

THE ROLE OF JUDICIARY IN GOOD GOVERNANCE

The fiftieth anniversary of the establishment of the Supreme Court of Pakistan is an occasion to examine that institution, both in retrospect as well as prospectively. In the first half century of the Supreme Court of Pakistan, the pendulum has swung from Judicial Restraint to Judicial Activism. It is the argument of this paper that throughout our troubled history the Supreme Court has endeavored to protect the individual from the excesses of a totalitarian state though it has suffered two purges under the guise of two Provisional Constitutional Orders of 1981 and 2001 when it was rendered unable to check authoritarianism.

Two Concepts Of Good Governance

The philosopher David Hume made the famous distinction between ought and is: between normative and descriptive statements. The word good is a statement of a norm. As such, there is more than one concept of what is good governance.

In Plato's Republic, good governance is defined as the rule of the philosopher king. The Republic states that, "Until Philosophers are Kings, or the kings and princes of this world have the spirit and power of philosophy, and political greatness and wisdom meet in one, and those commoner natures who pursue either to the exclusion of the other are compelled to stand aside, cities will never have rest from their evils, nor the human race, as I believe, and then only will this our state have a possibility of life and behold the light of day."

Aristotle has quite a different concept of governance. Instead of placing reliance on the Messianic qualities of the ideal philosopher King, Aristotle distinguishes between forms of government: Monarchy, Aristocracy, Oligarchy, and democracy. In the political thought of Aristotle it is the form of government institutions, rather than individuals, that matters most.

In some seminaries of Islam, Aristotle is considered as the Hakim-E-Awal, whereas other schools favour Plato to Aristotle. The campaign against Aristotle was led by Ibn Taimayah, in the wake of the sacking of Baghdad. Ibn Tamaiyah's philosophical thought was a reaction against the enlightenment of the School of Avicenna, the translator of Aristotle from Greek to Arabic.

In his *Kitabal Aql wal Naql*, Ibn Taimayah says, "Look at the followers of Aristotle. They are following him blindly while many of them know their master's theories are wrong."

The political philosophy of Plato leads to personal absolutism. Needless to say it has suited authoritarianism.

The Muslim World suffers from a democratic deficit because the debate between the adherents of Plato and Aristotle in the world of Islam was won by the Platonists.

These contrasting conceptions of good governance were also to be found in the political theories of Hobbes and Locke during the turbulent 17th century in which Britain witnessed a civil war and the regicide of Charles I, the dictatorship of General Cromwell, culminating in the glorious revolution of 1689 which enacted the Bill of Rights and recognised the concept of the rights of individuals versus the state. Hobbes had no room for the rights of the individual and believed in an authoritarian state to enforce the law and to protect individuals from a state of nature in which, according to Hobbes, the life of man was solitary, poor, nasty, brutish and short. It was Hobbes, the apostle of absolutism in his seminal work, The Leviathan, who lost the debate. Locke's philosophy of government based on the consent of the governed has become the universal political ethos. Good governance according to Locke consists of a government, which espouses the right to life, liberty and the pursuit of happiness. The Universal Declaration of Human Right adopted by the United Nations in 1948 expands on Locke's précis.

Government By Consent And Separation Of Powers

Consent of the governed is a necessary condition of good governance, even though it may not be a sufficient condition. Democratically elected governments are capable of impropriety and may be inept. The cure for excesses lies in regular fair and free elections and in check and balances through the separation of powers. The true test of accountability is when the incumbent is brought to task and removed from office through free and fair elections, which has never taken place in Pakistan's troubled constitutional and political history. Checks and balances require a separation of powers as expounded by another political philosopher, Montesquieu, whose reputation rests chiefly on *L'Esprit des Lois* (1748), a comparative study of political systems in which he championed the separation of judicial, legislative, and executive powers as being most conducive to good governance. His theories were highly influential in Europe in the late 18th century as were they in the drafting of our constitution, which recognizes a trichotomy of powers, namely the legislature, the judiciary and the executive as enunciated in the case of The State v. Zia ur Rehman, reported at PLD 1973 SC 49.

A study of the emergence of Pakistan reveals that the genesis of the state was Federal and democratic. Pakistan was achieved by the ballot and not the bullet, yet we suffer from a democratic deficit.

Democracy is a process of trial and error. It is not a utopia. It is not Plato's Republic. In the words of Winston Churchill, "Democracy is the worst form of government except all others."

In a leading case arising out of the imbroglio between Mushtaq Ahmed Gurmani and Malik Feroz Khan Noon, the then Prime Minister of Pakistan in 1958, the Supreme Court of Pakistan rightly observed in the judgment reported in PLD 1958 SC 333 at pages 362-363:

"But what has caused me most concern is that the learned judge should have assumed the role of a moral and political reformer. In his explanation submitted to this Court he states that he considered the alleged objectionable remarks to be necessary in the interest of the appellant and of the country of which he is the Prime Minister. And as regards his reference to the interests of the country and the disaster that may fall to eighty million citizens of Pakistan if a man like the appellant were allowed to continue as Prime Minister, the learned Judge clearly exceeded his function in judicially determining the

qualifications of a Prime Minister. This is pure politics and when politics enters the portal of the palace of justice, democracy, its cherished inmate, walks out by the back-door. A judge's duty in a given case is to adjudicate on the right or liability, the question of the existence or non-existence of which is raised before him, and this function he must discharge according to law and not according to what in his opinion the interest of the country or the state demand. The Constitution entrusts to the members of parliament who are chosen by the people of the land, and if the county is ruined by a wrong choice of the Prime Minister, the responsibility for the disaster is that of the people and their representatives and not of the Judge."

Transparency And Proportionality

Another aspect of good governance is the duty of the government to exercise discretionary powers in accordance with the principles of transparency and proportionality. The Supreme Court of Pakistan has displayed judicial activism in exercising the powers of judicial review, applying the criteria of transparency and proportionality.

In the leading case of Chairman RTA v. Pak Mutual Insurance Co, PLD 1991 SC 14, 25 the Honourable Supreme Court specified the seven principles of transparency or good governance.

Wherever wide worded powers conferring discretion are found in statutes, there remains always the desirability to structure the discretion and the need for this has been pointed out in the Administrative Law test by Kenneth Culp Davis in the following words:-

"Structuring discretion means regularizing it, organizing it, producing order in it, so that decision will achieve a higher quality of justice ... The seven instruments that are most useful in the structuring of discretionary power are open plans, open policy statements, open rules, open findings, open reason, open precedents, and fair informal procedure. When legislative bodies delegate discretionary power without meaningful standards, administrators should develop standards at the earliest reasonable time, and then, as circumstances permit, should further confine their own discretion through principles and rules. The movement from vague standards to definite standards to broad principles to rules may be accomplished by policy statements in any form, by adjudicatory opinions, or by exercise of the rulemaking power."

The Honourable Supreme Court has re-affirmed the principles of exercise of powers to review administrative discretion in order to ensure that discretion is exercised on rational and reasonable grounds. In the case of M/s Ittehad Cargo Service V. M/s Syed Tasneem Hussain Naqvi reported in PLD 2001 SC 116, it is held at page 121 as follows: -

"The High Court in exercise of its constitutional jurisdiction is possessed of power to examine the validity of the order in regard to grant of a concluded contract and strike it down on the grounds of mala fide, arbitrary exercise of discretionary power, lack of transparency, discrimination and unfairness etc. provided the challenge is made promptly and contentious questions of fact are not involved. The view gets support from the following observations made in

Messer Airport Support Services v. The Airport Manager, Quaid-I-Azam International Airport, Karachi and others (1998 SCMR 2268): -

“Further a contract, carrying elements of public interest, concluded by functionaries of the state, has to be just, proper, transparent, reasonable and free of any taint of mala fides, all such aspects remaining open for judicial review. The rule is founded on the premise that public functionaries, deriving authority from or under law, are obligated to act justly, fairly equitably, reasonably, without any element of discrimination and squarely within the parameters of law, as applicable in a given situation.”

The Right To Life And Liberty

Time does not permit a review of the judicial activism of the Supreme Court of Pakistan in the enforcement of each of the fundamental rights mentioned in the Constitution of Pakistan. The most important of these are the rights of life and liberty enshrined in Article 9 of the Constitution. Article 9 is as follows: -

9. **Security of person:** *No person shall be deprived of life or liberty save in accordance with law.*

The Honourable Supreme Court in the case of Ms. Shehla Zia & others vs. Wapda, reported in PLD 1994 SC 693, 712-713, held with respect to the right to life as follows: -

“Article 9 of the Constitution provides that no person shall be deprived of life or liberty save in accordance with law. The word life is very significant as it covers all facts of human existence. The word life has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally.”

In a series of cases dealing with the liberty of the subjects arising out of the detention of Malik Ghulam Jillian, Aga Shorish Kashmiri and Abdul Baqi Baloch, the Honourable Supreme Court of Pakistan has applied the principle that the decision of the authority detaining the individual cannot be subjective and is open to judicial review. By this means, the Honourable Supreme Court has safeguarded the liberty of the citizens of Pakistan and followed the dissenting judgment of Lord Atkin in the case of Liversidge v. Anderson and Another reported in (1941) 3 All ER 338. It was observed by Lord Atkin in his dissenting judgment as follows:-

“In England amidst the clash of arms the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which, on recent authority, we are now fighting, that the judges are no respecters of persons, and stand between the subject and any attempted encroachments, on his liberty by the executive, alert to see that any coercive action is justified in law. In this case, I have listened to arguments, which might have been addressed acceptably to the Court of King’s Bench in the time of Charles I.

I protest, even if I do it alone, against a strained construction put upon words, with the effect of giving an uncontrolled power of imprisonment to the Minister.”

In the case of Malik Ghulam Jillian V. Govt of West Pakistan, PLD 1967 SC 373, 389 the Honourable Supreme Court of Pakistan held that it was too late in the day to rely, as the High Court has done, on the dictum of the majority in the English case of Liversidge for the purpose of investing the detaining authority with complete power to be the judge of its own satisfaction. The Honourable Court went on to hold that the test of the satisfaction was objective and not subjective and the Court was entitled to review the grounds of detention. The Honourable Supreme Court of Pakistan has exercised the power of judicial review in safeguarding the liberty of the subjects, particularly in the cases of preventive detention and has exercised the power to review the material upon which the detentions are based, in order to satisfy itself that the power was exercised on reasonable and rational criteria.

The Supreme Court of Pakistan has been vindicated as subsequently the House of Lords has overruled the majority decision in Liversidge v. Anderson.

The Pursuit Of Happiness

John Locke defined good governance as the right to life, liberty and the pursuit of happiness. This paper has dwelled upon life and liberty. The concept of pursuit of happiness is enshrined in the directive principles of the state policy chapter 2, part-II of the Constitution.

The ten principles of good governance are prescribed in Articles 31 to 40 of the Constitution of Pakistan 1973, which enjoin all organs of the state to follow the following principles of policy: -

- 1) The Islamic way of life (Article 31),
- 2) Promotion of local government institutions (article 32)
- 3) Parochial and other similar prejudices to be discouraged (Article 33)
- 4) Full participation of women in national life (Article 34)
- 5) Sanctity of family (Article 35)
- 6) Protection of minorities (Article 36)
- 7) Promotion of social justice and eradication of social evils (Article 37)
- 8) Promotion of social and economic well-being of the people (Article 38)
- 9) Participation of people in armed forces (Article 39), and
- 10) Strengthening bonds with the Muslim World and promoting international peace (Article 40)

The principles of policy are not enforceable, as under Sub-clause (2) of Article 30 of the Constitution the validity of an action or of a law cannot be called into question on the ground that it is not in accordance with the principles of policy, and no action shall lie against the State, any organ or authority of the state or any person on such ground. At the same time, Article 29 provides that it is the responsibility of each organ and authority of the State, and of each person performing functions on behalf of an organ or authority of the state, to act in accordance with those principles in so far as they relate to the functions of the organ or authority.

As one of the three pillars of the State, it is the responsibility of the Honourable Supreme Court to act in accordance with the principles of State policy. Article 38 of the Constitution is quoted below *in extenso*:-

38. Promotion of social and economic well being of the people: *The state shall ...*

- (a) *secure the well being of the people, irrespective of sex, caste, creed or race, by raising their standard of living, by preventing the concentration of wealth and means of production and distribution in the hands of a few to the detriment of general interest and by ensuring equitable adjustment of rights between employers and employees, and landlords and tenants;*
- (b) *provide for all citizens, within the available resources of the country, facilities for work and adequate livelihood with reasonable rest and leisure;*
- (c) *provide for all persons employed in the service of Pakistan or otherwise, social security by compulsory social insurance or other means;*
- (d) *provide basic necessities of life, such as food, clothing, housing education and medical relief, for all such citizens, irrespective of sex, caste, creed or race, as are permanently or temporarily unable to earn their livelihood on account of infirmity, sickness or unemployment;*
- (e) *reduce disparity in the income and earnings of individuals, including person in the various classes of the service of Pakistan.*

The achievement of Article 38 can be regarded as the beacon light of the Constitution for this article enshrines in itself the vision and dream of a welfare state, which cares for the people and affords opportunity to the poor masses to enjoy the benefits of economic and political liberty free from the shackles of poverty. The duty of the state is to help the evolution of Pakistan into a just society by just means. The time has come for the long suffering masses of Pakistan to enjoy life in accordance with the directive principles of state policy.

The people of Pakistan are the ultimate political sovereign and their welfare is the essence of good governance. The highest constitutional role of the Supreme Court of Pakistan is to review the functions of the executive and legislature on the touchstone of article 38 of the Constitution to aid the people of Pakistan in their pursuit of happiness.