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Judicial Activism in Pakistan: A Case Study of the Tenure of Mr. Saqib Nisar Ex-Chief Justice

Abstract

Judicial Activism is a developing doctrine which can be defined as the active role of Judiciary in constitutional matters of the state. The Judicial branch of a state can play an effective role in dispensation of Justice and promotion of rule of law in the Country. In Pakistan, Judiciary being the third pillar of state and having trust of most of the public, plays an active role in matters of public importance and fundamental rights. In last decade, the concept of independence of Judiciary has strengthened the judicial wing of the state and since then the power of Judicial Review under Article 184(3) is being exercised at a wider scale by superior courts in Pakistan. Ex-Chief Justice Mr.Saqib Nisar during his tenure as Chief Justice (from 31st December 2016 to 17 January 2018) has exercised the review power frequently and has publicly prompted the concept of Judicial activism by calling it as a mandatory role of the Judge of the Supreme Court. This research will highlight the concept of Judicial Activism in Pakistan, further, it would analyze the tenure of Mr.Saqib Nisar as Chief Justice of Pakistan.

Key Words: Judicial Activism, Ex-Chief Justice Mr.Saqib Nisar, Suo moto Notice, Article 184(3), Constitution of Pakistan 1973,

Introduction

Judicial System plays a pivotal role in establishing rule of law in a country, that all men are equal and should be dealt in accordance with Law.¹ Judiciary is responsible to establish the supremacy of Law within the state. Developed countries of the world consider judiciary as their back bone and admire its role in a positive way. Throughout the world, Executive, Legislature and Judiciary are considered as the three main pillars of a state.² Pakistan, being a democratic country, believes in concept of separation of powers and the three organs of the state are empowered to work affectively within the limits prescribed by the constitution of Pakistan 1973 (hereinafter Constitution).

Judicial System of Pakistan holds a heavy responsibility, dispensing justice in society as well as to perform constitutional duties, are exclusive roles of superior courts.³ The Constitutional powers vested in it are to review and interpret the Laws in order to protect fundamental rights of the people. Thus, Judiciary has to perform multiple roles, to resolve litigations of public, interpret law and to assure implementation of the constitution in its true letter and spirit.⁴

Judicial Activism is a new doctrine which is evolving with a gradual pace, although there is no clear evidence found that can explain this term accurately. But it can be defined as active role of Judiciary within Constitutional matters of the state. It can be called as an updated form of Judicial review. It helps Judicial branch to look after the laws, whether they are consistent to the constitution or not.⁵ Further, It is a legal term that can be referred as orders of judges of the Supreme Court based on their personal or political opinions instead of questions of Law.⁶ In Pakistan, Superior Judiciary exercises review power on a wider scale and is promoting active role through its actions and orders. Since 1947, Judicial system of

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Pakistan has faced different ups and downs. From validating unconstitutional acts to removing elected Prime Ministers, resolving provincial disputes to matters of public importance, the Supreme Court has intervened several times in domain of other two organs of the state. After the Lawyer's movement of independence of Judiciary in 2007, this organ of the state has become most trustworthy institution for people of Pakistan.⁷ Since the last decade, judiciary has been proactively exercising extraordinary power under Article 184(3) of the Constitution, hence making Judicial Activism as most dominant characteristic of Apex Court in Pakistan.⁸ Different studies show that looking after constitutional matters of the state is mandatory role of the Supreme Court. If other two organs do not perform well, the court can cover space evacuated by them. This active role of Judiciary has started a new debate and the term Judicial Activism is making its place in minds of people as a necessary doctrine to be exercised by the Supreme Court. Many critics have called it as an unjustified use of power by the Supreme Court which is creating undue interference in matters of the Executive. This research focuses on concept of Judicial activism exercised by the Supreme Court in Pakistan and will neutrally analyze tenure of Mr. Justice Saqib Nisar (i.e: 31.12.2016 to 17.01.2019) as Chief Justice of the Supreme Court of Pakistan.

Literature Review

The role of Judicial wing of state has been a hot debate since long throughout the world, especially in Pakistan and India. Many of the writers had penned down their opinion in criticizing the role of judiciary, whereas, some of the researchers have appreciated it in another way. After the 2007 Lawyers Movement in Pakistan, the researchers had promoted active role of Judiciary and the stance that Judicial Activism is mandatory. The Judiciary too should involve itself in matters of the state. American Professor Suzzana Sherry in her article "A summary of more Judicial Activism" favored the doctrine in a manner that Judicial review is an antinode for excess of democracy, they believed that an overly aggressive role of Judiciary is far better than an overly restrained one.⁹ Paula Newberg in "Judging the State Courts and Constitutional Politics in Pakistan" wrote that unsatisfactory performance of other two organs of state has given Supreme Judiciary a free hand to actively play its role. In response, the Judiciary got huge attention, the doctrine started making its place and hence, judiciary became major forum for resolving people's grievances and to protect their fundamental rights.¹⁰

In India, in famous case of "Kesvananda Bharati" one of the judges gave remarks that law is not made for protection of rich or elite class, it is made for providing justice to common people¹¹. In another Indian case, Satya Narain Shukla vs State of U.P Chief Secretary, Court observed that active role of judiciary was required due to failure of Executive and Legislative branches of state.¹² The superior courts of country are custodian of fundamental rights of people, they should be actively intervening in affairs of state when it feels that matter is of public importance. Lord Justice Potter while addressing a conference said that primary functions of the Supreme Court not only include adjudicating justice but it also has to protect individuals against unlawful authority and has to develop common law, which cannot be achieved without practicing Judicial Activism.¹³ Iihan Niazi in his article favored the active role of Judiciary, he concluded that incompetency and power abuse of Executive has given people the reason to look towards the Supreme Court of Pakistan.¹⁴ The Supreme Court under wider interpretation of law intervenes in order to bring house of the Executive in order.¹⁵

After 2007 Movement of Independence of Judiciary, the superior Judiciary became the only hope for people of Pakistan. R K Kaushik in his news article "Justice Mian Saqib Nisar: A judge who nailed politicians" wrote that Justice Saqib Nisar has played a very important role in Judicial history of Pakistan, he started cases against corrupt politicians by using Article 184(3) of the Constitution. He used his suo moto powers whenever he thought the issue needed attention.¹⁶ The Judges must stand against corruption, play their active role against misrule and protect fundamental rights of people, as the judiciary is ray of hope for people of Pakistan.

In contrary, many scholars have used this term as Judicial extremism, criticizing that Judiciary should not act as a political party and Judges should not apply their personal opinions on their decisions. Umair Iqbal in his article "Democracy and Judicial Activism" strongly criticized this role of judiciary. He wrote that Judiciary has failed to serve its institution rather they are interfering in matters of state and is undermining role of the Legislature and elected members of the state, he stated that the judges should not act as elected politicians and should serve their institution in a better way.¹⁷

Judicial Activism has badly affected the concept of separation of powers and has given rise to unjustified exercise of power. Through Judicial Activism, the Court can look into matters which are not in its domain and are subjects of the Legislature and Executive¹⁸. Swati Sharma, an Indian Researcher, has used the term 'Judicial overreach', that can lead to intervention in matters of other two organs of the state, the policy making is clear domain of the Legislature and the

Judicial wing has nothing to do with legislative part, therefore it can lead to disturbance among state institutions regarding use of power.¹⁹

Mr. Farhat Ullah Babar in “Revising Suo moto Powers” wrote that Judges have got absolute power, there is no criteria for taking suo moto notice. The intervention of Judiciary and suo moto power needed to be reviewed as results of Judicial overcome are too serious.²⁰ If not regulated, raiding of schools and hospitals will continue by the superior Judiciary and would be justified as an important function of the Chief Justice of Pakistan²¹. The current study found that there is huge gap in research regarding Judicial Activism and exercise of suo moto powers in Pakistan, the research must be conducted in order to overcome the gap.

Discussion

Pakistan has been facing issues like bad governance, economic and political instability, lack of transparency, meritocracy and rule of law since day one. Getting independence from the British India in 1947, Pakistan inherited several things from the British India, one of the most important was Common Law System.²² Being a Common law Jurisdiction, the Judiciary has performed an important part in wellbeing of the country. In Pakistan, the Judicial review was first exercised in case of “Federation of Pakistan vs Molvi Tameez ud Din”. Molvi Tameez ud din, the then Prime Minister challenged the act of Governor General of dissolving the Parliament and filed petition before Sindh Chief Court, where the court declared the act of Governor General Illegal.²³ The Federation filed an appeal before Federal Court (later replaced by Supreme Court), where the court nullified the decision of the Sindh Chief Court and held that the act of the Governor General to dissolve the Assemblies was legal and there was no illegality found in dissolving the Assemblies.²⁴ Since then, the Judiciary has been exercising review power from time to time. Now, in prevailing law, Article 184 of the Constitution discusses the original jurisdiction of the Supreme Court of Pakistan.²⁵

Scope of Article 184 of the Constitution

Under Article 184, the Supreme Court issues declaratory judgments in matters of provincial governments which are placed before it.²⁶ Further, under 184(3) the Supreme Court has the power to take up matters which involve Interest of general Public in respect to enforcement of fundamental rights. The power to issue suo moto notice by the Chief Justice Supreme Court is exercised under the wider scope of this Article. This 184(3) Article is the major article due to which the Supreme Court exercises activeness and decides constitutional matters of the state.

In 2007, after the successful lawyers movement, the then Chief Justice Mr. Iftikhar Chaudhary won trust of the people of Pakistan. The independence of Judiciary became power of the Supreme Court. Mass media also played its influential role and highlighted the importance of role of superior judiciary for the country. Resultantly, the foundation of the concept of Judicial activism was laid and Mr. Iftikhar Chaudhary set a precedent that it is the task of judiciary to protect the fundamental rights of citizens and judges will always stand against corruption and misrule.²⁷

Tenure of Ex-Chief Justice Mr. Saqib Nisar

Mr. Saqib Nisar Joined as Judge of the Supreme Court on 18 Feb, 2010 and became The Chief Justice of Pakistan on 31st December, 2016 and remained in office till January 17, 2019. His tenure as Chief Justice can be called as the most discussed as well as criticized one. Independence of Judiciary is mandatory for the wellbeing of a country.²⁸ Under the umbrella of Independence of Judiciary, he took several suo moto notices during his tenure, using extraordinary powers under Article 184(3) was a routine work for him. From health to education, drinking water to mobile cards, visiting hospitals for checking facilities, calling government officials to his court and bashing and humiliating them was his habit due to which he had been under the criticism. He used to define that Judge should be like “baba rehmita” an elderly person of a village, who is there to resolve the matters of the people on basis of his experience and intelligence. His actions showed that suo moto is a power to be exercised regularly by the Chief Justice. Many media persons while criticizing him called it as an unnecessary extraordinary interference in state matters. Whereas, few people had backed his concept of Judicial Activeness and called it as mandatory thing to establish and promote rule of law in the country.

Health is a basic need of human life; state is responsible to provide basic health facilities to all its citizens. Ex-Chief justice took suo moto notice about lack of health facilities at public hospitals in Lahore. Medical superintendents of 19 public hospitals of Lahore were called along with necessary data containing details of available facilities at their

respective hospitals.²⁹ Later he personally gave inspection visits to hospitals in Punjab and Sindh and inquired about available facilities. He directed the authorities to cover lacking facilities and provide basic health to public at every cost. This act of inspection was unique, it is not duty of Judge to raid and inspect the hospitals. In response to his critics, he used to say that if state is not performing its duties responsibly, someone had to work effectively, let it be the Chief Justice of Pakistan.³⁰ He did not give any space to private hospitals, i.e. Doctors Hospital, National Defense Hospital, Hameed Latif Hospital and Etc. He took action against them for charging exorbitant fees and directed them to regulate their prices in a fair manner. If any hospital found over charging, mishandling the patients, the court would intervene and the judgment would decide the fate of that hospital.³¹ He strictly warned them to follow the principles set by Pakistan Medical and Dental Council, regulate buildings according to the laws.³² Furthermore, during suo moto proceedings on implanting of substandard and expensive coronary Stents, the court found that hospitals were implanting substandard Stents to all the cardiac arrest patients, whether they need the Stents or not, was not the question. Later it was found that reason of implanting Stents was commission fees which the hospitals were getting for the sale of stents from different companies.³³ He regulated their prices and directed the concerned authorities not to allow anyone to sale substandard and expensive Stent.³⁴

The Pakistan's first ever Kidney and Liver Transplant Institute (hereinafter PKLI) could not resist the power of Sua Motu. Ex-Chief Justice on allegations of corruption, mismanagement and exorbitant salaries took the Sua moto.³⁵ The Institute was expected to be a breakthrough for Kidney and Liver transplants in Pakistan. During proceedings, the Chief Justice humiliated the officials and removed them from their offices, whereas, Dr. Saeed Elahi, President of PKLI's name was included in Exit Control List.³⁶ Due to political Conflict of Ex-Chief Justice with Punjab Government, PKLI President along with Board of Governors was suspended and a new six-member committee was constituted to look after matters of the Institute. Forensic Audit was ordered to be made by the Anti-Corruption Establishment.³⁷ Later after the expiry of tenure of Mr. Justice Nisar, a new three member bench of the Supreme Court disposed of the suo moto, allowed Dr. Saeed to travel abroad and removed the ad-hoc committee which was constituted by the Supreme Court Earlier and directed the Punjab Government to take over the control of the Institute.³⁸ One of the judges of the three member bench gave remarks that all institutions should work within their prescribed limits. While withdrawing the inquiry ordered by Mr. Justice Nisar, the Judge said that the order of forensic audit was a judicial overreach and was unnecessary.³⁹ In the end, what came out of the suo moto was humiliation of the expert doctors, the plan of the hospital was ruined due to the political mindset of the Ex-Chief Justice. One of the Doctors while resigning stated that this is an example of the failure of the state authorities, where people want to work, they would be discouraged, humiliated and are forced to resign from their offices.⁴⁰ A plan that was a hope for upcoming years became a victim of the political mindset of the Ex. Chief Justice. Further, the succeeding Health Minister also faced the heat of Ex-Chief Justice, during the hearing Ex-Chief gave remarks that being provincial health minister she must be worried about the issue of PKLI and also that she is not performing her duty and is doing nothing about this.⁴¹

Education is one of the most important fundamental right of an individual. Article 25 A of the Constitution deals with the right of free and compulsory education to the children of 5 to 16 years of age.⁴² Regulating higher education is clear domain of the executive branch of the country. The Ex-Chief justice while looking into the matters of the private Medical Colleges, took suo moto notice on the heavy fees collected by private medical college from its students. Although, University of Health Sciences, Lahore, and Pakistan Medical and Dental Council is working to regulate the matters of private Medical Colleges. Unfortunately, the court intervened and during the proceedings of suo moto, it was found that colleges are charging heavy fesses on yearly basis and there is no mechanism for the fee, it was collected on individual to individual basis which was settled before admission between administration and student⁴³. He directed them to regulate the fees, as the colleges were getting lacs of money from students on the name of donation and education charges. He made them to refund the over charge and ordered that private medical college shall take the fees which should not be more than 8 lacs for one year.⁴⁴

Zainab Murder was another suo moto case, a six years old girl from Kasur on January 9, 2018 was found dead from the garbage, the little girl was first raped and then killed. The Ex-Chief Justice took suo moto of the murder of the little girl, the investigating authorities investigated the matter and arrested an accused person on January 23. The person was sentenced to death as the trial court (Anti-terrorism Court) found him guilty. The accused was punished, his appeal from all higher forums were rejected and he was hanged to death on October 17,2018 at Kot Lak pat Jail⁴⁵. This is an example of speedy trial, happened due to the suo mot notice taken by the ex-chief Justice. While on the other hand it clearly shows the mismanagement in the lower courts, as if the suo moto was not taken the matter would have taken years to be decided as it happens in other criminal cases of same nature.

Considering the needs of water in future and shortage in the recent time, Ex-Chief justice took suo moto and directed the federal government to make plan to construct Diamir Bhasha and Mohmand Dam to avoid any water shortage in near

future. A huge campaign for the collection of dam fund was started by use of mass as well as social media, and a number of people contributed in the funding for the construction of dam. The account is still working and government is collecting fund which will be utilized to construct dam in near future. He worked hard for this cause and even held fund raising campaigns in foreign countries like United Kingdom. Later, in 2018, the Prime Minister Imran Khan took over the control of dam fund and lead the campaign, he stated that it's not the job of the Chief Justice instead is the work of the government.⁴⁶ Furthermore, in May 2018, a suo moto notice was taken to regulate the mobile recharge tax deduction, the telecom companies were taking too much money, deducting 40 rupees on recharge of 100 rupees, and that the government had imposed so much taxes on the mobile phone recharge cards. He ordered to finish the tax deduction and directed the telecom companies to recharge the same amount as been paid by user, there should be no extra charges and the taxes should be minimized.⁴⁷ Later on, after his retirement, in March 2019, the two member bench of the Supreme Court showed its serious concern that how tax can be suspended under the ambit of Article 184(3), therefore, a three member bench headed by the then Chief Justice Asif Saeed Khosa restored all taxes on mobile phone recharge. The Bench in its short order held that the Judiciary shall not interfere in the matters of collection of Tax and revenue.⁴⁸ In addition suo moto notice has also been taken against the private news channels on non-payment of salaries to their employees, and another suo moto was taken against Axtax on issuing fake degrees and the list of suo moto notices taken by Ex-Chief Justice Mr.Nisar goes on.

That 2018 was a year full of Judicial dominance over other two organs of the state. Although in few of the suo moto cases, results came out positively, but if we look at those in a longer run, the use of extraordinary power by the Ex-Chief Justice has negatively affected the working of many public sector Institutions. Most of the time the Supreme court has encroached the domain of the Executive as well as Legislature. The Ex-CJ enjoyed the Judicial Activeness without any hesitation. Most of Lawyers and media persons had openly criticized his active role and called it as an unnecessary interference in matters of the state. The Judges of the Supreme Court also raised questions after his retirement while disposing off the suo moto cases. PKLI and Tax reversal decisions in mobile recharge cases are examples to name few. Furthermore, many questions were raised over performance of Lower Judiciary by critics, few of them called him as a person who is willing to improve all other institutions except his own. More than 40000 and 1.9 million cases were pending at Superior and lower courts till the last day of his retirement, Lower judiciary take years to decide even a simple case. No measures were taken to improve the Judicial System of Pakistan.⁴⁹ The Ex-Chief Justice on his visit to Sindh entered a District court where he went in the court of a Judge in presence of Media. He humiliated him, thrown his mobile at the table, and made him feel ashamed as media telecasted it as a breaking news. This act itself was against the norms of the office of a Chief Justice and further it is no way to reform the lower judiciary. At the moment, Judicial Activeness has become a developing doctrine and a lot of research is needed to be conducted in this specific field of Law. The Supreme Court intervention in Mr.Nisar's tenure started the debate of power politics and lead to weakening concept of Separation of powers and the debate will continue until this shall not be regulated. As Pakistan is a country, where the institutions are developing, the Supreme Court should act in a neutral way and do not intervene in matters of the state unless it is shear violation of the constitution. Establishing rule of law in the country shall be the priority of the superior Judiciary in Pakistan.

Conclusion

Protection of the Fundamental rights of the People and protecting the Constitution are the exclusive roles of the Superior Judiciary in Pakistan. As Pakistan is a country which has been facing several issues since the independence, the role of Judiciary can contribute positively in the progress and welfare of the state. The Supreme Court should carefully intervene in the policy matters of the state and act neutrally, Furthermore, the judge should act judicially and do not get influence of the media or politics. The Power of suo moto under Article 184(3) needs to be regulated, as Pakistan is a country which believes in the concept of Separation of powers, therefore, the Supreme Court as well as all other organs of the state should work within their prescribed limit in order to strengthen the institutions of the state. The Independence of Judiciary is the most important thing; there should be no compromise on the Independence. The Judges of the Supreme Court should not involve themselves in politics, they should decide the cases which are brought before them on the basis of Question of Law, not on the basis of their political or religious mind. In a country Like Pakistan, Judicial Activeness has very less space and it must not be exercised in order to dominate on the other organs of the state. Executive, Legislature and Judiciary are the three main pillars of the state and they must work in the prescribed limits and in cooperation with each other.

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