

‘JUDICIALISING’ THE PANDEMIC IN PAKISTAN

Yasser Kureshi*



What happens when constitutional courts ‘judicialise’ the state’s response to coronavirus? Last month, Pakistan’s Chief Justice Gulzar Ahmed [took notice](#) of the federal and provincial government’s performance in dealing with the coronavirus outbreak, and since then, the Court has had hearings every two weeks. In these hearings, representatives of the federal and provincial governments appear before judges, answer their questions and respond to their withering criticisms, all of which gets wide coverage in the media. How are judges playing such a prominent role in the Pakistan coronavirus response? And what is the impact of this ‘judicialisation’ of the coronavirus response, on the state’s policies to contain the virus specifically and on the state’s political structure, more broadly?

Populists, Courts and the Global Pandemic

Coronavirus crashed into a political world already rocked by populist leaders seeking to disrupt entrenched party systems and constitutional structures. Populist leaders have taken two approaches to dealing with the pandemic, with varying consequences for courts and constitutionalism. Some populist leaders, including Orban in Hungary and Duterte in Philippines, stressed the gravity of the threat from the virus to [appropriate sweeping emergency](#) powers that remove any constitutional checks on executive authority. In these systems, some courts [lost their independence](#), while others [attempted to uphold rights](#) and slow down the process of executive aggrandisement. Other populist leaders chose to downplay the threat from the virus, instead emphasising defiance as the best response. Leaders including Trump in the USA, Bolsonaro in Brazil and Imran Khan in Pakistan have compared the virus to a ‘[mere flu](#)’, [protested against](#) lockdown measures, and championed the resumption of economic activity. This defiant approach may give leaders some political mileage, but it complicates efforts to coordinate a uniform policy, as competing centres of authority within political systems often view the threat differently. When the government’s policy is premised on downplaying the threat, the federal government cannot exploit the language of an emergency to compel deference from all branches and tiers of government. In Brazil, Pakistan and the United States, state governments and local governments have acted independently, and sometimes in opposition to, the edicts of the central government. This crisis of coordination places constitutional courts in an important position, as the institution equipped to provide clarity about the distribution of powers in the political system, and interpret the constitutional scope for the federal government to impose its will over state and local governments. In Brazil, courts [intervened](#) in conflicts between the president seeking swift relaxation of lockdown measures and mayors adopting strict containment measures. This inter-governmental confusion also provides a justification for courts to expand their governance role and intervene in the development of the state’s response to the pandemic, as happened in Pakistan.

A Federal Problem and a Judicial ‘Solution’

Historically, Pakistan’s politics has been characterised by dissonance between two sets of political elites, one seeking a more centralised state, and the other seeking a more ethnically representative and decentralised system. The federal civil-military bureaucracy dominated Pakistan’s politics for most of its history, and ensured the balance of power between Pakistan’s centre and four provinces tilted decisively towards the centre. In 2010, in a landmark legislative achievement, the parliament passed the 18th constitutional amendment, that turned previously federal subjects of governance into provincial subjects, expanding the policymaking and financial autonomy of the provinces. This decentralisation created more room for provincial governments to craft their own policies to deal with governance challenges, including health and policing, two areas of policymaking critical to the coronavirus response. However,

the federal government and provincial governments have frequently differed in their policy preferences for dealing with the pandemic. Imran Khan's Pakistan Tehreek-e-Insaf (PTI) runs the federal government and three provincial governments, but the Pakistan People's Party (PPP), runs the province of Sindh. [Tensions escalated](#) between the federal government which seeks a swift return to normalcy and the Sindh government which pushed for stringent lockdown measures, but policy [differences also emerged](#) between PTI's federal and provincial governments. Hence, coordination issues between the state and the provinces have been rife.

The challenges in crafting a coherent national coronavirus policy gave the Supreme Court an opportunity to intervene. In the last fifteen years, Pakistan's Supreme Court has played an increasingly significant role in political and policymaking processes. At the core of this expansion of judicial power has been the court's growing public interest jurisdiction. *Suo Moto* refers to court taking up an issue of public interest on its own initiative, in the absence of a petitioner. The *suo moto* power is a potent tool in the hands of the Chief Justice, as there are no prescribed standards or criteria governing its usage. The Chief Justice intervenes at his own discretion, enabling him to selectively involve the judiciary in a range of new governance questions. *Suo moto* proceedings are also open-ended, and with each hearing the Chief Justice can raise new legal questions, expand the scope of the inquiry, and issue orders for state institutions. Supreme Court hearings are widely covered by the media, which makes it harder for federal and provincial governments to ignore or evade the Court's orders. Thus, the Court is able to use the vast discretionary powers afforded by its growing public interest jurisdiction to intervene in governance issues and shape the policymaking processes.

Over the last month, the Court has been conducting widely publicised hearings on the state's response to the virus. Officials from the federal and provincial government appear before the Court and answer questions about their policies. In these hearings, the Court focussed on the need for coordinating a uniform national policy to deal with the virus. In the first hearing, the Court called for a [meeting](#) between the Prime Minister and the Chief Ministers of all the provinces to form a policy applicable to all territories in Pakistan. The Chief Justice also criticised and struck down policy decisions made by any section of the government that it deemed as unilateral or undermining cross-government coordination. For instance, the Court criticised the procedures developed by provincial governments for reopening business, and [ordered](#) federal and provincial governments to come to a consensus on a new policy for reopening businesses that would be uniformly enforced all over the country.

The Chief Justice justifies judicial interventions into this area of executive policymaking by using his pulpit to excoriate the federal and provincial governments for their performance and lack of coordination. When the Chief Justice took *suo moto* notice, he complained this was necessary [because](#) "the government is just calling in meetings where no work is being done." Subsequently, each hearing was characterised by sensational criticisms, that would dominate headlines. The Chief Justice publicly [contemplated](#) the removal of the federal government's top health official, [chided](#) federal and provincial government for neglecting doctors and health workers, [condemned](#) the conflict between the Sindh government and federal government, and [expressed dissatisfaction](#) with the government's transparency stating "Nothing is being told as to how departments are working." The more the Chief Justice criticised the policies of the governments, the more he publicly justified his intervention in, and monitoring of, the coronavirus response.

After the Judiciary Intervenes

Undoubtedly, Pakistan's strategy to deal with the pandemic has been messy and inconsistent, and the conflicts between the federal and provincial government further undermine the state's ability to respond effectively. Yet the Court's interventions will generate further complications.

Whereas oversight of the procedural aspects of the democratic process falls within the expertise of judges, questions regarding the substance of technical policymaking are not suited for judicial resolution. Yet *suo moto* proceedings are guided by the personal preferences and interests of the Chief Justice, and if the Chief Justice wishes to shape the substance of public health care policies, there are few checks on where and how he intervenes. For instance, the Chief Justice [recently criticised](#) the federal government for spending money on coronavirus relief because he opined that coronavirus was "not a pandemic in Pakistan", and he ordered the government not to focus its resources on "one disease". When the personal observations of a judge with little relevant expertise are translated into formal judicial orders that must be implemented, this can undermine the development of a sound policy response to the virus. In recent years, Pakistan repeatedly witnessed policymaking dysfunction resulting from judicial overreach. It is imperative the response to the virus does not suffer the same fate.

The Court's interventions may also reverse the autonomy Pakistan's provinces gained in recent years. Ever since the 18th Amendment was passed, the federal civil-military bureaucracy has been seeking to reverse the process of decentralisation, and the current ruling party has expressed a similar interest. Given the current configuration of power in Pakistan, the barriers to reversing the constitutional amendment are currently too high for a legislative overhaul. However, as the interpreter of the constitution, the Supreme Court can reinterpret the 18th Amendment

in ways that reduce the level of autonomy and policymaking discretion afforded to the provinces. During the coronavirus hearings, the Court strongly emphasised uniform policies across the country, criticising provincial governments for acting independently. In its [most recent hearings](#), the Court held the Sindh Government could not independently decide whether to reopen shopping malls in Sindh, ordering it to defer to the federal Ministry of Health's decision regarding the province's shopping malls. The Chief Justice also [observed](#) that the 18th Amendment did not give provincial governments the power to regulate activities of business entities that pay federal taxes, without the consent of the president. This observation comes on the back of [several](#) other judgments in recent years that chipped away at provincial discretion in critical policy areas, since the passing of the 18th Amendment. If, in the name of uniformity and coordination, the Court incrementally rolls back provincial autonomy, this could undermine the project of building a more representative political and policymaking system.

Thus, in Pakistan, a crisis of coordination has created the opportunity for the judicialisation of this public health emergency. While the issues that have drawn the Court into this confusion need resolution, one must ask: Has the Court's intervention been constructive? And will it lead to a centralisation of political authority, not through executive decree, but through judicial interpretation?

* Senior Teaching Fellow, Department of Politics and International Studies, School of Oriental and African Studies; Postdoctoral Research Fellow, Trinity College, University of Oxford.