

Separation of Powers and Role of Judicial Activism in Pakistan

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Abstract

A system of checks and balances is established through a doctrine of separation of powers to prevent tyranny and excessive use of power vested upon legislature, Judiciary and executive branches of the State. Modern democracy is based upon the balance of this trichotomy of powers and democratic constitution is further safeguarded through judicial activism. Judicial inquisitorial activism through the legal lens checks and invalidates the acts of legislature and executives which are ultra-vires the constitution. The doctrine of judicial review in Pakistan is not unprecedented when compared with other countries. This study presents the judicial activism on legislative acts and on executives in order to restrain them to act under the framework of basic structure of the constitution. This study indicates that Superior courts have earned public trust through judicial activism, when legislators and executives exceed their powers beyond the permissible limits enshrined in the Constitution; but at the same time, this activism has also some prominent demerits when exercised in excess especially when international investment and economic activity is concerned in Pakistan.

Keywords: *Separation of Powers, Judicial Activism, Trichotomy of Powers*

Introduction

The doctrine of separation of powers creates checks and balances to prevent the accumulation of unchecked authority among the three organs of the State vis-à-vis Judiciary, legislators and executives (Bazmi & Quresh, 2021). Since one institution with absolute authority may potentially abuse its position without fear of repercussion, this idea was developed to prevent such abuse. This doctrine was introduced by French philosopher Montesquieu (1689–1755) in his famous book ‘spirit of the laws’. Separation of powers refers to the division of government responsibilities into distinct branches to prevent one branch from performing the fundamental functions of another. The purpose is to prevent the concentration of power and to establish checks and balances on one another.

But, absolute separation of power is not practically possible; there will always be some overlap, particularly between the legislative and executive branches (Mahmood Falki & Shahzad, 2022). However, there is a stringent separation between the judiciary and the other two branches because the judiciary must be independent and free from political influence. Therefore, judicial review is common in modern democracies to check the constitutionality of acts carried out by legislature and executives.

Judicial review is a constitutional authority granted to the highest courts to examine the constitutionality of a statute, law, administrative action, constitutional provision, or amendment. Superior courts all over the world utilize this potent legal instrument of judicial review to invalidate any extra-constitutional acts and policies of the administrative, executive, and legislative branches of the State. Through this process, the superior courts examine the constitutionality of government and executive actions to ensure that they do not violate the constitution. Judicial Activism imposes a system of checks and balances on the executive and legislative branches.

It was period of Stuart (1603-1988) when the judicial review process formally was introduced in the unwritten Britain constitution. In this regard, the efforts of Justice Coke in 1610 are acknowledged who introduced the concept of judicial review in Britain. It was Coke who invalidated the act of parliament by asserting the same to be ultra vires the fundamental principles of common law.

Significance of the Study

Good governance in any country revolves around the manner the institutions work within the ambit defined by the constitution without encroaching to others domain. Stability of good governance is sustainable when judiciary, legislators and executives perform their functions within the boundaries prescribed in the Law. It is matter of fact that due to political interference in Pakistan, separation of power has impacted governance. This study investigates the extent of interference affecting the democratic process and the intervention of the judiciary in economic matters which may create uncertainty and instability in the business environment of Pakistan.

The purpose of this study is to identify the overlapping exercise of powers exercised by the three organ of the state vis-à-vis legislative, executive and judiciary which creates discontentment and confrontation among them which ultimately jolts the democratic system of the country by imposing the undemocratic rules.

Literature Review

Separation of powers ensures a mechanism of checks and balances among three organs of the Government Vis-à-vis Executives, Parliament and Judiciary for good governance (Bellamy, 2017). The concept of separation of power propounded by the famous political scientist and philosopher Aristotle in 320 B.C in his famous book “*Politic*” (Aristotle, 2018). Aristotle in his book “*Politics*” discussed three elements of the constitution and describes as three pillars of the state mentioning separate characteristics for each pillar

and the same gives the profound thought to the common interest, second pillar is the executive officials who perform executive functions and third pillar is judiciary. Baron de Montesquieu, a political philosopher, elaborated the doctrine of separation of power in the most refined manner and divided these three powers among the three pillars of the state, such as legislative, executive and judiciary (De Secondat & De Montesquieu, 2022). He emphasized that none of the three organs of the Government would be able to overstep into constitutional powers of one another, which is essential for the modern democracies and welfare of public at large. John Locke, a modern political theorist, has also categorized the division of powers in three branches in 1748 (Locke, 1988).

Separation of powers is a fundamental principle of the Pakistani constitution. The country's constitution establishes a federal parliamentary system with three branches of government: the executive, the legislature, and the judiciary (Vile, 1967). The purpose of this division is to ensure that no single branch of government becomes excessively dominant and that each branch serves as a check on the other. This Constitution established a bi-cameral legislative structure. It goes without saying that the Islamic Republic of Pakistan's constitution supports the doctrine of separation of powers (Pakistan & Assembly, 1973).

The purpose of separation of powers is not to distribute the powers and make the institutions powerful but it's objective is empowerment of good governance and common good for general public (Manent, 2003). Concentration of power which leads to abuse is discouraged based upon the idea of separation of power (Barendt, 1998). In the American presidential system, for instance, the president has the authority to veto laws enacted by Congress. With a two-thirds vote, Congress can override a veto by the president. It is also possible for the president and Congress to agree on a law while the Supreme Court declares it unconstitutional. Similarly, the president can appoint judges and other government officials, but the senate must approve the appointments.

The division for exercise of powers ensures that each institution works in their own domains with some checks and balances mechanism; in fact this strain is productive for good governance (Shah, 2011). The public anticipates that justice will be administered promptly, fairly, and impartially. This can only be accomplished if the judicial system is robust and operates autonomously in both structure and operation (Farooq et al., 2016). The legal system serves as the cornerstone upon which a state is built. The right to justice is fundamental to the human condition. A robust judiciary in a state is seen as a vital pillar in any democracy because it assists the main institutions and actors in locating and ensuring the appropriate balance between them for the achievement of successful governance and, most importantly, the protection of the lives, property, and security of the general populace (Jetly, 2012).

The political administrators of Pakistan were unable to reach a decision on which government system to build and put into effect, which is an incontestable reality. In principle, they declared their intention to govern the state according to the principles of Islamic democracy, but in reality, they did not accept either democracy or Islam (Niaz, 2014). As a direct consequence of this, civilian administrations have been deposed by the military on many occasions. The legal system provided justifications for the seizure by the military, such as the law of necessity. Moreover, to achieve more loyalty from the courts, undemocratic forces engineered in order to control the decision of judges using different tactics to take oaths using Provisional Constitutional Order and Legal Framework Order in total disregard of constitutional framework (Ahmed, 2020). This was done in order to acquire greater obedience from the courts. Judges who ever ventured to disobey the dictates of the tyrants would find themselves removed from their positions as a result (Khan, 2005). Based on the study of literature, it can be hypothesized that three organs of the State vis-à-vis judiciary, executive and legislative overstep into jurisdiction of on another.

Research Methodology

This work has been carried out through exploratory and deductive approach to investigate the concept of separation of power in Pakistan. This doctrinal legal investigation helps to understand the overstepping of one organ of the state into another which create disharmony between the institutions which shakes the governance. In order to gain a more comprehensive understanding of constitutionalism regarding separation of power, the researcher has looked at a variety of case laws, some of which are considered to be leading constitutional cases, to mention a few:

- 2022 PLD 1 and 2022 PLD 48 Supreme Court of Pakistan, (Jurists foundation through Chairman v/s Federal Government through Secretary of Defence and others)
- 2000 PLD 869 Supreme Court of Pakistan, (Zafar Ali Shah v. Pervez Musharraf, Chief Executive of Pakistan)
- 2022 SCMR 406 (Government of Kyhder Pakhtunkhwa v. Sher Aman)
- 2022 SCMR 1691 (Hadayat ullah v. Federation of Pakistan)
- 2021 SCMR 775 9 Chief Executive officer, Multan Electric Power Company ltd v. Muhammad Ilyas)

Furthermore, In-depth analysis has been conducted on how the State organs in Pakistan have been developing to determine the scope of their jurisdiction. In order to successfully carry out this exploratory research, a mixed-methods strategy has been implemented. This study combines qualitative, descriptive, and theoretical components. The research method explores similarities and differences on how the concept of separation of power is implemented and the mechanisms of checks and balances. The study also analyzed the gaps between theory and practice.

Moreover, the historical perspective, landmark court decisions, and different events regarding executive-legislative-judiciary conflicts have been examined in perspective of

Pakistan. Further, comprehensive analysis of legal texts has been conducted to perform this study.

Analysis and Discussion

It is the Constitution of the country which delimits the boundaries and roles of each organ of the State regarding exercise of the powers. But, there are instances where the overstepping of one organ of the State into affair on another is found in Pakistan. Parliament has overstepped and encroached to the functions of judiciary. In this regard, it is observed that parliament has passed the legislation by undermining the autonomy of judiciary. Parliament has been observed to even encroach the administrative functions of judiciary in order to control it. This intervention of parliament into affairs of judiciary can hinder the functions of judiciary to perform independently to uphold the rule of law.

Parliament in Pakistan has also encroached its limits by interfering in affairs of executive branch. It sometimes lands to micro-manage the functions of executive branch by limiting the authorities of executive branch by curtailing its powers, which hinders the executive branch to effectively perform their functions and affect negatively the functioning of Government. It has also been revealed in this study that parliament has legislated some acts which are unconstitutional and against the spirit of separation of powers. It is important for parliament of Pakistan to respect and delimit itself to act in accordance with the boundaries defined by the framework of Constitution.

On the other hand, the executive branch is often involved to act in contravention to doctrine of separation of powers as enshrined in Constitution of Pakistan. The executive branch interferes with independence of judiciary by influencing the judicial decisions of appointment of judges, which can also undermine the independence of judiciary. Executives also encroach to the functions of legislature by promulgating ordinances and executive orders which otherwise are vested with the parliament; executive branch assumes the authority of

parliament. Therefore, executive branch creates a situation where parliament cannot effectively perform its functions to stabilize the democratic process.

Further, executives may also overstep in discharge of its function by violating the rights of public by limiting for example the freedom of expression. Executive branch may suppress the voice of dissent and restrict the activities of their political opponents and groups belonging to civil society. This way the executive branch undermines the essence of separation of powers and acts beyond the limits as enshrined in the Constitution. It is inevitable for stable and progressive modern democracy that executive branch neither interferes the functions of judiciary nor oversteps the functions of parliament to uphold the principles and rule of law.

The doctrine of separation of powers also requires judiciary to perform its functions independent of other two branches of the State vis-à-vis executive and legislative. The courts have issued orders and directions to legislature to perform in a certain way which may go beyond the constitutional mandate. In this regard, judicial restraint plays a role in modern democracy. This is also pertinent to admit that Courts cannot be deferential over the unlawful acts of legislature and executives but at the same time excessive exercise of inquisitorial approach of the Courts is also not favorable for democratic process, because in such matter personal opinion and views of the judges also comes on the way to adjudicate the matters of legislation and performance of executives. Courts apply the law objectively to interpret the legislative acts under the framework of the Constitution, but too much judicial review of acts done by legislature and executives may create strain amongst the organs of the State, which is not desired for good governance in the country.

In Pakistan the office of Prime Minister has kept all the powers within his office that creates imbalance among the legislature and executives. The Prime Minister of Pakistan being the executive head of the country exercised all the executive functions as enunciated in the

Constitution 1973 Islamic Republic of Pakistan, he being a head of the political party in power proposed all the legislation through his senior politicians of the party and get it passed from the parliament with the help of his other members of the legislature assembly of his party, as none of the party member can defy the party's decision due to party disciplinary rules and in case the member of the assembly caste the vote against their leadership, they shall be subject to the disciplinary proceedings under article 63 of the constitution 1973 Islamic Republic of Pakistan.

The legislature of the country has got grievance against the judiciary that the judges of the constitutional courts are usually directing them to make legislation on the particular line of action which is direct interference in their functions, since they are elected representative of the country, it is their prerogative to make a legislation as per needs of their people. However, the constitutional courts of the country put heavy stumbling blocks in the legislation process under the garb of fundamental rights and directing them to make legislation on the particular line of action which is unacceptable to them. According to the legislature, the courts of Pakistan do not have right to direct the legislature to make the legislation in accordance with their own whims and wishes but they can only interpret the laws. Constitutional courts of Pakistan are using executive powers either in their writ or *Suo-motu* jurisdictions. The High Courts in the country through the writ of *mandamus* have been directing the executives to make appointments, transfers and other functions which otherwise are purely functions of the executives of the country, similarly the Supreme Court of Pakistan while exercising *Suo-moto* jurisdiction.

The legislature of Pakistan has made amendment in the constitution whereby parliamentary committee has been established to keep check over the appointments of the judges of higher judiciary. The very formation and powers used by parliamentary committee has been challenged at the various constitution petitions and resultantly the power of the

Committee was reduced but its existence is potential threats to the independence of judiciary. However, as per 21st amendments made in the constitution, number of the judges was increased in the Judicial Commission of Pakistan which makes the role of other members such as federal and provincial laws ministers, Attorney General, member of Pakistan Bar Council and provincial power council ineffective.

Conclusion and Recommendations

The constitution of Pakistan has provisioned clearly the division of the authorities in a very precise form. The constitution provides trichotomy of powers but there is need of time and exigency of hour that these powers should be defined in the most elaborative ways by fixing the strict boundaries, as either branch of government should not intrude in the functions of others. The recent judicial interference in the function of executive and the legislative is purely due to writ of Mandamus provided under article 199(1)(A) of the constitution 1973 and the sou-motu powers exercised by the Supreme Court of Pakistan as well as being the apex appellate court of the country provided under article 184 and 185 of the constitution. The High courts in Pakistan as well as Supreme Court issued directions to the legislative to make legislation over particular issues which are considered as direct over stepping the powers of the legislatures by the judiciary. In light of findings in this study following recommendations are made:

1. Judiciary being an independent and most important organ of the State may not excessively exercise the authority for judicial review of the acts done by the parliament in order to avoid the controversies and retain the public trust. Whereas, at the same time, the superior courts cannot afford, for the public good, to be fully deferential on acts of parliament which are in contravention to the Constitution of Pakistan as the courts are guardians of the Constitution. This is also worth mentioning that deferential approach of the Courts may be more harmful than excessive judicial

activism as this approach may sweep the path for undemocratic forces to intrude to get unchecked powers.

2. Legislative and executive positions may be occupied by different persons. The executives must not be part of legislation process and legislators must not be allowed to hold the positions of executives. This idea is also supported by great political and democratic theorists, and is practiced in some of the developed countries. This camouflage for an individual to hold at the same time positions of legislators and executives pave way to excessive power which poses threat to liberty of the individuals and democratic process.
3. The three organs of the State need to cooperate with each other, if any one acts in contravention to the Constitution, the other two can contribute to controlling the wrong one that too within the limits of constitutional framework.
4. In order for Pakistan to realize its democratic ideals, its political leaders must be on the same page regarding the strengthening of civilian institutions. In addition, for democracy to remain stable, it is essential that all state institutions remain within their designated boundaries. The civilian institutions should adhere to the Constitution's principle of separation of powers.

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