

Question no 01:

26th Ammendment hais put a Full stop on the judicial activism in Pakistan. Comment.

Introduction:

26th Constitutional ammendment of Pakistan received the assent of the president on 21st October, 2024, making a milestone in country's ongoing discourse on judicial reforms. The ammendment consists of 27 clauses and aims to redefine the balance of power between the judiciary and parliament particularly in the realms of judicial appointments. The core objective of 26th ammendment is to establish a parliamentary oversight on the judicial matters curbing the influence of supreme court, it expands the role of elected representative in the judicial commission of Pakistan.

There has been a long-standing history of judicial activism and tension between judiciary and legislature in Pakistan. 26th amendment not only reconfigures the dynamics of judicial appointments but also echoes the famous Roman question:

Quis Custodiet Ipsos Custodes?
Who will guard the guards?

Background:

There has been long-standing history of judicial dominance in the case of judicial appointments and judicial activism since the independence of Pakistan.

Judicial activism is the philosophy of law making in which judges's personal views about public policy among other factors guide their decision

(Black's Law Dictionary)

There have been numerous cases of

judiciary activism. Moulvi Tameez-ud-din case was the first case of judicial activism in 1954.

i. Moulvi Tameez-ud-Din Case (1954)

Background The constitutional assembly of Pakistan was dismissed by Governor General Ghulam Ahmed.

Outcome court validated the action invoking Doctrine of Necessity to justify unconstitutional action due to political crisis

ii. Citing 'Doctrine of Necessity' martial law was validated too as manifested by Dosso'-case 1958, Nusrat Bhutto case (1977) and Syed Zafar Ali Shah case 1997

<u>Dosso Case</u> (1958)	<u>Nusrat Bhutto case</u> (1977)	<u>Syed Zafar Ali Shah Case</u> (1997)
<u>Background</u> Martial Law imposed by General Ayub Khan and President Sikander Mirza.	<u>Background</u> Arrest and detention of Nusrat Bhutto during military coup of General Zia-ul-Haq	<u>Background</u> General Pervez Musharraf had suspended the constitution.

Dosso Case

Nusrat Bhutto
Case

Syed Zafar
Ali Shah
Case.

Outcome

Outcome

Outcome

Supreme court upheld

Supreme court upheld

Supreme Court

Martial law regime

martial law, refused

validated the

again applying the

to question its

Suspension of

doctrine of necessity

validation.

constitution and

allowed Pervez

Musharraf to

amend it as well

iii) Promoting Judicial Independence,
barring legislature and executive
interference:

In "AQ-Jihad Trust Vs The Federation
of Pakistan" case, the court ruling
ruled out politicization of the judiciary
reinforcing judicial independence.
It provided protection against the
executive interference in the judicial
appointments and removal.

iv) Judicial Activism During CJP
Iftikhar Chaudhary's Era:

As per the constitution of 1973

article 184

"Supreme court had extensive powers allowing it to take actions without application."

Suo moto was extensively used by Chief Justice Iftikhar Chaudhry in various note-worthy cases:

Pakistan Steel Mill Corruption Case

SC intervened and directed FIA to transfer case to NAB

Use of Contempt of Court Act

→ SC used the act to prosecute political

figures including former PM Yousuf Raza Gillani leading to his Disqualification.

Panama paper case

SC formed joint investigation team to investigate the allegations against PM Nawaz Sharif.

The court disqualified him from holding office on account of non disclosure of assets.

v Judicial Activism During CJP Saqib Nisar's Era:

Chief justice Saqib Nisar also used extensively the suo moto powers. He established Dam Fund and visited many countries also for collecting funds for dam.

The case of kidney and liver institute was also criticised for disrupting institutional worth and criticising and humiliating the skilled workforce.

How 26th Amendment Has Ended Judicial Activism:

Suo moto power was extensively used in the history which increased the interference of judiciary into the executive and legislature work domain. By introducing an amendment in article 184, 'Suo moto practices have been restricted. Supreme court can no longer make decisions on its own.

Before

SC had extensive powers allowing it to take actions without an application

After

Suo MOTO powers have been restricted. SC can no longer make any decision beyond the contents of application filed under article 184.

Conclusion:

In a nutshell, the 26th constitutional amendment has curtailed the power of supreme court to fetter its interference in the domains of executive and legislature to ensure the dominance of true spirit of democracy.

"Judicial Activism must be restrained in a democracy where legislature is elected to represent people's will."

(Stone G, the birth of Judicial Activism)

Question No 02:

Enumerate the measures adopted by Pakistan to spotlight on the plight of Kashmiri people in the Indian Occupied Jammu and Kashmir after 5th August.

Introduction:

The Kashmir conflict is one of the major bones of contention between India and Pakistan. Both of them consider Kashmir to be an integral part of their states. Till date, four wars (1948, 1965, 1971, 1999) have been fought between two countries, three of them were for Kashmir. Kashmir conflict began with illegal accession of Kashmir to India despite Kashmir being a Muslim majority state. All the rails and road communications of the state were with Pakistan. Its

Exports and imports moved through Pakistan. Timber, which was its most important source of revenue, was exported by being floated down the rivers into Pakistan. The destiny of West Pakistan and Kashmir was linked together by nature and by all possible interests - economic, religious, cultural and strategic. Yet, it was, became part of India against the will of its people.

Background:

Jammu and Kashmir is divided into three culturally distinct districts

- i. Kashmir
- ii. Jammu
- iii. Ladakh

The state's economy is agriculture based. The final status of Jammu and Kashmir has remained unsettled especially because Pakistan rejected

the process through which Jammu and Kashmir had acceded to India. A dyadic war over Kashmir sovereignty ended in 1949 with UN brokered ceasefire that left two countries separated by 460 mile long LOC.

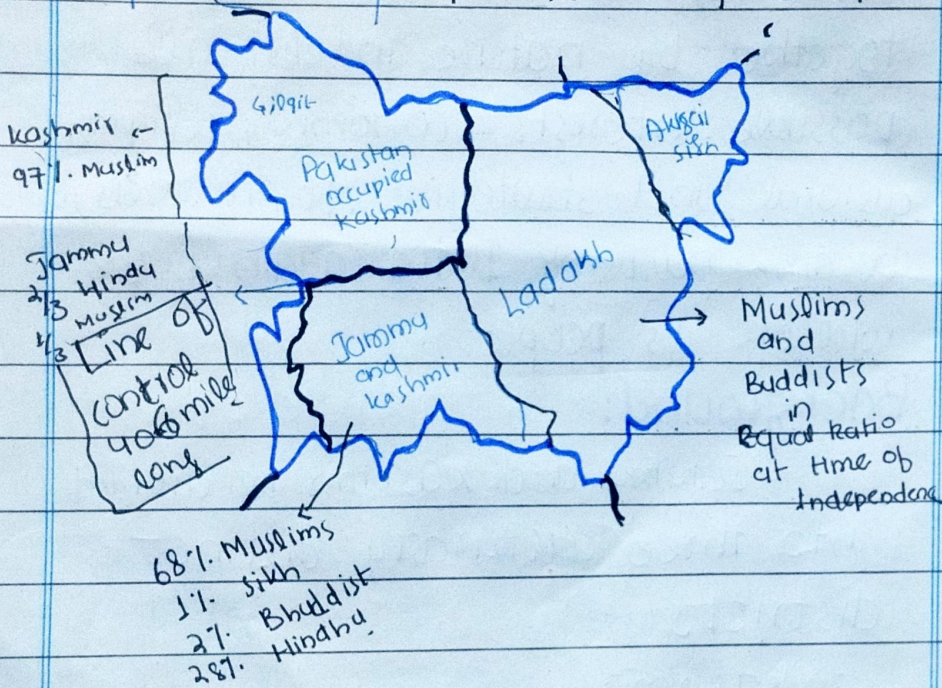


Figure: Shows different important districts of Kashmir with population of different sects at time of Independence of India and Pakistan. Also Highlights line of control in 1949, through Article 370.

Date: _____

Kashmir was constitutionally acceded to India. Giving Kashmir "special status." Except for four departments (Finance, defence, foreign policy and communication) all other powers rested with Kashmir. It could have its own flag, own constitution and its own residential powers. Through Article 35A, no one outside the Kashmir could buy land, avail education scholarships or local government jobs in Kashmir. Article 370 and article 35-A were abrogated by Prime Minister Modi:

Abrogation of Article 370:

In late July 2019 and during early days of August, India moved additional troops (about 45000) into Kashmir -

On August 5 with Jammu and Kashmir in "Lockdown" Indian home minister Amit Shah introduced the bill in parliament to abrogate article 370

and reorganizing state by bifurcating it into two union territories, Jammu and Kashmir and Ladakh, the former having legislative assembly

(1949) ← Article 370

Kashmir "special status"
own flag
own constitution
denied property rights to outsiders

Article 35-A (1954)

no one outside Kashmir could buy land, property, avail educational scholarships, local government jobs in Kashmir

Abrogated on 5th August 2019

(presidential ordinance)

people from rest of India would have right to acquire property in Jammu and Kashmir

inter would lead to demographic changes in the region from majority (Hindu to majority Hindu ^{Muslims} to majority Hindu.

central laws will automatically apply to state.
conscience of state not required.

Pakistan's Reaction to the Abrogation of Article 370:

Pakistan's response to the abrogation of Article 370 was firm and highlighted the plight of Kashmiri people.

1. Youm-e-Istehsal (Day of Exploitation)

Pakistan rejected the abrogation of Article 370. Pakistan declared 5th August as Youm-e-Istehsal (Day of exploitation) and conducts different programmes every year to show solidarity with the people of Kashmir.

2. Openly Criticised India for violation of Bilateral Agreements and International Law:

Pakistan criticised India for violating Shimla Agreement 1972 according to which

"No state shall unilaterally alter the situation in Kashmir."

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India did not consult Pakistan, nor it accepted that it violated the international treaty.

Pakistan also highlighted the fact that India is violating the article 49 of 1949 Geneva Convocation:

The occupying power can not transfer its part of population into the territory it occupies.

→ Article 42 of 1907 Hague Convention also mentions:

A territory is considered occupied if it is under the authority of hostile army
Kashmir is under the authority of 8,00,000 Indian soldiers.

3. Raised Issue of Kashmir On International Platforms:

Pakistan raised the issue

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of Kashmir more enthusiastically on international platforms. It was the result of efforts of Pakistan that after 5th August 2019, three meetings by United Nations were called in a year for Kashmir. Then President America - Donald Trump offered to play the role of the mediator.

4. Drew World's Attention to human right violation in Kashmir.

For approval of bill of Abrogation, Kashmir state was placed under Lockdown. A severe shortage of food, medicines was faced. Also atrocities by Indian soldiers could be seen every now and then. Pakistan raised voice for Kashmiri people on diplomatic front which attracted the attention of many international organizations of

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human rights including Amnesty International, etc. OIC issued a report which highlighted the plight of Kashmiri people.

s. Passed Multiple Resolutions in Parliament:

In Pakistan passed multiple resolutions in the parliament against blatant violation (against) of UN resolution and bilateral agreements by India.

Conclusion:

In a nutshell, Pakistan should continue efforts at domestic and diplomatic front for the Kashmir issue. Pakistan should raise the voice more vigorously and should continue to propose possible solutions for Kashmir issue like plebiscite, UN trusteeship, Independence or General Zvez Musharraf's four point formula.