with the constitution. He also contended that Congress has no power to pass conventional legislation to amend the constitution. Therefore, the court established the principle of judicial review i.e. the power to declare the law unconstitutional.

Research Methodology

The research is exploratory and qualitative in nature. The research methodology includes the analysis of primary & secondary data. It also includes the comparative analysis of various case laws on topic. National and international research papers on issues are analyzed in collaboration with statutory provision of constitution & other relevant laws.

Sources of Data Collection

Without data collection, no research can be conducted (Ali, Shah, and Ahmad, 2021). Research should be based on the constitution of 1973 and case laws as the primary source for data collection. Secondary materials include newspapers, articles, periodicals, and books written by legal and political experts. Some electronic resources and other materials can also be used to help research.

Limitation of The Study

Due to scarcity of resources, time constraints, and the scope of the subject, the research under this study is defined as a brief description of Pakistan's judicial activism. Access to the judicial data was also one of the limitations. Furthermore, a great hurdle was faced while accessing to the judgments in suo moto cases except the Reported Judgments.

Positive Aspects of Judicial Activism

Judicial Activism plays a vital role in safeguarding and promoting the rights of the citizens. Following are some of the positive aspects of judicial activism:

1) Judicial activism is the last refuge against arbitrary and irresponsible governments. The vigilant judiciary upholds the constitution and limits the legislature and executive actions. It serves as a check and balance against the state's unbridled abusers of power.
2) Judicial activism has brought a new hope of life in shape of providing relief to the common citizens. The suo-motu notices taken in cases of missing persons is one of the biggest examples.
3) The proactive judiciary informs the general public about its basic rights.
4) The main aim of judicial activism is to provide relief to the aggrieved persons by neglecting the technicalities of the court’s legal procedure. It takes action on a simple application on a plain paper in terms of Public Interest Litigations.

5) Judicial procedures are generally faster than legislature and executive, and it speeds up the distribution of justice and the execution of matters referred to it.
6) The executive and legislative organs are the arms of the government and to a large extent adhere to the party's interests and positions. Therefore, they may not truly defend the interests of the public. Therefore, only the judiciary can uphold the rights of citizens.
7) The judiciary is to a large extent regarded and considered as the only bystander of state affairs. Judicial activism provides space for judicial organs to demonstrate their authority and contribute to the well-being of the country.
8) Judicial activism is a powerful tool in the hands of the judiciary, which can invalidate the extra constitutional actions and policies of the executive and legislative bodies.

Negative Aspects of Judicial Activism

Judicial activism is regarded by those who advocate the active role of the judiciary as the last protection against arbitrary and irresponsible government. On the other hand, if judicial activism is hijacked by individuals for personal glory and not for administration of justice, then it may bring the entire government machinery to a standstill. Following are the reasons why some scholars oppose the active role of judiciary.

1) The policies formulated by the Supreme Court of Pakistan have weakened domestic traditions and prolonged the structural weaknesses of the government's executive branch. For good or bad, the people elected the government to govern the country, and disentitling the government through such powers is violative upon the rights of the people in terms of electing their leadership.
2) Repeated and excessive use of judicial activism gives the government, neither the time nor the space to put its vision into practice. There are no shortcuts that can be taken to accomplish a healthy functioning democracy especially in a state like Pakistan where democracy has never been allowed to flourish due to frequent suspension and abrogation of the constitution by dictatorship regime.
3) The post conservative school of thought argues, by taking Suo-Motu notice, the court is discouraging people from following the due process of law. They also argue that due to frequent taking of Suo-Motu and completely focusing on the cases of public interest litigation the cases already pending before the

Supreme Court of Pakistan are further delayed and litigants wait for years for their cases to be decided by the Apex Court.

4) They also suggest that how an unelected and unaccountable body or person may decide on policy matters while as a matter of fact it should be the exclusive purview of the elected officials.
5) The active judiciary will give rise to the influx of bulky petitions which would stagnant the efficiency of the Apex Courts in terms of delayed justice. As we have witnessed that during 2009 and 2011, the number of applications submitted in the Human Rights Cell, increased to the tune of 139,906 applications per day as compared to 500 applications per year in the past.
6) The court's repeated intervention has weakened the people's confidence in the government's integrity, quality, and efficiency.
7) Judicial activism has also faced criticism many times. The judiciary often confuses personal prejudices and opinions with the law in the name of public interest litigations.
8) Due to judicial activism the theory of power of separation between the three arms of the state has been tossed.

Critical Analysis of Judicial Activism in Pakistan

Every power and authority must have some binding rules and regulations otherwise that authority will be a curse rather than a blessing. Suo-motu is the constitutional power granted to the Supreme Court under Article 184(3) of Constitution of Islamic Republic of Pakistan and should be construed in accordance with the true spirit of the Constitution. It is worth saying that the judiciary would never allow other state pillars to interfere in the affairs of the judiciary and vice versa. Most people in civil society, media, and the legal profession do not care about the constitutionality of the judgment, nor do they consider the international and economic impact, which can be seen from the results of some judgments in the commercial field. As we have seen, most of the suo-motu notices were taken on the populist views and cases highlighted by the media only. The chairman of the Lahore High Court Bar Association Abed Saqi (Jamshed 2014) views about the Chief Justice Iftikhar Muhammad Chaudhry, he said;

> "He has destroyed the judiciary as an institution and destroyed the constitution as a sacred document for his own personal aggrandizement"

In April 2014, as the Supreme Court judge, justice Saqib Nisar called for setting parameters for the use of Suo-motu power to "correct the mistakes made." But when he became Chief Justice himself, his position changed. Similarly, the President of Supreme Court Bar Association, after Chief Justice reinstatement, talked to media outside the Supreme Court. He said:

> "Most of the Suo-Motu taken by former Chief Justice Iftikhar Muhammad Chaudry was beyond law and they should be reviewed**"**

Analysts criticize judicial activism, saying that when the Supreme Court directly take notices of an issue, it becomes a trial court itself, which abolishes the defendant's right to appeal and violates the basic right of a fair trial envisaged under Article 10A of the constitution. Proponents of judicial activism believe that "justice delayed means justice is denied", so responding to the statement, critics also questioned the delay of routine cases by the Supreme Court in wake of popular cases, so is this normal? Cases have been re-prioritized, which may bring setbacks to the system, with more than 1.5 million cases awaiting court hearings across the country. Barrister Aitizaz Ahsan (Babar 2020)warned that the crisis is coming to countries where institutions have huge powers without any responsibilities or obligations. All work of state institutions must define parameters in accordance with the Constitution, especially those institutions that determine the limits of these parameters. He says:

> **"**The use of Suo motu notices impinge on the domain of the executive and the parliament, taking judicial activism too far and exercising absolute powers with no responsibility are issue that must be debated in the interest of putting the ship of the state on an even keel"

After ten years of experiences of judicial activism in Pakistan, it can be safely said that net profit in intermingling in the affairs of other institutions is close to zero. None of the high-profile suo-motu cases led the Supreme Court's sustainable reform or governance or personal accountability. With Supreme Court acting as the complainant there was no conviction in such cases which includes the Hajj corruption case, the Pakistan steel mill case, the Exact Fake degree case, and the NICL scam. Similarly, the Supreme Court declared international treaties like RekoDiq, Rental Power Plants etc. as based on malafide which tantamount to the Pakistan image deterioration internationally. The consequences have brought shame to the county worldwide, and investors are unwilling to invest in

developing countries where judicial institutions crack down on international transactions. Suo-motu, which were taken by the former Chief Justice Saqib Nisar, are still fresh in memory. Advertisement made for the Dam Fund and then actively campaign for such project during the tenure as the Chief Justice of Pakistan was proved as an unproductive stunt. Anyone needs to be held responsible for misleading actions that experts keep warning about from time to time because such a huge investment in public infrastructure projects needs a lot of money.

Recommendations

Suggestions to Supreme Court of Pakistan

In order to encourage the Supreme Court of Pakistan to apply the original jurisdiction granted by Article 184(3) in a transparent manner that maintains judicial independence, the following suggestions may be considered:

I. Supreme Court Benches Composition

The Supreme Court should adopt transparent rules to regulate the standards of trial cases and the composition of Benches.

II. Establishment of Special Trial Courts

It is necessary to set up a special court for trial of Public Interest Litigation cases. The routine cases shall not be further delayed, and all court trials shall be conducted in accordance with the cause list released in this regard. Since the Suo-motu notice is issued by the Chief Justice of Pakistan therefore as per the natural justice he became a party to the litigation, so he could not adjudge the case.

III. Discourage Yellow Journalism

The Supreme Judiciary is not allowed to take Suo-motu notice on every media report, because most of the media reports are only shallow news, without any investigation or authenticity, and promote yellow journalism, which is not conducive to the true spirit of justice (Samuel 2016).

IV. Supreme Court Must Not Act as a Trial Court

Supreme Court is directly concerned about the matter in question and forms the court of first instance itself. Therefore, it abolishes the defendant's right to appeal, which is mandatory for a fair trial under Article 10-A of the Constitution. According to law, the case must be brought in the lowest degree court, so the aggrieved party could have the right to appeal against the judgment, but in suo-motu cases, the aggrieved party is deprived of such appealing rights.

Therefore, after taking Suo-motu notice, the Supreme Court must transfer the case to its appropriate court.

Suggestions to Legislature

I. Legislature must define the Terms used in Constitution

According to the Constitution of Pakistan 1973, the Supreme Court has the right to take Suo-Motu notice in public interest issues, but it neither defined the scope and limitations of Article 184(3), nor does it give any appropriate definition to the terms Suo-Motu or public interest. Therefore, the legislature has the responsibility to define each term used in the legislation and the concept behind its usage. Therefore, the legislature must amend the constitution and add interpretative clauses to define the jurisdiction in terms of "Suo-Motu".

II. The High Courts in The Province May Also Be Granted Suo-Motu Powers (Saifudin 2021)

The Supreme Court of Pakistan may not be granted the sole power to take Suo-Motu notice on public interest issues. After the 18th constitutional amendment, the provinces have become independent, so the high court may also be granted the power to exercise Suo-Motu jurisdiction.

III. Formation of Research Wing in Supreme Court

The Supreme Court cannot address all public interest litigation as other regular litigation is harmed due to already Pending-Lis. Legislators can enact laws to restrict the Supreme Court from taking action directly on media reports. It must first submit the issue to the research wing of the Supreme Court. After investigation or inquiry, if deemed necessary, may take action based on the findings of the investigation/ inquiry.

IV. Define Some Boundaries and Restrictions on Suo- Motu

The legislature can formulate Legislation to restrict the powers of the Supreme Court from exceeding its set jurisdictional sphere. The legislature can also enact laws to bind the Supreme Court to make a decision on the Suo-motu notice within a prescribed time limit on the recommendation of the Supreme Judicial Council (if any).

Suggestions to Media

I. Avoid Yellow Journalism

Media is considered as the fourth pillar of the state and has the responsibility to highlight public issues. It also has the responsibility to become the voice of the marginal class of the society against the

tyranny of the upper class. Therefore, it is recommended that the media should avoid yellow journalism by exaggerating every regretful issue. The media should highlight issues related to the masses after proper investigation.

II. Monitor the Media Channels

PEMRA should monitor the media and stop yellow journalism that causes social chaos. The media should not make special reports on the cases adopted in the Suo-motu notice which is pre-judicial to the parties under trial.

Conclusions

In conclusion the argument boils down to whether short term achievements are worth following at the cost of injuring long-term goals. Pakistan needs to have stronger institutions, and more importantly independent institutions. For those institutions to then flourish there need to be "reasonable" checks and balances to ensure not only compliance but also certainty. The Suo Motu and its application at least in its current form is unpredictable and undefined, with the courts not adhering to specific jurisdictions the suo motu can then have over reaching effects possibly then coming into conflict with those institutions. Future Chief Justices may need to have a certain level of foresight in judging the use of the suo motu along with its merits. The concept stands to be seen as necessary in the current legal and political environment but not in the unchained form it currently resides.

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