

Judicial Review and Its Impact on Public Policy: A Critical Analysis

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Abstract

The institution of judicial review is an important mechanism of holding the government legally accountable, nevertheless questions remain about its proper role in a separation of powers system. This article analyzes the effect of judicial review on the policy-making process from an expertise perspective. It shows that the exercise of non-expert judicial review can induce more informed policies and that non-expert courts have incentives to exercise judicial review in a manner consistent with institutional concerns for expertise. In addition to its importance as a mechanism of legal accountability, our analysis underscores another virtue of judicial review: legal review of governmental policy by non-expert courts can improve the amount of information available for policy-making. The article contributes to a literature on the scope and legitimacy of judicial review and has broader implications for understanding the effect of institutional checks and balances on the quality of policy-making.

Keywords: judicial review, expertise, deference, cheap talk, information transmission

Introduction

Judicial review is a doctrine related to the judiciary's power to ascertain the constitutional validity of laws and the legality of decisions made by public bodies. It is an exercise under which executive and legislative actions are subject to review by the judiciary. It is concerned with:

1. the constitutional validity of any law, be it primary or subordinate legislation; and
2. the constitutional validity or lawfulness of a decision, action or inaction of a person or body in relation to the exercise of a public function.

According to US Supreme Court Justice Iredell, the power of judicial review or the authority to declare legislative enactments void is "...of a delicate and awful nature."

The definition of judicial review can vary across different governments. In considering the scope of judicial review, a broad distinction must be drawn

between ministerial, legislative and administrative powers on one hand and judicial powers on the other. The validity of the exercise of ministerial, administrative and legislative powers that affect the legal interest of individuals is always open to challenge in the courts, unless judicial review has been excluded, directly or indirectly, by the relevant statute. The executive findings or orders cannot be upheld on the grounds that they are *res judicata* (matters already judged).

Since early times, English common law courts have asserted the right to determine the proper jurisdiction of courts administering other systems of law and containing them within that jurisdiction through writs of prohibition. But it was not until the seventeenth century that the modern conception of judicial review emerged. The distinction between ‘excess of jurisdiction’ and ‘erroneous exercise of jurisdiction’ was drawn in cases where a lower statutory tribunal was directly attacked through the writ of *certiorari*.

The **Constitution of Pakistan** has been modeled partly on the **American Constitution** and partly on the **British Constitution**. Our **Constitution** prescribes a limited government. The principle of judicial review was first added to the **Constitution** in 1962. **Article 199** of our present **Constitution** is the successor to **Article 98** of the **1962 Constitution**. It was introduced without any material change to the substance or language of the original provision. In terms of its extent and limits, **Article 199**, though comparable with the British writ jurisdiction, is significantly different. Nonetheless, the judgments of English courts regarding the extent and limits of writ jurisdictions can and do help Pakistani courts in the interpretation of **Article 199**. Reference may be made to the precedents in *Presiding Officer v. Sadruddin Muhammad Hussain v. Sikandar*, *Jamal Shah’s case* and *Rahim Shah’s case*.

Almost all judicial review questions, even when the constitutional validity of a legislative enactment is challenged, arise out of administrative actions. This is clearly reflected in the language of **Article 199**¹. Under the power of judicial review, courts can direct a person performing functions in connection with the affairs of the federation or a province, to do something that they are required to do by law or not do something that the law prohibits them to do, or declare such an act illegal. Courts can also inquire about whether a person in custody is being held lawfully and can require a person holding a public office to prove the authority under which they claim to have acted.

All executive and administrative authorities derive their powers from the **Constitution** or laws made under the **Constitution** and conferred upon them expressly or by necessary implication. Thus, when an administrative authority takes action under the law, it can be questioned about whether it has acted *intra vires* or *ultra vires* to the **Constitution**, or whether the law giving them the power to act is constitutionally valid. This is because it is a basic rule of constitutional law that a constitutionally invalid or *ultra*

vires law, be it a result of primary or subordinate legislation, is incapable of conferring any jurisdiction or power.

Judicial review in Pakistan.

In Pakistan, the concept of constitutionalism is maturing gradually where the state organs are striving to identify their jurisdictional spheres. ***Sayyed Yousaf Raza Gailani v. the Registrar of the Supreme Cour***², is considered to be a landmark case of constitutionalism wherein the court emphasized that constitution should be interpreted in accordance with constitutionalism, in order to ensure equilibrium among the state organs: the legislature, the executive and the Judiciary. Hence, all the state organs and holders of high public offices derive their legitimacy from the Constitution. So, the ultimate sovereignty is vested in the Constitution to which the people of Pakistan have surrendered their will.

Until the 1980s, because of the colonial history and a continuing interest among Asian elites in western legal institutions and process, Asian legal scholars were commonly familiar with western legalism and constitutionalism, while their legal counterparts in the west were generally ignorant of the law and constitutionalism in Asia³.⁶⁰ However, with the changing trends, the concept of globalization, and the importance of Asia in the sociopolitical economy of the world, which has tremendously changed, necessitated the western legal counterparts to be fully conversant with the Asian legalism and constitutionalism. In order to further conceptualize constitutionalism, it may be referred to as a theory that advocates compliance to constitutional principles. Unlike a normative theory that establishes forms and procedures for the governance, constitutionalism provides a mechanism in order to regulate, restrict and control governmental powers.

In modern democracies, active and impartial Judiciary is imperative to ensure proper functioning of the state organs. In the Mughal era, Diwan-e-Mazalim was considered to be the highest office in judicial fabric. During the British Raj (1858–1947), new judicial configuration was devised in the Subcontinent. After partition in 1947, both India and Pakistan established their own constitutional schemes on the basis of the Government of India Act, 1935. This Act empowered the courts to check on constitutionality of the enactments by virtue of Section 223-A. In Pakistan, the Constitution envisages trichotomy of powers whereby every state organ is required to work within its constitutional limits⁴.

The Superior Courts entrenched power of judicial review by virtue of Section 223, 223-A and 204 of 1935 Act. Later on, the Indian Act of 1935 was replaced by the Constitution of 1956 that conferred power of judicial review to the High Courts and the Supreme Court by virtue of Article 170 and Article 22 respectively. In 1958, the Constitution was abrogated by the Chief Martial Law Administrator. Afterwards, the Constitution of 1962 introduced presidential form of government and its Article 98 articulated

about judicial review. However, the Constitution of 1962 was replaced with an interim constitution by military dictator. With the consensus of all political parties, the Constitution of Pakistan, 1973 was passed without any substantial linguistic changes. In this Constitution, power of judicial review was conferred to the High Courts and the Supreme Court by virtue of Article 199 and 184(3) respectively. The SC in various cases assumed its authority where question of public importance or protection of fundamental rights was involved⁵

Generally speaking, primary function of the state is dispensation of justice. An effective judiciary is subject to its impartiality. The judicial autonomy got international recognition through various conventions such as the UDHR, 1948, the ICCPR, 1976, and 1985 the UN

Convention on Prevention of Crimes and Treatment of Offenders. The supremacy of the Constitution is guaranteed through the courts. The Constitution also bestows impartiality of the judiciary. Independent judiciary helps keep every organ working in its constitutionally defined jurisdictional circle. In the US history, *Marbury v. Madison*⁶.

The Constitution of Pakistan envisages trichotomy of powers, which enables every state organ to work in its respective sphere. In a federal system of government, judicial review is far more important because it keeps a federation and its units in their limits and does not let them overstep beyond the powers granted under Constitution. A constitutional mechanism is regulated to ensure the impartiality of courts and dignity of its officers. The preamble to the Constitution envisages autonomy of judiciary and disqualifies a Parliamentarian if he/ she defames judiciary.⁷ Furthermore, the Constitution of Pakistan, 1973 articulated certain provisions in order to ensure the impartiality of courts. These Articles include appointment of the Superior Courts' judges⁸, term of their office⁹ removal from office¹⁰ Judicial immunity¹¹, freedom from Parliamentary criticism¹², exclusiveness of authority and original jurisdiction of the Supreme Court regarding any dispute between two or more Governments¹³, advisory jurisdiction of the Supreme Court¹⁴ issuance of decrees, orders, or directions as may be essential for doing complete justice¹⁵, finality and binding authority of decisions¹⁶ and rules of procedure whereby Superior Courts are authorized to make rules so as to regulate practice and procedure of the Courts.¹⁷

Similarly, state functionaries derived their authority from the Constitution and are expected to use their power within the limits prescribed by the Constitution. Public authorities are required to act rationally, independently, and without arbitrariness within the prescribed authority. In case where a person is aggrieved of any administrative action or where protection of fundamental rights is concerned, such person can approach the Superior Courts in order to review the impugned order. In case titled, *Munir Hussain Bhatti v. Federation of Pakistan*¹⁸, where the Parliamentary Committee refused recommendations of the Judicial Commission regarding the

appointment and extension of the four judges of LHC and two judges of the SHC on the pretext that the former represents will of the Parliament. Hence, decision of the Parliamentary Committee cannot be reviewed. It was held that appointment, removal, and term of judges ensure judicial impartiality. The Court observed that it has constitutional right to review decision of the Parliamentary Committee which is working as an executive body and to ensure independence of state organs with a reasonable control.

In case of ***Musammat Badshah Begum v. Additional Commissioner Lahore Division***¹⁹, the Supreme Court observed that the Court has ample power of judicial review in order to make sure just, fair, and reasonable application of law. Further, courts are not bound by the letters of law rather bound by the spirit of law. The rationale behind power of judicial review can be contemplated briefly in the following points: a. In order to secure supremacy of the Constitution, power of judicial review has been granted. Courts are guardians of the constitution and do not allow even themselves to override the provisions of the Constitution. Further, courts are considered to be the first hand machinery for the implementation and enforcement of the Constitution. Moreover, if there is conflict of ordinary law and the constitution, the constitution stands upright and the law is declared void. In case of ***Sayed Abul Ala Maudoodi v. Government of West Pakistan***²⁰, the Supreme Court held that the Constitution is supreme and it has to prevail over the ordinary law. This is possible only when the authority of judicial review is admitted.

Judicial Review is meant to secure rights of people and has come to play a vital role to rescue people from the abuse of authority being exercised by public functionaries. The underlying objectives of Article 199 are summed up in the case of ***Muhammad Basher v. Abdul Kareem***²¹. The Court observed that it is duty of the Court to protect fundamental rights of the people, to act and aid the law, and to protect the law and Constitution against exploitation by the state functionaries. Further, it is duty of the Court to strike a fair balance so as to create a rational compromise of state functionaries with the rights of citizens.

Judicial Review is a mechanism whereby the state affairs are governed by a fundamental law that may be referred to as a constitution. Contrary to the concept of authoritarian government, where powers are concentrated in a single body and there always exists the apprehension of the authority being misused. The constitutionalism deals not only with the kinds and procedure of the governance, rather it provides a platform for regulating, constraining, and transferring of the state's authority. In a democratic form of government, the will of people is represented by constitution that creates, organizes, and elaborates jurisdictional authority of the government. In order to conceptualize the idea of constitutionalism, it has been divided into particular and general constitutionalism and explicit and implicit constitutionalism. Constitutionalist often believe on proper and improper

use of authority, expecting the state authority to confine to the former one. Conversely, the actions may be prohibited, permitted, or required. So, a constitution must provide arrangements to make sure that the government performs what it is required to do so that to ensure that it is restrained from prohibited acts. In democratic configuration of government where state affairs are evenly distributed among the state organs ensures constitutionalism which establishes a state governed by rule of law.

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

POLICYMAKING AND PUBLIC INSPIRATIONS

For long-term consolidation of democracy and constitutionalism, the government should devise policies according to public inspirations. The institutional, internal, and foreign policy must reflect the popular will. Most importantly, both Military and the government should be on the same page while designing foreign policy. Being an Islamic ideological state, the people are very sensitive about religion, Kashmir, and Palestine issue. The government's policies in these matters must not contradict public sentiments, which could lead to civil disobedience and could motivate extralegal discourse. Similarly, the government should have institutional policies, which clearly demonstrate that how government resources would be utilized for public welfare, including expeditious justice, health, education, infrastructure, and provision of other basic necessities. Such durable and visionary policies will help develop a pro-democratic discourse. The government has been facing so many challenges such as law and order situation, terrorism, political instability, institutional conflicts, and institutional disequilibrium. All these challenges revolve around institutional disproportion. Some of our institutions are very strong and some are made and represented so weak that they are not able to deliver according to their constitutional mandate. This institutional imbalance created public distrust in the representative institutions, which encouraged the powerful institutions to substitute the civilian government.

in the prevailing transition, where both judiciary and the civilian government were committed to reverse the extraconstitutional actions, simultaneously embarked upon other challenges: after *Musharraf's* regime, the court not only asserted autonomy from military, but also sought autonomy from the civilian government. The government reverse *Musharraf's*

extraconstitutional legacy and realized constraints on judiciary, which the latter considered attack on its sovereignty. Consequently, both these institutions started another journey of confrontation. Like Parliament, judiciary claims itself as representative of the popular will and its excessive activism not only affects working mechanism of other state organs, but also impacts its own institutional functioning and integrity.

In order to make this regime-shift a successful democratic transition, structural and other necessary reforms are inevitable: Judiciary as an institution faces so many challenges, which needs to be addressed in collaboration with the government. Within those challenges, judiciary should ensure strengthening its institutional democratic values against the individuals' interest, in order to avoid individual's influence inside the institution. Besides *suo motu* actions, the judiciary should take all necessary steps for ensuring availability of justice to common people. In the executive branch of the government, there is disproportion among various departments, which is coupled with structural issues, unavailability of resources, and futile exercise of resources and time due to duplication of efforts. External influence from media and politicians adversely affects its functional structure.

Conclusion.

It is critical to recognize and solve the structural and systemic problems that important institutions like the judiciary and the executive branch of government face if a successful regime shift towards democracy is to be achieved. These difficulties not only make it difficult for these institutions to run smoothly, but they also make it difficult to build a strong democratic foundation. In order to overcome these obstacles and clear the path for a lasting democratic transition, a coordinated effort marked by cooperation between these institutions and the government is necessary.

The judiciary, as the custodian of democratic values and protector of individual rights, is one of the most important areas that requires attention. The court system is not impervious to difficulties, either, such as flaws in its structure and susceptibilities to outside pressures. The judiciary must put institutional democratic values above personal considerations in order to maintain its efficacy and integrity. This entails defending its independence from unwarranted political or outside pressure, maintaining the rule of law, and encouraging accountability and transparency in its work. In addition, the judiciary must work to ensure that all citizens, especially the underprivileged and disenfranchised, have access to justice by using strategies like *suo motu* actions and effectively managing legal proceedings. The judiciary can perform its role by improving its institutional capability and responsiveness. Finally, a successful democratic transition requires sustained efforts to solve the structural and institutional obstacles that important governmental institutions face. It is imperative that the government, the judiciary, and the executive branch work together to execute structural changes that uphold

democratic principles, safeguard the rule of law, and advance inclusive governance. Through strengthening the judiciary's institutional integrity, guaranteeing justice accessibility, and improving the executive branch's efficiency and resilience, the regime transition can transform into a long-lasting democratic system that promotes prosperity, engagement, and trust among all citizens. To become a healthy democracy, the nation must overcome its obstacles and commit to democratic values. Only then can collective action be taken to reach its full potential.

References

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- ⁵ MLD 2011 SC 450
- ⁶ *Marbury v. Madison*, 5 U.S. 137, 2 L. Ed. 60, 2 L. Ed. 2d 60 (1803).
- ⁷ Article 63(g) of the Constitution of Pakistan, 1973.
- ⁸ Article 175 (A), 177 of the Constitution of Pakistan, 1973.
- ⁹ Article 179, for the retiring of Judges of Supreme Court at the age of 65 years and Article 195, for the retirement of Judges of the High Court.
- ¹⁰ Article 209, 210, 211 of the Constitution of Pakistan, 1973.
- ¹¹ Article 4 of the Qanun-e-Shahadat Order, 1984.
- ¹² Article 68 of the Constitution of Pakistan, 1973
- ¹³ Article 184 of the Constitution of Pakistan, 1973
- ¹⁴ Article 186 of the Constitution of Pakistan, 1973
- ¹⁵ Article 187 of the Constitution of Pakistan, 1973
- ¹⁶ Article 189, 201 of the Constitution of Pakistan and Article 55, 56 of the Qanun-e-Shahadat Order, 1984.
- ¹⁷ Article 191, 201 of the Constitution of Pakistan, 1973.
- ¹⁸ PLD 2011 SC 207
- ¹⁹ SCMR 629 SC 2003
- ²⁰ PLD 673 (SC 1964). PLD 271 (SC 2006).
- ²¹ PLD 271 SC 2004