

AN ANALYTICAL REVIEW OF IMPACT OF JUDICIAL ACTIVISM ON THE DEMOCRATIC SETUP OF PAKISTAN: A QUALITATIVE STUDY

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Abstract

Judicial Activism has shaped the political circumstances of many nations with varying political systems and regime types. This work reviews range of available data to probe case of judicial activism in Pakistan. There is a split in the academic literature and discussions between organizations who are in favor of and against judicial activism. Pakistan is three tier structured state. The doctrine of trichotomy is fundamental in its constitutional structure. Ideal democracy is completely dependent on the concrete fact that every institution plays its role within its own constitutional domain. Interference of one organ in the domain of another directly affects the democratic system in country. Pakistan belongs to those nations where democracy has never been stable. Pakistan's constitutional and democratic history reflects such events that clearly led to the instability of democratic set up in country. The study in hand is an endeavor to explore factors and analyze the impacts of Judicial activism on the democracy in Pakistan, applying the principle of qualitative method, through conduction of in-depth interviews from the renowned, credible and close stakeholders and persons associated with Pakistani media. Study explored various factors based on the viewpoints of 10 participants and concludes magnificently recommendations that how to make the democratic system successful in Pakistan.

Key words: *Judicial Activism, Democracy, Constitution, Suo motto, Separation of Power*

1. INTRODUCTION

Judicial activism is a legal term which is applied to describe the Judiciary's role in interpreting and enforcing the constitution and laws beyond the traditions by Judiciary. In Pakistan, judicial activism has played a significant role in shaping the political landscape. For this, the Judiciary has received both praise and criticism for causing political chaos.

Under Judicial activism, Apex Courts enforce their own views of constitutional requirements, rather than existing legislation (Kmiec, 2004). Through judicial activism, judges give verdict related to constitutional issues and can deny the validation of the actions of other pillars of government. When judiciary exceeds its limits, either in its verdicts related to political issues, provision of fundamental rights to citizens or supremacy of law, it becomes judicial activism (Roosevelt & Garnett, 2006).

The term "*trias politica*" or "*separation of powers*" was presented in 18th century by a renowned political philosopher Montesquieu. He analysed the theme of Britain Constitution and supported the phenomenon of separation of powers between three organs of the state. The doctrine of Separation



of Powers, is actually the doctrine of constitutional law that keeps check and balance between Legislature, executive and judiciary and constructs foundation of any prosperous democracy. Every organ of the state workouts within its jurisdiction as regularised by the constitution, subject to a reasonable check by the other branch, in order to resist unwarranted use of powers and interference with the authorities of other organs of the state (Munir, et al.2020). Trichotomy of powers is expressly provided in the constitution of Islamic Republic of Pakistan 1973 that envisaged distribution of powers between executive, legislature and judiciary. All organs are required to exercise powers within their prescribed limitations (Mahmood,2010). Encroachment, done by one institute upon the legitimate field of other directly fallouts with destabilisation of democracy within the state. Such clash of institutions is more common in under developed countries as compare to developed ones and it became the root cause of political instability in such countries (Ahmad,2017). The theory of separation of power is significant scheme of the constitution of Islamic Republic of Pakistan government but there has always been a clash between the superior institutions of Pakistan which is a reason of derailing democracy of the country (Bazmi & Qureshi,2021).Suo moto action is basically an outcome of judicial activism and has its base in common law and its First decision was given in early 19th century by John Marshall an American Chief justice of US supreme court in history in remarkable case of Marbury v. Madison. In south Asian countries like Pakistan, India and Bangladesh, it is frequently used tool by supreme Court. Although the word suo-moto is not expressly used in Article 184(3) but its source is provided in it. According to this Supreme Court has its original jurisdiction to take suo moto notice in any issue having public importance and matter of fundamental rights. Supreme Court of Pakistan has power to take any action in a situation which according to its believe impacts the fundamental rights and issue a proper verdict on it (Javaid, 2023).

Democracy is form of political system which permits the people of country to select the ruler of choice and it ensures their rights and freedom as citizens of the country. The idea of democracy revolves around the notion of rule of law as it is regarded as a basic element of democracy, rule of law provides equality, justice, right, duties and superiority of constitution in a society. Unfortunately, the idea of democracy is not as much successful in the history of Pakistan due to many reasons. One of the main reason behind the failure of democracy is the lack of performance by one organ and intervention of other organ of government in its functions. So in order to protect such a intervention judiciary is considered as a guardian of constitution and the fundamental rights and suo moto powers is a tool which helps to highlight the issues that are being neglected by elected institutions (Khalid, 2012).

Political history of Pakistan witnessed an active role of judiciary in politics. From Molvi Tamiz ud din case till Pervez Musharaf death sentence judiciary plays an active role to dismantle the democratic process in Pakistan. Judiciary has remained under the influence of other institutions. The other examples of constitutional cases of judicial activism are National Reconciliation Case, 18th Amendment Case, and Proclamation of emergency order and High Treason Case against Chief of Army Staff. The case related to human rights included Darshan Masih Case, Shrin Munir Case, and Environmental Case etc (Munir & Mahmood,2019). In some cases, it had bear the pressure of military and justify the Martial Laws of different eras and on the other hand it also threatens democracy by disqualifying the ruling party as happened in Panama Case. Past decade has seen judicial activism in its full swing. Judicial activism was seen in almost all spheres either it was hospital issues, child abuse case or the funds collection for constructing dams. Judiciary has been found everywhere. This judicial activism in all the sectors threatened democracy more than ever (Munir & Khalid, 2018).

2.RESEARCH QUESTIONS:

1. What are the impacts of suo moto actions on political and democratic process of Pakistan?
2. To what extent the Lack of separation of power has become the reason of increasing judicialization in Pakistani politics?



3. How far other state institutions played important role in destabilizing democratic process in Pakistan?

3. RESEARCH METHODOLOGY

3.1. Research Design

The qualitative principle of research methodology is employed to conduct this study that seemed the most appropriate design as the object of study in hand is to explore and analyze the impacts of Judicial activism on the democracy in Pakistan. Interview protocol contains open ended question applied as a research design.

3.2. Sample of Study

In this study sample of 10 key participants were selected. Despite from the credible persons affiliated with Pakistani media, primary data also from well-known and prominent Performers directly affiliated with elite governmental institutions and department of the prestigious state of Pakistan. Officials from the Judicature (retired) and bureaucracy (in service), active and renowned politicians, member from the supreme court bar association of Pakistan, credible journalists and analysts etc employed as main participants. Data obtained, in year 2020.

Detail of Interviewees (Table.01)

Sr.no	Participants' Affiliation/Positions	Interview dates	Code names
01	Pakistani politician, advocate of Supreme court , prominent leader of Lawyer movement (chief justice restoration movement) and served twice as a leader of the house in the senate of Pakistan .	November 3 rd 2020	Respondent .01
02	Pakistan political scientist and military analyst/Caretaker chief minister of Punjab 2018.	September 27 th 2020	Respondent .02
03	Advisor and an internationally acclaimed sinologist and master trainer Pakistan Industrial Technical Assistance center.	December 3 rd 2020	Respondent .03
04	Hilal-e-Imtiaz (HI-Military) and Sitara-e-Imtiaz (SI) in serving as chief advisor to the President UMT on Institutionalization and governance and positioned as the Professor of Practice.	November 14 th 2020	Respondent .04
05	Ex-Vice Chancellor BZU, Multan. Professor of IR. Ambassador of Pakistan to Yuman	September 7 th 2020	Respondent .05
06	Senior Parliamentarian and former education minister in Punjab government.	October 26 th 2020	Respondent .06
07			Respondent

	Pakistani senior Journalist and columnist and chief editor of daily Pakistan Newspaper	December 27 th 2020	.07
08	Joined DMG in 1984 Remained posted as Assistant Commissioner, Deputy Commissioner, DCO, Secretary in various Government departments.	December 4 th 2020	Respondent .08
09	Served as a justice of the Lahore High Court(1994-2002)	September 11 th 2020	Respondent .09
10	Remained Posted as Secretary in various governmental departments	October 26 th 2020	Respondent .10

3.3.Data Collection

Data of this research paper has collected by the primary source of elite interviewing. For this purpose, open ended interviews were conducted by the elites belonging to different administrative, legislative, judicial, and Academic institutions. The principal author of this paper collected data by using multiple sources like zoom meeting, telephonic discussion and one to one meetings. Respondents no.01 and no.02 has interviewed by telephonic conversation. Respondents no.05,07 and no.09 was interviewed by zoom meeting. Rest of the interviews conducted in one to one meeting in year 2020. (For the detail of sample size involved 10 respondents see table no.01)

3.4.Data Analysis

Data was analyzed using thematic analysis as it is most flexible tool to explore the perspectives of respondents in depth. It is also a well-composed and systematic analysis method for interview based textual data (willig & Roger, 2017). It is magnificent forms of analysis in qualitative research having an attitude for abstraction of real themes from data and comprises indicative, investigative, and recording designs or themes. It is the slightest explanation of a set of data that is broadly used in qualitative data analysis (Javadi & Zarea,2016).

3.5.The Ethical Considerations

The ethical trepidations, cautiously considered throughout this study. All the participants were informed about the purpose of interview conduction and objectives of the study as well. To keep their identity or any other concerns confidential, code names were used instead of their actual names.

4.Findings and discussion of the study

This section outlines the main themes.

4.1. Devastation of Trichotomy

Devastation of Trichotomy came out as a main theme of study. The suo-moto actions by the judges of apex-court, exercised in high frequency may imbalance the system of state that is structured on the pillars of trichotomy. The disproportionate use of suo motto in administrative matters directly shatters the trichotomy. One of the participants of the study (Respondent 10) stated that Suo motto power is a necessity, but its exercise in high frequency, shatters the fundamental principle of constitution named trichotomy which further upsets the entire structure of state. The powers of judges, under article 184(3) of the constitution are exercised when few requisites are contented namely, that question of public importance is involved and such importance is attached with enforcement of fundamental rights as fall under the domain of Fundamental rights as incorporated in the constitution of Islamic Republic of Pakistan (1973). Additionally, article 184(3) is remedial in nature and the Supreme Court of Pakistan ought to exercise these powers to ensure remedy to the citizens in its true spirit.



4.2. Probability of Ultra vires

Probabilities of ultra vires are extracted as another theme of the study. Behind the exercise of suo motto power, one mind authority is exclusively involved. Although chief justice is the curator of the fundamental rights of the citizen but probabilities of abuse of suo-motto power always exist. Respondents 01 and 09 stated that provisions of Article 184(3) become attractive when a matter of public interest is involved, the court must take it up since it deals with the fundamental rights of people. However, an unwarranted abuse of Article 184(3) has brought about irreparable damage to Pakistan. These powers are a force to be reckoned with in the hands of a Chief Justice; The Courts of Pakistan have disqualified members of National Assembly using the powers delegated to them under Article 184(3). Such excessive use of 184(3) has sabotaged the whole political and democratic system of Pakistan. Therefore, suo motto powers should be acted out by a coalition of judges and not by the Chief Justice alone.

4.3. Intervention by State Institutions

Data revealed that apart from judicial activism, other factors, also prevailing that adversely affect the democratic norms in Pakistan. Most of the times, defensive institution of the state ignored the process of democratization.

The capture of civilian political power by such institutions had moved towards in discouragement and eroding the democracy in Pakistan. The reasons of such interventions in politics has taken place on the basis of vested interest of state institution, poverty, economic instability, weak institutions, corruption and as well as on the basis of low political cultural. Rspndent.04, openly supported this theme and stated that historically, the Judiciary has always stood steadfast by the army and in this way judicial decisions interfered and obstructed the mechanism of governance. Molvi Tameez-ud-din, Dosso case, Nusrat Bhutto and Musharraf case etc are the leading examples. Another participant (Respondent 03) shared the same view point that Judiciary has sanctioned military takeover under the guise of doctrine of necessity; it has approved and permitted military coups because of 'circumstances'

These kinds of flaws have been provided the opportunities for the military coups. When political leaders frequently approach the Judiciary for settling matters that are essentially political in nature, it plainly showcases that political institutions are not disposing of their responsibilities suitably and, therefore, looking to the state institutions to come and rescue them. Hence involvement of such situations create disproportion in state functioning especially when compared to the political institutions. According to Samuel Huntington (1991), the sources of such specific institute's interventions in politics have not only the keen interest of the officers themselves, but it is also the result of weak political institutions and low political culture of the developing countries.

4.4. Status clarification necessity

Date revealed that distinction between "Republic" and "democracy" must be truly determined and understood especially by the stakeholders. Any state business can be effectively run by understanding the basic meanings of both terms that would be helping to strengthen the democratic structure in Pakistan. Study at hand shed light on the terms "Republican" and "democracy". One of the participants (Respondents.04) commented on the essence of republican and democratic states. The republican states actually define their purposes and then work hard to achieve these said purposes, like U.S.A. and France. On the other hand, democracy is form of political system which permits the people of country to select the ruler of choice and it warrants their rights and freedom as citizens of the country.

Of course, according to the Objective Resolution (1949), the purpose of the state of Pakistan is to implement the Islamic laws and principles based on Quran and Sunnah. It also entails that only Allah is sovereign and the powers are delegated to humans as a mandate (*ammanat*). Now the question arises, has any Pakistani government ever honestly tried to achieve these goals with their state craftsmanship? If the answer is "Yes" then we can claim that we are living in the Islamic Republic of Pakistan. However, if the answer is a "No" then we must define and clarify our status as either a republican or parliamentary democracy.



4.5. Ineffective Role of political parties

Another theme that extracted from data analysis is ineffective role of political parties that largely effect democratic structure in Pakistan. One of the participants (respondent.06) recorded his view point that Role of political parties is fundamentally important in any democratic country. Unfortunately, political class today is blaming National Accountability Beauru (NAB) for a major chunk of the problems. On the other hand, these same political parties didn't amend the laws for NAB despite the fact that they have been in power for a decade. They have always used their muscle against their opponents. The same stance was upheld by a renowned journalist who articulated that it is due to the disputes and differences among the politicians, the ruling elite of Pakistan (the Judiciary) is able to interfere and ensure its participation; the room provided to Judiciary is because of the discrepancies of other institutions (Respondent.07). Another participant (Respondent 10) also expressed that the political culture of Pakistan has always been so weak that the Judiciary or another institute has been forced to intervene. The fate of the state is decided by the other institution and the President and Prime Minister are under their thumbs. This is all due to a weak democratic setup."

In Pakistan there are multiple regional parties that are not active at national level and with no effective organization in entire country. Unfortunately, defeated parties always condemn strategies of the ruling parties or by allying with parties having regional parties either form a coalition government or try to oppose the policies of government which is hazardous to democracy. Another dynamic is that political class has risen to the occasions by blaming other parties and institutions as well. Indeed, they really ailing the democratic system within their own sphere (Waseem,2016).

4.6. Interpretive role of judiciary.

Interpreting role of judiciary also came out as a main theme of the study. Judiciary is the custodian of fundamental rights of the Pakistani citizens but this is bliss for some and hurdles to other, for the reason that though it provides and ensures the fundamental rights but it also identifies the failure of government in providing those rights. Secondly, this step of judiciary ensures that it is intervening in the powers of legislature which is considered as clash of institutions resulting into failure of democracy. One of the participants (Respondent.02) added that The Judiciary undeniably plays a role and impacts the democratic process because it is the Judiciary that provides interpretations regarding constitutional impasses; when a difference of opinion arises concerning elucidation of constitutional provisions, it is the Supreme Court of Pakistan that provides the ultimate explanations and interpretations. Therefore, whatsoever judgments, judicial role or political activism that the Supreme Court, embodies or exemplifies goes a long way in shaping the direction of politics and nature of democracy of the nation. If the Judiciary is not independent, democracy will be compromised.

Constitutional Petition No.02 of 2022, regarding the defection of The Supreme court of Pakistan decided while interpreting article 63(A) that the vote of any member cast in against the any direction issued by the letter of the head of the Pakistan cannot be counted and must be disregarded, and this is so regardless of whether the Party Head, subsequent to such vote, proceeds to take, or refrains from taking, action that would result in a declaration of defection. In case of Punjab Assembly, when Deputy Speaker considering the contents of directions of the party head of the PML(Q), rejected 10 votes as casted in favor of Chaudary Pervaiz Elahi then suo-moto action was taken and it was decided to count the 10 votes in favor of Chaudary Pervaiz Elahi (Malik,2022). Article 63A of the Constitution of Islamic Republic of Pakistan is a complete code in itself, which provides a comprehensive procedure regarding defection of a member of the Parliament and consequences thereof. In case the Election Commission of Pakistan confirms the declaration sent by a Party Head against a member, he/she shall cease to be a Member of the House. As a result, thereof, his/her seat shall become vacant (Constitutional Petition No.02 of 2022).

4.7. Doctrine of Necessity

Application of law of necessity by the judiciary, extracted as a substantial evidence that how judiciary supported the martial laws on the basis of law of necessity. The Political and democratic history of Pakistan verifies and substantiates continuous periods of crises due to undemocratic and



unconstitutional behaviors of its institutions. At times the bureaucracy demonstrated excessive use of power. At others, the unconstitutional acts of the Parliament provided openings for the Judiciary to play a correcting role (Ahmad,2012).

A renowned and celebrated lawyer (Respondent 03), stated that the doctrine of necessity was articulated by Chief Justice Munir (1958) in the case of Dosso vs. the Government of Pakistan. It legitimized the martial law of Ayub Khan. And this legitimization of martial laws by the Judiciary continued in all subsequent cases as well i.e. of Yahya Khan and Pervez Musharraf. In Begum Nusrat Bhutto's case and consequent Zafar Ali Shah's case the doctrine of necessity has been excessively exercised and employed. Hence, historically, the Judiciary has always stood steadfast by the army that ultimately trucked down the democratic process throughout the history of Pakistan. Regarding this, another interviewee (Respondent 5) stated that such judicial decisions always interfered and obstructed the mechanism of democratic governance.

Adversely, history testifies that in times of need, the Judiciary been more active to protect the democratic system and norms in Pakistan. After 2007-2008 however, we find a change in disposition of the superior Judiciary as regards to the protection of democracy but, again, the best safeguard of democracy is the political structure. One of the participants(Respondent.08) stated that In instances of military takeover in Pakistan, the Judiciary has by and large sympathized and given authorization to it, knocking out the Executive and the Legislature. After 2007-2008, the superior Judiciary has started to protect democracy. Political disputes, in his opinion, should be settled by the political leaders themselves.

4. CONCLUSIONS AND RECOMMENDATIONS

The study concluded that suo moto notices and judicial activism have had on Pakistan's democracy a complicated and multifaceted impacts. When political leaders frequently approach the Judiciary for settling political matters, it plainly showcases that political institutions are not disposing of their responsibilities appropriately. Looking to the state institutions for providing assistance actually created a disproportion in the functioning of state institutions especially when compared to the political institutions.

The study explored that it is not only the discriminatory or coercive role of the institutions or negligent behavior of the politicians but various other factors are responsible for the destabilization of the democratic process in Pakistan. The proactive role that the judiciary plays in interpreting the law, safeguarding fundamental rights, and ensuring that other branches of government are held accountable is referred to as "judicial activism." Suo moto notices, then again, is a power practiced by the legal executive to take up a matter voluntarily with practically no conventional protest or solicitation.

Study recommended that judicial activism, respect for the roles and responsibilities of other branches of government must be balanced. Judiciary activism and suo moto notices have the potential to strengthen democracy and safeguard citizens' rights; however, their effects must be carefully monitored to ensure that they do not undermine democratic governance and the separation of powers.

The backlog of cases and delays in the administration of justice are the major of the problems on the part of Judicature because of deviation from its true professional role. The dire need of the hour is that judiciary must perform within the domain of legal track as defined by the Constitution of Islamic Republic of Pakistan 1973.

The legislatures ought to focus on reinforcing the Legal executive and guaranteeing its freedom, instead of endeavoring to impact or control it for political accompaniments. A free Legal executive can assume a more successful part in maintaining law and order and advancing majority rules government in Pakistan.

Today, on-going debate at various levels in Pakistan, probing as to what extent the Parliament plays its role in the selection of judges. Presently, the role of Parliament is very limited but to strengthen the judicature and ensure transparency at all levels, particularly the proper framing of infrastructure, it is recommended that the appointment process of judges should be free,

independent and transparent. Stakeholders of Pakistan, anyhow can adopt set international trends, practices and procedures in this regard and may also extract good positive lessons from its experiences..

Suo motto powers have been exercised on minor issues as well as on the reports of random tabloids (CJ.Saqib Nisar era as an example) that actually encroached the limitation of other organs. To decimate the needless exercise of the suo motto power, the term suo motto and attached discretion with it, must be defined within a clear frame and some substantial provision, sub-section or sub-clause may be added in the statutory law. Thus, though Suo motto powers must remain and must be carried out in such a way that the consecration of judicature is upheld.

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