

Global Environmental Changes & Issues: The Engrossment of Pakistan Supreme Court

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Abstract: *United Nations had taken initiative in 1992 to secure environment from the harmful effect it stated that "Stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system ... to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner" (United Nations Framework convention on climate change, 1992). It adds that "Each of these Parties shall adopt national policies and take corresponding measures on the mitigation of climate change...and in this regard, a convention in 2014 set new principles for the member states...appropriate measures to anticipate, prevent or minimize the causes of climate change, especially through effective measures to reduce greenhouse gas emissions, and to minimize the adverse effects of climate change through the adoption of suitable adaptation measures."*

Key Words: Environment Issues, Supreme Court, National Measures

Introduction

The Oslo declaration (1993) goes a long way in this direction and argues that "The essential obligations States and enterprises have to avert the critical level of global warming." The principles premise that "[f]ulfilling these obligations is necessary and urgent if we are to avoid an unprecedented catastrophe," and emphasize the primary role of state responsibility (as well as a similar responsibility on "enterprises") in fulfilling these obligations: "Avoiding severe global catastrophe is a moral and legal imperative. To the extent that human activity endangers the biosphere, particularly through the effects of human activity on the global climate, all States and enterprises have an immediate moral and legal duty to prevent the deleterious effects of climate change. While all people, individually and through all the varieties of associations that they form, share the moral duty to avert climate change, the primary legal responsibility rests with States and enterprises". (Emphasis added) The work shall assess the efforts of Pakistan in controlling the harmful emissions in the industries and the role of courts in this regard.

Legislative Measures and Role of Courts in Pakistan

The constitution of 1973 in article 38(D) has focused to make a surely healthy environment for the citizens; article 9 provides a complete of the basic rights, in *Shehla Zia V. The WAPDA* (1994) the court emphasized the availability of a clean environment, it directed the authorities to construct the grid station outside the residential area. The petition had demanded that the high voltage of transmission lines shall have a disastrous impact on the healthy environment of the population which is against article 9 of the constitution; this case of public interest litigation had opened the way for social litigation in the State (*Shehla Zia V. The WAPDA*, 1994).

Article 9 of the constitution calls for the Right to Life which has a vast jurisdiction; in the said case electromagnetic waves are hazardous for the people; in the same manner, Lahore High Court in *Pakistan Chest Foundation* (1997) that smoking has a harmful effect on the environment which shall be discouraged, smoking on public places and advertisement on the national broadcasting channels impact the people (*Pakistan Chest Foundation v Government of Pakistan* 1997 CLC 1379).

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In another case held at High Court Lahore, it declared that the newly constructed sewerage system must be safeguarded against the unhealthy environment which is against article 9 of the constitution. For this purpose, the priority of the government must be to provide a clear direction to protect the citizens against a healthy environment as guaranteed by the constitution (Ameer Bano v S.E. Highways PLD 1996 Lahore 592).

In the Anjuman Tjran Charam case, the honourable of Lahore high court recorded its statement that those things creating problems for the healthy environment of citizens must be kept away at distance from busy places and the skins spread unhygienic atmosphere nearby; under article 9 of the constitution smelling materials which create diseases is against the right to life as guaranteed by constitution (Anjuman Tajran Charam v The Commissioner 1997 CLC 1281).

Clean water is the basic right of each citizen as cited by courts in the Anjam Irfan case, it stated that River Ravi has become a source of pollution for the residents; it creates unhygienic conditions which spread acute diseases and it is against article 9 of the constitution of 1973. The court directed the authorities to formulate guidelines to ensure an atmosphere fit for a healthy environment as the basic right of every individual (Anjum Irfan v Lahore Development Authority through Director-General PLD 2002 Lahore).

Public interest litigation become a vital source of jurisdiction for high and supreme courts in Pakistan while discussing a case stating that clean water has become an essential element of the right to life as guaranteed by the constitution, it further adds that imported foods must be made fit for the people and the citizens must be secured from its harmful effects (Adeel-Ur-Rehman v Federation of Pakistan 2005 PTD 172).

While dealing with a case of social litigation, the Lahore high court opined that the right to life has become a vast source of jurisdiction; it also implies clean water, and a pollute less atmosphere, it covers all those elements which have an impact on the life of a person, it also includes basic facilities to the citizens which can protect him from odd conditions (Mohammad and Ahmad v Government of Pakistan PLD 2007 Lahore 346).

Lahore high court while explaining article 9 of the constitution stated that it includes all things that can improve the standard of life, it is not only just to live but to live better, the term right to life is a vast phenomenon and it must be secure from all perspective, it further adds that "Article 9 of the Constitution protected life of citizens and where the life of a citizen was degraded, quality of life was adversely affected and health hazards were

created affecting a large number of people the same amounted to a deprivation of life which was prohibited by Arts.9 & 14 of the Constitution" (Syed Mansoor Ali Shah v Government of Punjab 2007 CLD 533 Lahore).

Polythene material has been injurious to the health as stated in Khurram Khan v Government of Punjab 2009. The court opined that "cancerous effects on health and could also cause the respiratory problem, thus, after use of polythene bags for a short period, same could not be disposed of by throwing, dumping or by burning" (Khurram Khan v Government of Punjab 2009 PLD 22 Lahore).

In Haji Mullah Noor Ullah v Secretary Mines and Minerals (2015) the courts argue that "If anything endangers or impairs quality of life in derogation of laws, a citizen has right to have recourse to Art.199 of the Constitution for removing that very thing and polluted air is one of them, for it is detrimental to the quality of life". The following remarks of the courts have discussed the relationship between human health and pollution, in this regard clean environment is the basic right of each citizen as guaranteed by the constitution of 1973" (Haji Mullah Noor Ullah v Secretary Mines and Minerals 2015 YLR 2349).

Supreme Court in recent times had worked for securing an environment from hazardous impacts; it favours Islamabad Chalets, Mini Golf and Murree development schemes, in this regard it appointed a famous environmentalist to look after these cases and how they affect the overall situation. The story of activism dates back to British colonialism. The king was the source of real powers while parliament had a limited power which can be clearly demonstrated as "before the revolution of United States, English courts existed which maintained the supremacy of Parliament during James-ii era, ten out of ten judges believed that supremacy of executive must remain" (New York Bar Association, 1915, at 11). The ongoing fight for supremacy in England continued for centuries; in the initial years the courts favor the Royal family but with the passage of time parliament got supremacy to legislate laws as added: "the right to make or unmake any law whatever," meaning that "no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament" (Dicey, 2013, at Para 27).

The members of the Judiciary had been divided over the tussle between the two strong institutions in the State; Lord Coke favoured parliamentary supremacy while some others wanted to legitimize the laws made by the king. The majority of jurists disfavored the judiciary role to declare the parliamentary acts invalid but there

have been some instances in which courts tried to exercise the powers of Ultra Virus. The term has come from the ancient past which denotes declaring the initiative which is beyond the power as null and void. Jurists in the United States has taken the concept of Judicial overreach from colonial master i.e. England, as observed English judges have this authority because the legislature plans them to...it should be applied only to guarantee that the executive branch of government does not act as void...beyond the influence established to it by the legislature through legislation...These double concepts, the policy of parliamentary goals and as void, formed the main English theories of judicial review for nearly one hundred years.

In United India, the power of judicial review has been adopted from the colonial masters, as there were some examples in which courts exercised the same power as enumerated, it is significant to mention that during the pre-independence period, Indian courts were exercising judicial review power and in fact struck down acts of legislature or executive as being ultra vires. But, such juncture used to be unusual and the range for judicial review was constrained, until the Government of India Act, 1935 was enacted (Lalasaheb, 2015).

Although the powers to declare the laws ultra virus were not as sound as in the United States because the latter provides a complete list of fundamental rights. In the case of Indian colonies, it exercised limited powers in this regard. The first such exercise was made in 1878. Here the Privy Council and the court of Calcutta utilized the same under certain restrictions, as discussed Where an Act has once been passed by a parliament which is absolute; I believe it to be completely obligatory upon Courts of law. Where it is passed by a governing body, the powers of which are restricted, it is not the less obligatory, provided it be not in surplus of the powers given upon the restricted Legislature...it is our obligation to say whether the power conferred to the Lieutenant-Governor to remove the authority of this Court was realistically conferred (The Empress v. Burah and Book Singh, 1878). This is why S.P.Sathe (2005) has analyzed the situation in Indian and said "The courts struck down very few statutes during the colonial period. Professor Allen Gledhill observed that instances of invalidation of laws by courts were so rare that "even the Indian lawyer generally regarded the legislature as sovereign and it was not until the Government of India Act of 1935 came into force that avoidance of laws by judicial pronouncement was commonly contemplate." However, the courts continued to both construe the legislative acts strictly and to apply the English common law methods for

safeguarding individual liberties" (Sathe, 2005, at 29).

The legal analysts argued that although the act of 1935 does not clearly describe judicial overreach granted to the courts in India but implicitly it could be exercised such functions as explained by Lal Mitter (1939), your purpose as the Federal Court will be to develop and describe the provisions of the Constitution Act, and as custodian of the Constitution it will be for you to announce the legitimacy of statute passed by the parliament in India, on the one hand, and on the other, to identify accurate restrictions of the powers of the executive. The way in which you will infer the Constitution will mainly decide the constitutional growth of the country (Mitter, 1939). After independence, the courts frequently exercises the power of judicial review, the first exercise of such powers can be seen in Gopalan V. State of Madras (1950). It was from here onwards that courts utilized the sense of justice in making the decisions, in a number of other cases the courts resorted to judicial activism in India.

Pakistan has had a peculiar set-up since independence in 1947. Frequent military takeovers have created a vacuum for the judiciary to intervene in the political affairs of the State. As compared to India, courts in Pakistan have exercised limited powers due to the intervention of the Governor Generals in the initial years. It compelled the courts to go for Keelson's theory to legitimize illegal action taken by the executive. The act of 1935 provided a legal document because, until 1956, the State has no constitution of its own. It was adopted as an act of 1947 with certain amendments according to the prevailing situation; the Federal court of Pakistan has played a narrow role in the development of a strong judiciary and further limited judicial review in the country (Shabbir, 2013).

Constituent assembly desired to amend a clause in the act of 1935 to enable the courts to issue various writs to the executive and other officials but General Ghulam Mohammad, the then Governor General, was against this proposal, while sensing the situation, he dissolved the assembly. Speaker of the constituent assembly Mr Maulvi Tamizudin took the case to the Sindh chief court which declared his action against the spirit of the act. The government went against the decision in a case titled The Federation of Pakistan V. Maulvi Tamizudin (1955). The court opined "the only issue that the Court is required to determine in such cases are whether the legal power existed or not and whether it was properly and rightly exercised which a purely political issue is" (The Federation of Pakistan V. Maulvi Tamizudin, PLD 1955), and the decision of Sindh

chief court was declared ultra virus. In The case of Usif Patel (1955), the court declared the emergency imposed by General Ghulam Muhammad invalid (Usif Patel V The Crown, 1955). It was the first show of judicial power in the history of Pakistan to challenge the autocratic government and declared the action of the Governor General null and void. It added that "any legislative provision that relates to a constitutional matter is solely within the powers of the Constituent Assembly and the Governor-General is, under the Constitution Acts, precluded from exercising those powers." The sweeping power of the executive has been declared ultra virus by the federal court" (Usif Patel V. The Crown, 1955 FC 387).

A decision of the Lahore high court for protecting the environment was a mile in Laghari V. Pakistan; it maintained that how an indigenous court can set standards for the government for legislating in the favor of the environment and it has also confirmed that it is the prime duty of the government to protect citizens and that must be the first priority as envisaged by the constitution, it further added that government is bound to enforce the decision of the court and a judicial commission has been constituted which will monitor the activities and actions of the government and shall report back to the court. In the said case a farmer Asghar Laghari has challenged the progress of government for climate change; he challenged the case under article 9 of the constitution which concentrates on the right to life, in a plea, it was requested that the ongoing climate has a high risk for water, food and energy security of the State, despite the government legislation for climate change in National Climate Change Policy (2012) and also it has set a framework for the implementation of climate change policy (2014-30) but nothing pragmatic has been done by the authorities concerned.

The honourable judge calls on the responsible persons and found no progress, an interim directive has been issued to the departments to make sure the implementation progress till Dec 15th 2015, while sensing the situation a judicial commission has been constituted comprising of members from various ministries and departments to assist the court. The court argues that climate change is a mega problem for all countries including Pakistan; its impacts on producing floods, drought and serious threats to the energy security of the country, it is high time to protect citizens and ensure the constitutional rights of the people. Article 9 concentrates on the right to life which has a vast jurisdiction, article 14 also safeguards the basic rights of the people, environment protection has now become a vital thing which needs to move forward, and the

constitution in articles 23 and 19 A also safeguard these rights (Emphasis added).

The Court emphasized to the government that the cabinet division must initiate the process for environmental protection. It adds that "Considering that Climate Change is a major national security threat, this lackadaisical approach is not appreciated ... Joint made on behalf of the Ministry of Climate Change regarding the implementation of NCCP and Framework ... in this regard to the Court on the next date of hearing".

In the post-Court decision chairman, CCC commented that "after the intervention by this Court. The concern and debate on the issue of climate change have gathered momentum...It is clear that the Policy, as well as the Framework, were almost untouched till the Commission was constituted by this Court, resulting in mobilizing the government machinery. Since then there has been modest progress in achieving the objectives and goals laid down under the Policy and the Framework". The court while sensing the situation noted that no proper implementation has been made so far, it directed the authorities to work out the plan till June 2016; it also ordered the ministry of climate change to arrange a suitable purse for implementing the court decision, it add that: "The allocation of budget by the Government of Punjab is integral to the enforcement of fundamental rights of the people of Punjab as climate change can cause serious food and health security issues and unless immediate adaptative steps are taken... to look into the matter with utmost seriousness and allocate budget for climate change in consultation with CCC" (Emphasis added).

Since 1607-008 judicial activism has been there in one way or the other. King James wanted a supreme authority in the State, while Justice Coke wanted the supremacy of law in England. The Chief justice declared the imposition of tax by the king void and further added that it was the prerogative of parliament to impose taxes on the citizens (Coke, 1552). In the same manner, he declared an act of parliament i.e. College of Physician act (1953) as an ultra virus because it was against the welfare of the people. He was of the view that even legislature is subordinate to common law which reflects the customs and tradition of the English citizens. After the establishment of the judiciary act of 1789 in the United States; the famous *Murphy V. Madison* (1803) extended the power of courts to check the despotic tendency of the executive in the State. Even justice Martial declared the said act void and argued that laws are what judges say, it was the first scientific judicial overreach by any court in the world. He stated, "...principle, supposed to be

essential to all written constitutions, that a law repugnant to the Constitution is void and that courts, as well as other departments, are bound by that instrument" (Murbury V Madison, 1803, at 60). The Brown V. Board of Education (1954) eliminated all the segregation laws prevailing in the United States. The said instances show that courts through judicial sightedness checked the unconstitutional tendencies in the State and if were found against the spirit of the constitution or against the welfare of the people would be declared void.

In Pakistan, the concept of judicial activism is not as old as in the United States and some other countries. Although the wave started in the 1980s and 1990s when superior courts declared the illegal dismissal of governments as valid under the Doctrine of the State of Necessity originally propounded by Hans Keelson. In the case of Darshan Maseeh (1990) the court while taking action regarding the bonded labour in the brick factories declared its violation of the art 9, 11, 14, 15, 18 and 25 of the constitution of 1973. The court directed the government to legislate on Forced Labor. In this regard, the government enacted the Bonded Labor System Abolition act (1992). Courts in Pakistan frequently deal with the cases of human rights, honour killing, forced marriages, acid attacks and other forms of violence against women in society in political matters. In the Al-Jihad Trust (1996) the court declared the appointments of judges and a detailed decision has been delivered. Muhammad Nawaz Sharif went against the dissolution order of president Gulam Ishaq Khan under art. 184(3) of the constitution; the court declared the action void but couldn't restore his government. Although courts have contributed in some way toward democracy in Pakistan; the case of Usif Patel (1955) discouraged emergency in the country against a strong military dictator. In Asma Jillani (1972) the courts again came to the rescue and declared civilian martial law void. In Benazir Bhutto's (1988) case the court played its role by restoring the political parties' act which is considered to be a soul for democracy, in Muhammad Nawaz Sharif (1993) the courts declared the action of president Ghulam Ishaq Khan as void but couldn't restore his government on the plea that a nation is well prepared for the election. In Chief Justice Iftikhar Chaudhry V the President (2007) the courts declared the emergency as ultra virus and in the Sindh Bar Association (2009) the role of the superior judiciary has been remarkable but how ever since the entering of Iftikhar Muhammad Chaudhry as chief justice and Saqib Nisar as Chief justice judicial activism has been increased immensely. We will concentrate on the important judgments which nourished judicial overreach in Pakistan

and created mistrust among the various organs of government.

Since the inception of Pakistan, the judiciary has always facilitated the serving government and has hurdled rule of law in the State. With the exception of a few occasions, it has benefited the executive. When the government of Nawaz Sharif was dismissed under 58(2) (b) by president Ghulam Ishaq Khan, he challenged this move in the Superior court. Mr Roedad khan argued regarding the role of the judiciary, where does the sovereignty exist in Pakistan? The superior judiciary in 'Pakistan shaped history' by legalizing the imposition of martial law by Ziaul Haq and giving him the right to amend the constitution. All nine judges were a part of this judgement. The army has at all times used executive and judiciary against the representative governments (Khan, 1997). Mr Robertson and Nicol added "in certain commonwealth countries there do exist an unhealthy relationship between the judges and the Government that appoints them"(Robertson & Nicol, 1992, p. 298).

When Nawaz Sharif approached Supreme Court for the restoration of his government; the bench with the majority decided to restore the government but justice Sajjad Ali Shah in dissenting note opposed the decision. Justice Saeed ul Zaman Siddiqi and Rafiq Tarar advised the Chief Justice to punish Justice Sajjad Ali Shah for using abusive language in his dissent vote against the decision but the matter was resolved peacefully. The full bench of the Supreme Court announced the decision as "On merits by the majority (of 10:01) we hold that the order of April 18, 1993, passed by the President of Pakistan is not within the ambit of the powers conferred on the President under Article 58(2) (b) of the constitution and other enabling powers available to him on that behalf and has, therefore, been passed without lawful authority and is of no legal effect. 'According to the views presented by the chief justice after the decision argued that the president is no more neutral and had lost the credibility to govern the State with impartiality. The court held that the president under 58(2)(b) doesn't authorize him to dismiss the elected government in such a situation and the recent dismissal doesn't fall within the ambit of the said art, but the government couldn't be restored; military made a secret between the president and prime minister and both tendered their resignation.

C J Syed Sajjad Ali Shah went abroad, Justice Ajmal Mian was also absent on the occasion, and no judge had been nominated as acting chief justice; sensing the situation justice Saeed u Zaman Siddiqi urged the government to nominate an acting CJ for Supreme Court, thus he

was elevated to the post which created anger in judicial circles because premier wanted to get rid of Sajjad Ali Shah as chief justice of Supreme Court. He recommended five names for the office of the superior judges without the advice of the government. In response, the government directed to reduce the strength of judges from 17-12; thus a constitutional dilemma emerged in the State. Akram Skeikh the legal advisor of the prime minister advised him to take back the letter and further commented that through Art. 209 Of the constitution of 1973, a legal remedy can be done against their ill intentions (Hussein, 2018, pp. 69-87).

Chief Justice called the premier in contempt of court; in a live PTV speech he addressed the nation as I have exposed a larger, deeper plotting but I will fight. I will, inshAllah, face every difficulty because the question is not that of my private interest but of the national interest. I will not permit my community to become prey to this conspiracy.' There has been a severe fight between the two heads of the institutions. Since the dissent note in the 1993 verdict, he was not in a good book of the premier, the formation of special courts by the government of Nawaz Sharif has created a gulf between them and there was a stiff mistrust between them.

Supreme Court suspended the 14th amendment to the constitution which created further dissension in the ranks of the government because it was considered an intervention in the affairs of parliament as stated, the suspension of the 14th amendment; Nawaz Sharif had said that the Chief Justice's initiative was unlawful and undemocratic and that it would revitalize 'horse trading or lotocracy' in the legislature; he also uphold that the Chief Justice of Pakistan had shaped a situation that was both ill-fated and unfair (The Dawn, 1997). In contempt of court, he was declared guilty because he has publically criticized the judiciary which comes in the domain of contempt of court. On the next day, the premier apologized to the court and the proceedings were adjourned but the court was not satisfied and quote from history as "...the grandiloquent fear that criticism of the courts may endanger civilization has, in the twentieth century, continued to lead to the punishment of persons who have insulted members of the judiciary or impugned their impartiality" (Pannick, 1987, p. 110).

The issue turned into a constitutional crisis, the government amended the "Pakistan Contempt Law" which provided an opportunity to the premier to launch an appeal against the decision of the court, but president Laghari refused to assent to the bill. Now premier was in a precarious situation he asked for the help of the

speaker National Assembly but in vain as stated "On November 5, 1997, as recounts Gohar Ayub Khan in his recently published book 'Glimpses into the Corridors of Power', Nawaz "asked me to go with him to the PM's House. In the car, the PM put his hand on my knee and said, 'Gohar Sahib, show me the method to seize the Chief Justice and keep him in jail for a night'. Naturally, Gohar Ayub was stunned, as a disciplined officer he counsel him not even to think about it, but deep thinking Nawaz thought further, and in the November of that same year he had his thug, physically attacked the Supreme Court of Pakistan while CJP Sajjad Ali Shah was hearing a contempt case brought against him (Nawaz) and then proceed to engineer, with the help of Sajjad's brother judges, the successful removal of their Chief Justice (The Dawn, 2007, Aug 5). When the chief justice sought the help of the chief of Army staff he refused to honour him and finally he was ousted from his seat.

Conclusion

Due to Industrialization and urbanization air pollution has increased in Pakistan; the industries emit piousness material in the shape of carbon mono oxide, organic compounds, and other chemicals which are havoc on the environment, despite these factors vehicles in big cities create further emissions of dangerous gases and other chemicals (Shakil, A. 2009). A report submitted by World Bank stated that a dangerous portion of hydrocarbon is emitted by vehicles in Pakistan. In order to reduce its harmful effect growing more trees and improving the ecosystem is the best solution, in a report submitted by Organization for the Economic Cooperation and Development stated that "Pollution will become the biggest cause of premature death, killing an estimated 3.6 million people a year by 2050. Urban air pollution is set to become the biggest environmental cause of premature death in the coming decades, overtaking even such mass killers as poor sanitation and a lack of clean drinking water" (Qadir, Noman & Fazal, 2002). According to the reports submitted by National Conservation Strategy states that vehicles in Pakistan produced more harmful chemicals than in the United States; they emit 20 times hydrocarbons, 3.5 times nitrous oxide per kilometre which is a matter of great concern for the State (Ahmad & Shakil, 2009).

Recommendations

A healthy environment is essential for the development of the personality of any nation as stated "The right to a healthy environment has been regarded as a vital aspect of the right to life, for without a healthy environment it would not be

possible to sustain an acceptable quality of life or even life itself ... It is not unusual that changes of perspective induced by an enlarged or more enlightened awareness should open up new vistas of social, economic and cultural outlook, often producing fundamental changes in the orientation of human society... All states, big and

small, rich and poor, developed and developing, in principle have accepted the idea of sustainable development...In addition to this, some countries, like India, have provided the duty to conserve the environment as a fundamental duty" (Ansari, [1998],4 MLJ).

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