



Modus Operandi of Activism vis-à-vis Passivism: Legal Rhetorics in Pakistani Jurisprudence

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Abstract: *The study explores the reasons behind the paradigm shifts in Pakistani jurisprudence where the judiciary shifts its practices between activism and passivism. The Islamic Republic of Pakistan as a state functions in a way where the system works on the basis of power-sharing between the executive, legislative and judicial branches, however, the judiciary usually steals the limelight with every changing politico-historical phase. Judicial activism and passivity are very much rooted in the socio-historical realities of the country. Judicial activism, which is the practice of judicial power to enunciate and impose counter-ideologies, which once applicable pledges meaningful recodifications of power dealings inside the institutions of the governance, depicts the political part performed by the judiciary. As a significant organ of the state, it plays a vital role in the constitutional machinery of the state by interpreting the laws as well as monitoring the executive and legislature. This activism and passivism have both positive and negative impacts on the state of affairs in Pakistan.*

Key Words: Pakistan, Democracy, Rule of Law, Judicial Activism

Introduction

Foundational Chronicles

The Indian Subcontinent was divided into the Republic of India and the Dominion of Pakistan in August 1947. From the onset of the independence movement, the lawmakers played a significant role in the foundational discourse. Notable Hindu and Muslim lawyers advocated and campaigned for the independence movement so the prime objectives were very much focused on the future legal frameworks of the two independent states. The significance of the lawyers to the formation of the new state of Pakistan is clear from the fact that the founding father of the nation, the intelligent and remarkable, Muhammad Ali Jinnah was trained as a barrister at the Lincoln's Inn in London.

The judiciary plays a fundamental role in any country's fate. Pakistan as a newly conceived nation also had the same notions. At the time of liberation, the country adopted notions of English judicial independence into its system but the denotation and practice of judicial independence in the newly conceived nation diverged at a later stage according to the socio-political realities. Interestingly, right from the

beginning, “the desires of Pakistan's founders faltered on the state's incapacity to rise above many of its colonial inheritances and its inability to match its government with the democratic rhetoric and constitutional principles that characterized the independence movement” (Newberg, 1995). Replicating the English system, these rules “protect judicial tenure and compensation from manipulation by the executive or legislature in order to preserve judicial decision-making from interference” (Neudorf, 2017). Regardless of this adoption the meaning and practice of judicial powers varies in Pakistan. The country adopted certain rules from their colonial masters but even then the implementation of these rules differed because of the local history and environment. In forging a distinct judicio-constitutive identity the country progressed away from its colonial heritage. The judicial system of the country is connected has distinct characteristics that closely connected to its national character. If a country has an impartial judiciary then it can help in the implementation of the rule of law as well as keep track of the other organs of state to ensure fair ruling. Post-independence Pakistan faced many challenges in

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developing a legal framework in the shape of a constitution. In this regard, desperate attempts were made in 1956, 1958 and later in 1962, but none was fruitful. All these efforts bore no results because the makers of the constitution disagreed on the legal codes and statutes or their application to the socio-political reality of Pakistan. The novice state however was able to formulate its premiere legal framework in 1973 (Thanvi, 2018). The arduous journey on the legal front had an impact on all the branches of the government because these are intertwined. The country's struggle to attain a viable constitution endorsed the significance of the notion of Pakistan as a state. The written constitution of the country played a significant role in inculcating a sense of national identity in the newly independent country. It was especially important for a country to have distinct ethnic and religious communities to agree upon common constitutional grounds to uphold harmony and collective citizenship.

In post-independence Pakistan, the judicial system evolved as a hierarchical scheme in which the superior and subordinate courts were placed in a tiered order. The design of the Pakistani judicial system can be equally intriguing and frustrating for a student of law. This multi-layered judicial system of Pakistan has a chequered history not only in isolation but also in relation to the other state pillars. In the initial years of the post-colonial existence the state courts "influenced the development of the constitution and the state structure" (Azeem, 2017). This history is "replete with periods of independence from and capitulation to the executive" (Khan, 2019). The triumph and vicissitude in the fate of the judiciary are closely related to the relationship with the executive or the other branches. During the power shifts "executives holding the trump card of central power, with the backing of the civil bureaucracy, have continually undermined parliaments, despite popular resistance to abuses of executive authority" (Newberg, 1995). The initial role of Pakistan's judiciary was highly influenced by the politics of the time so the country's jurisprudence tried to preserve the state at the time of catastrophe. This state of affairs limited the role of the judiciary and instead rendered narrow meanings to judicial independence. Though the country gained independence from colonial rule, it still faced internal systemic challenges in the form of military interventions in the democratic systems.

Research Questions

1. What are the reasons behind the phases of judicial activism and passivity in Pakistan?

2. How has the politico-historical milieu of the country influenced judicial activism in Pakistan?

Research Objectives

This study aims to

1. Explore the reasons behind the Pakistani judiciary's activism and passivity.
2. Analyze the influence of the politico-historical milieu of Pakistan behind the emergence of judicial activism in Pakistan.

Conceptualizing Judicial Activism Vs Passivity: Analysis

The judicial system of Pakistan has seen many ups and downs since the country's inception, however in the recent past the term 'Judicial activism' has gained the status of a cliché in the legal lexicon. Judicial activism is a laden term that has multiple denotations and inferences. The term refers to the Judiciary's role in deciphering and implementing the constitution and laws beyond the conventional limits of its occupation. The concept is the occurrence of pronouncements made by judges in the domains that seem to belong to politics and policy. The term 'judicial activism' was first coined by Arthur Schlesinger in his article for Fortune magazine. Schlesinger divided the judges into two groups, one that believed in the limited role of the judiciary and the second that favoured "expanding the range of allowable judgement for legislature" (Schlesinger, 1947). In alignment with this conceptualization, judicial activism has become a term synonymous with judicial decision-making that at times interferes in the policy-making "exclusive prerogatives of the elected legislator" (McLachlin, 2000). In Pakistan judicial activism has played a vital role in modelling the political landscape and consequently occasionally received admiration for consolidating democratic rule and at times faced condemnation for stirring turmoil in the country. Pakistan's judiciary has either "adopted a submissively deferential approach to the executive by upholding the legality of military intervention in civilian government and enforced laws promulgated under new legal orders imposed by the military rulers" or "enforced individual rights against civilian governments and placed limits on their legal powers" (Neudorf, 2017). These two positions allowed the judiciary to either

work in collaboration with other organs of state or to practice the phenomenon of separation of powers.

The history of judicial activism started with the inception of the country and evolved hand in hand with the political landscape of the nation. Pakistan's judiciary has been working on two extreme ends at times activist and populist and at other times passivist and non-intruding. Over different historical time periods the people of Pakistan witnessed the judiciary aligning with the executive and against the populace and more recently the previous phenomenon has been reverted when the judiciary stood with the people and against the executive. This emergence of the "assertive judiciary in Pakistan is an apparently anomalous development given the broader trajectory of the collapse of institutional autonomy in the civilian sphere of governance" (Niaz, [2020](#)).

Yasser Kureshi in his book *Seeking Supremacy: The Pursuit of Judicial Power in Pakistan* terms this shift as "judicial assertiveness" ([2022](#)). In other words, judicial assertiveness can be defined as "the degree and frequency with which courts challenge powerful actors in their rulings" (Kapiszewski, [2011](#)). The argument that the "judiciary converges on a set of institutional preferences in response to the preferences of the institutions and network" cannot be overlooked in the Pakistan context (Kureshi, [2022](#)). The judicial behavior either activist or passivist has to maintain a tactical balance keeping in view their own individual ideologies, institutional preferences and potential consequences of their verdicts. These binary roles of the judiciary have been lauded and at times been rejected by the people of Pakistan because "in the positive dimension of judicial independence, Pakistan's judiciary has used its institutional standing and constitutional powers to entrench itself as an agent of change and to intervene in important policy matters", but on the hind side its negative dimension is important, in which "the judiciary protects its independence from what it sees as any intrusion by other branches of government, which extends to the acceptance, by the executive and legislature, of judgements that relate to its role and powers" (Neudorf, 2017).

As a postcolonial state, Pakistan's democratic system was disrupted numerous times by the interference of military dictators. The country has historically "swung between the poles of dictatorship and democracy, and between civilian and military rule" (Newberg, 1995). As far as the role of the judiciary

during these dictatorial interventions is concerned, it mostly validated the military interventions. This military-civil relationship always bestowed power to the military, whereas the civil/ democratic government always proved vulnerable and fragile. The country gained power with a parliamentary vision but the military has seized power numerous times since its inception in 1947, resulting in "ruling directly and indirectly for more than half the life of the country" (Newberg, 1995). However, in the past one and a half decades in the history of the country, this power centre seems to have shifted from the military to the judicial because of the activist tendencies of the Pakistani judiciary. Despite several movements and oppositions from within the system, the military emerged as "a powerful political actor due to its coercive power" (Hussain, [2012](#)) in the past, but with time judiciary asserted more and more power. This judicial activism and the newly assumed role of the judiciary stemmed from "Pakistan's new political system" (Kureshi, [2022](#)). These changing power dynamics in the country had to be accepted by the other power-sharing elites.

However, the judicial activism in the country can be seen from numerous perspectives. Unwarranted activism may generate obstructions for other state organs and create suspicion in elected legislatures at the cost of the nonelected tyrants. Judicial activism refers to the role of the judiciary where it becomes proactive and crosses its customary functionary boundaries in which it is expected to resolve disagreements in accordance with the constitution or laws of the land. In these changing phases "whenever the judiciary felt itself insecure or under any kind of threat, real or perceived, it had the tendency to withdraw into a shell" (Khan, [2019](#)). Pakistani judiciary has played a considerably significant role in modelling and endorsing democracy in the country, however, it has not always been successful in upholding its mandate. Judicial autonomy and influence from other organs of state has been the most important reason for this incompetence of Pakistani jurisprudence.

De Jure Judicial Vistas

The emergence of the judiciary as an assertive power in Pakistan can only be comprehended within the socio-political reality of the country. The power play amongst these various state actors "fell into the category of modus operandi, instead of being a fight to the finish" (Waseem, [2012](#)). The changing role of the

judiciary mostly started impacting the common man's imagination during the tenure of Chief Justice of Pakistan, Iftikhar Muhammad Chaudhary. His tenure expanded over a period of eight years from 2005 to 2013. This was perhaps the first time that the judiciary of Pakistan started playing an active role in the affairs of the nation. Notwithstanding that the previous Chief Justices were not doing their work, Chaudhary's tenure is unique because of his public persona nationally and internationally. During this time the Supreme Court of Pakistan accelerated "a political crisis that sent the country over the constitutional cliff" (Yap, 2017).

Like the opponents and supporters of judicial activism, Chaudhary also had many people with or against him. He was at times accused of "politicization, judicial overreach and even judicial terrorism" (Ahmed, 2015). The opponents of judicial activism under Iftikhar Muhammad Chaudhary emphasized strategic judicial restraint in favour of broader socio-political and even economic benefits. This start of a new era in the role of Pakistan's senior judiciary was embedded in the socio-political reality of the time. It would not be untrue to assume that the "seeming expansion of the frontiers of judicial review merely marks the renegotiation of the political power between the judiciary, the military as well as political and economic elite" (Ahmed, 2015). Chaudhary's dismissal was ordered by the then-dictator General Pervez Musharraf in response to the Supreme Court's decision to reverse the privatization of the state-owned Pakistan steel mills.

The matter soon turned into a major controversy in the country because the issue of the Chief justice's dismissal did not stop with the sacking. The dictator furthered his designs and filed a reference of transgression against the serving chief justice. However, this action was not accepted and the members of the bar turned against this action. Resultantly a nationwide lawyers' movement was launched in favor of restoration of the chief justice. High-ranking judges and lawyers played a momentous part in instigating the Adliya Bachao Tehreek (Save the Judiciary Movement). These historic events demonstrated the public support for the judiciary and the "capacity for judicial independence to become a popular political issue" (Neudorf, 2017). Other than this the "Quebec Bar and Law Society of Upper Canada also responded strongly and favourably to this movement" (Azeem, 2017). This two-year-long movement "seemed

to shake the foundations of the society" (Azeem, 2017). This monumental case in the history of the country stirred the common public as well as the lawyers to take a more vocal stance. The advent of a confrontational judiciary divided the common opinion as well as the legal scholarship. The champions of judicial activism vindicated that it was for the greater good, especially for egalitarian association and constitutionalism. On the contrary, the adversaries considered it as an instrument to destabilize civilian administration at the cost of its sovereignty with the service of selective adjudication. This historic movement changed the media image of the country internationally.

Although this movement was applauded favourably by the global elite however the state of affairs in Pakistan is not as simple as comprehended from abroad. During Iftikhar Muhammad Chaudhary's tenure, the Supreme Court of Pakistan experienced major changes in jurisprudence and constitutional politics. Chaudhary's "remarkable refusal to submit to General Parvez Musharraf's military regime marked a turning point in the alternation of these two judicial roles" (Neudorf, 2017). This intense controversy polarized the common people as well as sparked the lawyers' movement. Fervent disagreement was experienced amongst different segments of society and the debate crossed the national boundaries and became an international issue. The movement stirred support from home and abroad and the "Harvard Law School was quick to award the Medal of Freedom to Supreme Court Chief" (Azeem, 2017). This change in the image of Pakistan's justice system and the growing interest of the common public as well as the international community raised the spirits of the forerunners to altogether another level.

Although Pakistan's constitution gives freedom to the judiciary and rhetorically protects the system, this interpretation of the constitution keeps on changing with the changing socio-political environment of the country. Pakistan's judiciary is "inherently vaulted and its decisions or even inclinations are viewed as portentous for the country's history" (Azeem, 2017). In Pakistan, "judicial autonomy and the freedom of judiciary refers to the enforcement of individual rights without outside interference or limits" (Neudorf, 2017). The Judiciary of Pakistan has experienced alteration in this status and has responded in numerous ways during different historical time

periods. This changing dynamics has both "positive and negative dimensions in that it repels government threats to the judicial decision-making process and also bolsters the power and standing of the judiciary, often at the expense of the other branches of government" (Neudorf, 2017). The relationship between the executive and judiciary shapes the power dynamics of the political scenario.

Judicial activism does not only give power to the office of the chief justice but also allows the judiciary to intervene in significant policy matters. On several occasions "the courts have tried to bridge the breach created by institutional incompatibilities and have provided a forum for society to articulate its demands" (Newberg, 1995). This check and balance amongst the different organs of the government helps the system move towards betterment. Over the previous seven decades' of history, Pakistan's judiciary has changed amongst binary judicial roles that functioned in strain with one another. These different roles of the judiciary have not always been positive. Especially in the constitutional history of the country, the "judiciary significantly contributed in shaping and re-shaping of state organs" (Munir, 2021). At some points in history, the judiciary has been blamed for damaging the democratic culture of the country. But at other historical moments, in the history of Pakistan, numerous supreme court rulings can be pointed out where the judiciary played an important role whereas other governmental organs seemed to have failed. The inactive periods of Pakistani jurisprudence coincide with the military rules in the country.

One of the cornerstones of Pakistan's government is the Supreme Court of Pakistan (SCP), which not only participates in the game of governance but also has the power to change the rules in favour of

institutionalization. The hitherto subservient and docile Supreme Court of Pakistan faced both criticism and public acclaim at various historic moments. Stability, coherence, complexity, and adaptability are the most significant aspects of the institution. The Pakistani courts at all levels have played significant roles in the past seventy-six years' history of the country by influencing the progression of the state structure as well as the evolution of the country's constitution. The country "has struggled with the constitution, governments and the structure of the state" (Newberg, 1995). The level of interaction between civil society, the executive and the judiciary has altered over time depending on the socio-political conditions, especially during times of political chaos.

Conclusion

This study has analyzed the history of judicial activism and passivity in the postcolonial reality of Pakistan. It is concluded that the most important newfangled expansion in Pakistan's political system has been the escalation of the judiciary as an insistent and combative centre of power. This progress of the judiciary and the relationship with other organs of state in Pakistan explains why the country's high courts went from being loyal to the established norms to open competition and confrontation with both military and civilian institutions. The study concludes that the growth of the judiciary as an assertive power centre can be explained by a change in the socio-historic milieu that shapes the scenario. Another important concluding remark is the judiciary's struggle for survival throughout the history of the country. Ever since the inception of the nation, the judiciary has been frequently under strain and recurrent degradations at the hands of repressive governments.

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