

**The Role of the Judiciary in Protecting the Rights of the People -  
Judicial Activism.**

Article 37 (d) of the Constitution of Pakistan requires the State to ensure inexpensive and expeditious justice. The primary responsibility, therefore, for providing justice, inexpensive as well as expeditious, is on the State and "the State" has been defined in Article 7 to mean the Federal and Provincial Governments, the Provincial Assemblies, and such local and other authorities that are empowered by law to impose taxes. It follows that these bodies and authorities are constitutionally required to establish and maintain such institutions that ensure civic and social justice to the people and also a judicial system that can be accessed speedily and with affordable expense by people for redress in case of violation of this mandate. The common perception is that the primary responsibility for providing justice to the people rests on the Judiciary through the judicial system and also as the protector and defender of the Constitution. However, without the full support of the legislature and especially of the executive, judiciary alone cannot discharge its responsibilities of providing inexpensive and expeditious justice to the people.

Let us first examine the desired role of the legislature in providing justice. The courts are required to decide cases in accordance with the Constitution and the law. Various questions should arise for consideration when the lawmakers decide to make a law. Are the lawmakers aware of the nature of law itself, its functions and purposes? Do they ever consider the interests of the common persons (common men and women) for whom the laws are being enacted? Do the proposed laws that are being debated in the legislative bodies represent the understandings of the law? Do the lawmakers consider whose values are being promoted, and whose interests protected, in the enactment of the law?

The common persons are always critical of our legal system. Questions are always raised as to the fairness of our legal system. A common person does not perceive our legal system to be fair and as a protector of his or her rights. He considers the law an enemy rather than a protector of his rights. These and other questions that should be considered during the debates in the legislative assemblies are usually ignored. Taking a concrete example, can it be said with any certainty, when a law is being made, that our legislators ever consider what would be its likely effect on Pakistani women who form about half the population of the country. Hundreds of amendments have been made in

our Constitution yet, except for one or two amendments, no amendment has been made for advancing the cause or rights of the common person. As stated earlier, the courts have to impart justice in accordance with law and, if the law itself is not fair, at least as regards the common person. It is not an easy task for the courts to protect the rights of the people. It can, therefore, be said that a legislature is a very important component of "the State" in safeguarding the rights of and for providing justice to people.

Coming now to the role of the executive in providing justice to the people, a few facts would clearly show that, without executive's active support, it is very difficult for the judiciary alone to cater to the aspirations of the people as regards providing justice to them. For instance, the ratio of judges to the population in UK and USA is over 100 judges for one million people as compared to Pakistan and India where it hovers around 10 judges per one million people. The sanctioned strength of High Court Judges is 28 in Sindh and there are around 450 other judges in the province. According to the population of Sindh (about 40 million), the number of all the judges should be over 4000 if the ratio in UK and USA is applied. Then the allocation in the five budgets (federal and provincial) for administration of justice is around Rs.10 billion. During 2001 (according to an Article in Dawn), the loss of W APDA and KESC (two public sector corporations) was Rs. 60 billion. To sustain these two public sector corporations, the government provided the requisite finances to meet the losses. Losses to these and other public sector corporations have continued and the executive has financially supported these public sector corporations to sustain their existence.

In the presence of these figures, Rs.10 billion or so for administration of justice throughout Pakistan is negligible. If resources are always found to meet the colossal losses of public sector corporations, there is no reason why the executive should not provide the finances required for revamping and streamlining the justice system. Instead of Rs. 10 billion, perhaps Rs. 100 billion or even more should be provided for administration of justice, if more courts are required, especially at the district and city courts level. If the quality of our judiciary at the subordinate level is to be enhanced, the salary package for them has to be raised substantially. At present, the civil judge 1 magistrate gets a total package of Rs. 20,000/- per month which includes a special allowance of Rs.6000/- per month added recently to the emoluments and this is hardly adequate to provide a decent living to the judicial officers who look after and decide around 75% of the cases which reach our judicial system. We need more courts at the district and city court level, instead of only 450 judges in the subordinate judiciary in Sindh. The initial effort should be to raise this figure to at least 1000 and the emolument/package should be such that it should attract the right kind of applicants. It

has to be realised that no more than 10% of the cases that enter the judicial system in our country ultimately reach the High courts and the Supreme Court. If the justice system is to be improved for the common man at all, the primary efforts should be to strengthen the district and city court system in the country, which looks after more than 80% of the cases which reach the judicial system in Pakistan and, without the full support of the executive and the legislature, no noticeable improvement can be expected in the judicial system of our country. It is regretted that justice has never been a priority for any government in Pakistan, whether military or civil, since its birth.

Coming now to the role of judiciary in safeguarding the rights of people, reference can be made to Part II of our Constitution which comprises two chapters - Chapter 1 relating to Fundamental Rights and Chapter 2, the Principles of Policy. Fundamental Rights enshrined in our Constitution can be enforced through the judicial system specifically by approaching the High Courts in a Writ Petition under Article 199 of the Constitution or directly in the Supreme Court under Article 184 (3) of the Constitution.

Article 8 of the Constitution provides that any law, in so far as it is inconsistent with the fundamental rights, shall be void to the extent of such inconsistency and the same Article obligates the State that it shall not make any law which takes away or abridges the fundamental rights. Chapter 2 comprises what are described as principles of policy. These principles, inter alia, include socio economic-rights that are not found in the chapter relating to fundamental rights. Article 37 of Principles of Policy relates to promotion, of social justice and eradication of social evils. It requires the State to remove illiteracy and provide free and compulsory secondary education within minimum possible period and to make technical and professional education generally available and higher education equally accessible to all on the basis of merits. The constitutional mandate under Article 37 (d) requires the State to ensure inexpensive and expeditious justice. Article 38 relates to promotion of social and economic well being of the people. According to Article 38 (d), the State is required to 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. Principles of Policy are, however, not justifiable – these cannot be enforced through the Courts and Article 30 provides that the validity of an action or of a law shall not be called in question on the ground that it is not in accordance with the Principles of Policy and no action shall lie against the State on such ground.

There is a basic distinction between the rights conferred on the people under the chapter on fundamental rights and the rights of people under the Principles of Policy. Fundamental rights can be enforced through the courts but the latter are not justifiable. However, while interpreting Article 9 under the fundamental right chapter, which provides that no person shall be deprived of life or liberty except in accordance with law, the Supreme Court of Pakistan in the case of Shehla Zia vs. WAPDA (PLD 1994 S.C.693), in a remarkable example of judicial activism, interpreted the word "life" in such a liberal manner that perhaps it can be said that, on account of this interpretation, all the socio-economic rights contained in the Principles of Policy have become part of the right to life under Article 9 (a fundamental right) and, therefore, enforceable through the Courts. Justice Saleem Akhtar who authored the well-known judgment in Shehla Zia's case, gave the following interpretation to the word "life":

"Article 9 of the Constitution provides that no person shall be deprived of life or liberty save in accordance with law. The word "life" has not been defined in the Constitution but it does not mean nor can 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.

"The word "life" in the Constitution has not been used in a limited manner. A wide meaning should be given to enable a man not only to sustain life but to enjoy it. Article 14 of Fundamental Right provides that the dignity of man and subject to law the privacy of home shall be inviolable, The fundamental right to preserve and protect the dignity of man under Article 14 is unparalleled and could be found only in few Constitutions of the world. The Constitution guarantees dignity of man and also right to life under Article 9 and if both are read together question will arise whether a person can be said to have dignity of man if his right to life is below bare necessity like without proper food, clothing, shelter, education, health care, clean atmosphere and unpolluted environment. "

Article 37 (d) is to be found under the Chapter relating to Principles of Policy and it requires the State to ensure inexpensive and expeditious justice. In a number of judgments of the Supreme Court delivered during the period from 1989 to 1999 the right to access to justice has been held to flow from the right to life and, therefore, held to be a fundamental right. As access to justice has been held to be a fundamental right,

aggrieved persons can move the High Court and the Supreme Court in cases where this right has been denied.

Under the Constitution and the judgments delivered by the Supreme Court itself, it becomes the responsibility of the Supreme Court and the High Courts to find a way so that this right becomes a reality for the people in Pakistan. For improvement of our judicial system, the judiciary is required to play its role on account of its own judgments that access to justice is a fundamental right flowing from the fundamental right to life. If through the traditional methods it is not possible for the higher judiciary in our country to grant relief to the people so as to fulfil their right to access to justice, our Supreme Court and High Courts can adopt innovative methods to provide justice to the common person. In this context the terms used are "Public Interest Litigation" and 'judicial activism". Judicial activism has been equated with innovative interpretation. One example is the judgment of the Supreme Court in Shehla Zia's case on the interpretation of the word "life" in Article 9 of the Constitution. Another judgment that can be cited is in the case of Al-Jihad Trust vs. Pakistan (PLD 1996 S.C. 324) known as the "Judges Case", where the word "consultation" under the Articles relating to appointment of superior court Judges was interpreted to mean "meaningful consultation" and it was held by the Supreme Court that the recommendation of the Chief Justice of Pakistan has primacy over the President. By interpretation of the word "consultation" in this manner, the hitherto prerogative of the President (on the advice of the Prime Minister) for appointment of Judges of the High Court came to be transferred to the Chief Justice of Pakistan.

In Collin's dictionary of American Government and Politics, judicial activism has been defined as "the making of new public policy through the decision of judges". In Black's Law Dictionary, the term has been defined as "a philosophy of judicial decisions whereby the judges allow their personal views about public policy along other factors to guide their decisions".

In societies which are constitutionally and democratically developed, like the US and UK, the term judicial activism can mean the philosophy through which the judges make their personal views about public policy the basis for their decisions, but, in developing countries like Pakistan and India, people expect the courts to bring about a socio economic change for the benefit of the poor. It is expected in developing countries that judges should take up the responsibility of trustees on behalf of the people. The reason for this expectation is that, in these developing countries, the executive and legislature have totally failed in providing socio-economic justice to the poor people. To put it in

another way, the executive and legislature have failed to ensure good governance. A society, which does not have good governance especially on the part of the executive, may require or expect the judiciary to act as their trustee for bringing about a socio-economic change for the benefit of the common people.

Good governance has been defined as the process of decision making and the process by which such decisions are implemented and this can be used in several contexts such as national, provincial or local governance, and good governance is a system of governance which is effective and efficient, transparent and accountable and follows the rule of law. If these are lacking, then it can be said that the society suffers from bad governance.

On account of indifference and apathy of the executive towards the plight of the common people (bad governance in countries of the third world), they look to the judiciary as their only hope for providing them justice including social justice. In all third world countries, the executive proclaims its total commitment to rule and law but when it comes to law enforcement and providing justice including social justice to the common people it remains totally indifferent.

These appalling conditions persuade the judiciary in certain countries to come to the rescue of the common man through what is now known as Public Interest Litigation (PIL). Justice Krishna Iyer and Justice Bhagwati of the Indian Supreme Court played a very significant role during the decades of 80s in developing PIL. In view of the indifference and apathy of the executive towards the common man and the fact that the traditional judicial procedure was too cumbersome, expensive and longwinded and time consuming, they started entertaining letters and informal communications directly from the affected whose fundamental rights had been violated. According to Justice Bhagwati, a former Chief Justice of India, the judiciary has to play a vital and important role not only in remedying the difficulties of the common man but also in eliminating exploitation and injustice and for this purpose it is necessary to make innovations in order to meet the challenges posed by this new role of an active and committed judiciary. In view of extensive use of PIL during the period of these two brave judges, the Supreme Court of India delivered a large number of decisions in the socio-economic area adopting a new role for judiciary in the field of social policy. Earlier, this area was considered to be the exclusive zone of the executive and legislature in India. A Full Bench of the Andhra Pradesh High Court has also held that the executive is accountable to the public through the instrumentality of the judiciary.

In Pakistan two judges stand out in the field of Public Interest Litigation and judicial activism, namely, Justice Mohammad Afzal Zullah a former Chief Justice of Pakistan and Justice Saleem Akhtar (also of the Supreme Court) for decisions relating to bonded labour, environmental pollution, discharge of nuclear waste caused by smoke emitting vehicles, right to unpolluted water in the salt mines in Khewra etc. and in several other decisions, Supreme Court of Pakistan has used innovative methods of interpretation in an effort to bring about a socio-economic change for the benefit of the common people. Despite all these decisions and the efforts by the Supreme Courts in the subcontinent, the quality of life of the common people has not improved. Both India and Pakistan suffer greatly from continuing increase in pollution, increase in population and poverty, illiteracy, lack of proper health care, unemployment, lack of public amenities and bad law and order situation. Despite very high (8.5%) economic growth in Pakistan during last year (second in the world after China), the socio-economic condition of the common man in Pakistan has not improved. The benefits of the economic growth have not trickled down to the poor. Access to justice has not improved. The conviction rate in criminal cases is less than 10%. Criminal cases and civil cases take ages to be decided. Parole and probation systems are not implemented. It appears that only poor people violate the law as a visit to the jails in the country shows that only poor people (with insignificant exceptions) are confined.

Recently the Supreme Court of Pakistan has taken suo moto actions in several areas including kite flying and serving of food in connection with wedding functions and also in thousands of individual cases of harassment, injustice and illegal actions against citizens specially women. These are very commendable steps taken by the Supreme Court that can be described as exercises in judicial activism. However, there are scores of other areas where our superior judiciary can initiate action through judicial activism, innovative interpretation and PIL with an effort to bring about a change for the better for the common people. It has to be remembered that the judiciary is not an alternative to the executive or legislature but, through judicial activism, it can persuade the legislature and the executive to discharge their responsibilities, as the representative of the people, not only in the enforcing of the fundamental and civic rights of the people but also in the socio economic field. For instances action can be taken by the Supreme Court suo moto or on petitions in many areas e.g. eradication of corruption; transparency and accountability in executive decisions affecting rights of people; efficient governance of public sector bodies e.g. hospitals and educational institutions; control of population; control of traffic accidents.

Again it may be emphasised that it is not suggested that the Judiciary should take over the functions of the legislature or the executive. Right to information has been held to be a fundamental right by our Courts, and the Supreme Court could initiate action suo moto or on the petition of a citizen requiring the concerned branch of the executive to place all the relevant information or data including documents on a matter of public importance (perhaps in any of the areas mentioned earlier) and, if not satisfied with the material and information placed on record and coming to the conclusion that the executive had not discharged its responsibility under the Constitution or the law, the Court may then give directions to the executive to take such steps as may be required to fulfil their responsibility under the Constitution or the law.