



RCBHC



RESEARCH CENTER, HIGH COURT OF BALOCHISTAN

COURT: HON'BLE MR. JUSTICE SHOUKAT ALI RAKHSHANI
SUBJECT: CONSTITUTIONAL LAW
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Query

What is the constitutional concept of trichotomy of powers, and to what extent may the courts, in exercise of judicial review, interfere with policy matters or executive orders?

The Constitution of Pakistan is founded upon the principle of *separation of powers*, whereby each *organ* of the State, the *Legislature*, the *Executive*, and the *Judiciary*, is confined to its respective *constitutional domain*. The Constitution does not envision that the courts are bestowed with unfettered powers that can be exercised within the disguise of judicial review. The judicial power is the power that is defined by the Constitution and law any *assumption of authority beyond such domain violates the doctrine of trichotomy of powers*, which undermines constitutionalism. The judicial function, circumscribed by Article 199 of the Constitution, *is one of review and not of governance*; it empowers the Court to *examine executive or legislative action* and pronounce it to be right or wrong, but does not permit the Court to *step into the shoes of the Executive* to perform its tasks. Assumption of executive functions by a judge not only constitutes *judicial overreach* but also imperils the legitimacy of the judicial institution by blurring the constitutional demarcations that safeguard institutional balance.

This principle was emphatically reaffirmed by the august Supreme Court in *Chief Executive Officer, MEPCO v. Muhammad Ilyas (2021 SCMR 775)*. The Apex Court held that:

“7. When judiciary encroaches upon the domain of the Executive, as in this case, where the learned judge disregarded the eligibility criteria and the recruitment policy of the Executive Authority and assumed the function of the Executive, it is said to commit judicial overreach - which occurs when a court acts beyond its jurisdiction and interferes in areas which fall within the Executive and/or the Legislature's mandate.¹ Through such interference the court violates the doctrine of separation of powers by taking on the executive functions upon itself. The instant case is a textbook case of judicial overreach, where a judge directs an authority to issue an Appointment Letter disregarding the recruitment process, merit and the employment policy of the executive authority. Such judicial role imperils the separation of powers, jeopardizes the legitimacy of the judicial institution and undermines constitutional democracy. It is imperative that the courts do not derogate from their constitutionally mandated oversight function of judicial review. Certain values in the Constitution have been designated as foundational to our democracy which means that, as corner-stones of our democracy, they must be scrupulously observed. It is a sure recipe for a constitutional crisis if these values are not observed and their precepts are not carried out conscientiously.”

The delicate balance between judicial review and judicial overreach has been eloquently articulated by the august Supreme Court. Judicial review is the genus encompassing the power of the judiciary to examine executive, legislative, and administrative action against the touchstone of the Constitution, while its sub-species are judicial activism and judicial restraint. Both these approaches, though distinct in their orientation, operate within the zone of judicial

legitimacy. However, when the judicial function transcends its constitutionally demarcated limits and encroaches upon the sphere of policy-making or executive governance, it assumes the form of judicial overreach, an impermissible transgression that amounts to judicial legislation or judicial adventurism. This distinction was thoroughly expounded in **Mian Irfan Bashir v. Deputy Commissioner, Lahore** (PLD 2021 SC 571), wherein the Supreme Court held:

6. Judicial overreach is when the judiciary starts interfering with the proper functioning of the legislative or executive organs of the government. This is totally uncharacteristic of the role of the judiciary envisaged under the Constitution and is most undesirable in a constitutional democracy. Judicial overreach is transgressive as it transforms the judicial role of adjudication and interpretation of law into that of judicial legislation or judicial policy making, thus encroaching upon the other branches of the Government and disregarding the fine line of separation of powers, upon which is pillared the very construct of constitutional democracy. Such judicial leap in the dark is also known as "judicial adventurism" or "judicial imperialism." A judge is to remain within the confines of the dispute brought before him and decide the matter by remaining within the confines of the law and the Constitution. The role of a constitutional judge is different from that of a King, who is free to exert power and pass orders of his choice over his subjects. Having taken an oath to preserve, protect and defend the Constitution, a constitutional judge cannot be forgetful of the fact that he himself, is first and foremost subject to the Constitution and the law. When judges uncontrollably tread the path of judicial overreach, they lower the public image of the judiciary and weaken the public trust reposed in the judicial institution. In doing so they violate their oath and turn a blind eye to their constitutional role. Constitutional democracy leans heavily on the rule of law, supremacy of the Constitution, independence of the judiciary and separation of powers. Judges by passing orders, which are not anchored in law and do not draw their legitimacy from the Constitution, unnerve the other branches of the Government and shake the very foundations of our democracy.

The same line of reasoning was reiterated in the *NAB Amendment case* in **PLD 2024 SC 102** (NAB Amendment case) reiterated that judicial review is a constitutionally sanctioned power to test legislative and executive action against the touchstone of the Constitution, but ***it does not authorize the judiciary to rewrite laws, frame policies, or assume executive functions.*** Justice Syed Mansoor Ali Shah underscored that *the separation of powers is a foundational guarantee of constitutional democracy, requiring each organ of the State to act within its own sphere.* Any judicial intrusion into legislative or executive domains amounts to overreach, imperiling institutional balance and eroding judicial legitimacy. It was observed that:

*“3. Courts must realize that legislation is an elaborate undertaking which is an outcome of debate and deliberations of public, social and economic policy considerations. Role of a judge in a democracy recognizes this central role of the Legislature. **The courts can judicially review the acts of the legislators if they offend the Constitution, in particular the fundamental rights guaranteed by the Constitution.** While examining this conflict of rights and the legislation, the courts must consider that they are dealing with a legislative document that represents multiple voices, myriad policy issues and reflective of public ethos and interests, voiced through the chosen representatives of the people. And remembering that undermining the legislature undermines democracy. With this background, only if such a legislation is in conflict and in violation of the fundamental rights or the express provisions of the Constitution, can the courts interfere and overturn such a legislation. At the foundation of this approach is the basic view that the Court does not fight for its own power. The efforts of the Court should be directed towards protecting the Constitution and its values⁵”.*

In **Khushal Khan Khattak University v. Jabran Ali Khan** (2021 P L C (C.S.) 921), it was further emphasized that in the absence of a legal and statutory basis, any directions cannot be by the High Court to the executive, offends the doctrine of separation of powers and lay beyond the scope of judicial review under Article 199 of the Constitution. The court noted:

*“19. We also find that the learned High Court arrogated to itself the executive function of being the appointing authority which function is beyond the pale of jurisdiction of the High Court and militates against the fundamental concept of trichotomy of powers which is a foundational block of our Constitutional scheme. Further, **the High Court in our opinion lacked the power to direct regularization of the Respondents in the absence of a legal and statutory basis for the same.** The Appellants have in their parawise comments specifically distinguished the posts which were regular, and those, which were not. The learned High Court has omitted to examine this aspect of the matter and has made sweeping and generalized observations that are against the record as well as the facts and circumstances of the cases before it.”*

The principle was consistently applied in **Abdul Hameed and others Versus Water And Power Development Authority through Chairman, Lahore and others** [2021 S C M R 1230] where the Hon’ble Supreme Court reaffirms that ***courts should not interfere with policy decisions unless it is clear that the policy in question is patently illegal or the result of an arbitrary exercise of power.*** The role of courts is to ensure legality, not to evaluate the efficacy of policies. The judgment speaks it in the following tone.

*“11. **The roles of each organ of the State are defined within the Constitution of the Islamic Republic of Pakistan, so also in different laws.** The learned Tribunal has elaborately dealt with this issue, and, has relied on a judgment of this Court reported as Muhammad Shabbir Ahmad Nasir v. Secretary Finance Division Islamabad (1997 SCMR 1026) and Muhammad Farid Khattak v. Chief Secretary Government of N.W.F.P. (2009 SCMR 980). A transgression of those roles by one organ would amount to the usurpation of the power of another, which would be against the spirit of Article 7 of the Constitution of the Islamic Republic of Pakistan. **It is not the role of the Courts to interfere in policy decisions, unless it is manifest that, such a policy decisions are the outcome of arbitrary exercise of power, mala fides, patently illegal or manifestly unreasonable.***

In said case the Court also placed reliance in this regard on the case of **Asaf Fasihuddin Khan v. Government of Pakistan** (2014 SCMR 676) of which, the relevant part was reproduced as: -

“It is to be noted that the duty of the Court is to confine itself to the question of legality. Its content should be whether a decision-making authority exceeded its powers; committed an error of law; committed a breach of the rules of natural justice; reached a decision which no reasonable tribunal would have reached; or abused its powers”.

In case **Syed Azam Shah Versus Federation Of Pakistan through Secretary Cabinet Division, Cabinet Secretariat, Islamabad and another** 2022 S C M R 201 in which the Hon’ble Supreme Court defined the compass and magnitude of the judicial review of the government policies held that;

*“12. The decision of Steering Committee was not particularized or person specific to the appellant but it was made applicable across the board for all Principals, Professors and Teachers in BS-20 and above which does not seem to be discriminatory or arbitrary but on account of reasonable classification with rational nexus. **The compass and magnitude of judicial review of governmental policy is now well settled and defined in which neither the court can act or represent as appellate authority with the aim of scrutinizing the rightness, fittingness and aptness of a policy nor may act as advisor to the executives on matters of policy which they are entitled to formulate. The extensiveness of judicial review of a policy is to test out whether it violates the fundamental rights of the citizens or is at variance to***

the provisions of the Constitution, or opposed to any statutory provision or demonstrably arbitrary or discriminately. The court may invalidate laws, acts and governmental actions that are incompatible with a higher authority more so, an executive decision may be invalidated for being unlawful and also maintains check and balance. This can be sought on the grounds that a decision arises when a decision-maker misdirects itself in law, exercises a power wrongly, or improperly purports to exercise a power that it does not have, which is known as acting ultra vires; a decision may be challenged as unreasonable if it is so unreasonable that no reasonable authority could ever have come to it or a failure to observe statutory procedures. The dominance of judicial review of the executive and legislative action must be kept within the precincts of constitutional structure. In the case of Abdul Hameed and others. v. Water and Power Development Authority through Chairman, Lahore and others (2021 SCMR 1230), this Court held that the roles of each organ of the State are defined within the Constitution of the Islamic Republic of Pakistan, so also in different laws. It is not the role of the Courts to interfere in policy decisions, unless it is manifest that such a policy decisions are the outcome of arbitrary exercise of power, mala fides, patently illegal or manifestly unreasonable. The court placed reliance on the case of Asaf Fasihuddin Khan v. Government of Pakistan (2014 SCMR 676), in which it was held that the duty of the Court is to confine itself to the question of legality, whether a decision making authority exceeded its powers; committed an error of law; committed a breach of the rules of natural justice; reached a decision which no reasonable tribunal would have reached or abused its powers.

In case of Asaf Fasihuddin Khan Vardag v. Government of Pakistan (2014 SCMR 676) the Supreme Court encapsulated the principle by holding that Judicial review is confined to legality, ensuring that a decision-making authority does not exceed its powers or breach rules of natural justice. The Court noted that the Courts do not assess the fairness of policies but examine whether the decision-making process was lawful, rational, and procedurally fair. This case underscores the three grounds of judicial review: illegality, irrationality, and procedural impropriety.

In *Watan Party v. Federation of Pakistan* (PLD 2013 Supreme Court 167), the Court held Under the constitutional scheme of trichotomy of powers, the judiciary cannot assume the role of policy maker or administrator, nor can it ordinarily interfere with governmental policies and priorities unless such action is shown to be mala fide or in violation of fundamental rights.

Conclusion

The doctrine of trichotomy of powers, embedded in the Constitution of Pakistan, safeguards the functional autonomy of each organ of the State by confining the Legislature, Executive, and Judiciary to their respective domains. Within this framework, the power of judicial review stands as a necessary check, but it is confined to testing legality, whether an act is unconstitutional, mala fide, ultra vires, or patently arbitrary, while leaving the wisdom, efficacy, or expediency of policy choices to the political and executive branches. Thus, the courts may interfere only where executive order or policy action demonstrably violates constitutional guarantees or statutory mandates; beyond this, intervention amounts to judicial overreach, imperils institutional balance, and undermines the very constitutional democracy the judiciary is sworn to protect.

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