

JUDICIAL ACTIVISM AT THE COST OF SEPARATION OF POWER IN PAKISTAN: A COMPARISON OF JUSTICE IFTIKHAR CHAUDHRY AND JUSTICE SAQIB NISAR'S ERA

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ABSTRACT

The study deals with the significant role of judicial activism in different eras in Pakistan. It examines the role of judicial institutions in damaging the democratic culture of the country. Since the independence of Pakistan, frequent military interventions were validated by the Superior Judiciary of Pakistan. The study discussed these landmark cases which dented the doctrine of Separation of Power in the county. The concept of judicial review has been originated and developed in Britain, and later reached the US in Marbury v. Madison. The history of Pakistan is marred by several instances of Judicial Activism, in which the jurisdiction of the judiciary encroached upon the domain of legislature and executive. In this study, the activism of populist Judges, Justice Iftikhar Chaurdhty and Justice Saqib Nisar has been compared. Their Judicial actions have been discussed in which the domain of the executive has been compromised. The populist actions of Judges dent the independence of the Judiciary and lead to judicial impartiality, as in several cases, different verdicts are observed in the same nature cases. The study concluded by establishing the link between Judicial activism and Separation of powers, as all organs of the states have constitutional limits to work within, The researchers also proposed some judicial reforms, that will maintain the sanctity of the Doctrine of Separation of Power while exercising Judicial Activism.

Keywords: Judicial Activism, Separation of Power, Judicial Review in Pakistan, Judicial Reforms.

INTRODUCTION

Nowadays, judicial activism has impacted every walk of Life, ranging from human rights violations to the maintenance of roads. The Judiciary is mandated to declare any law unconstitutional and invalid. Although the remedy depends upon the attributes of the judge rather than any provision of the Legal system. Democracy is founded on the theory of separation of powers between the three organs of the state. The Legislature, executive and judiciary must function within their prescribed constitutional limits. The Judiciary only steps in when other organs failed to provide and protect the rights of the citizens, this proactive role of restoring the fundamental rights of a common man are known as “Judicial Activism” or “Suo Moto” (Kishwar Munir & Iram Khalid, 2018).

The doctrine of Separation of Powers between the three organs of the state i.e., Legislature, executive and judiciary is the cornerstone of any thriving democracy. Before getting into judicial activism, it is pertinent to understand this theory of Separation of Power. In the view of Montesquieu, the merging of the diverse and separated roles of different organs of the state poses an immense risk to the autonomy of a state because it could “expose the liberty of the citizens to arbitrary control” (Vile, 1998). Thus, in order to protect the citizens from the unchecked and unfettered exercise of authority by

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one organ, the distinct parameters of the jurisdiction of all the organs must be established. This involves outlining the judiciary's precise sphere of authority within which, they exercise their powers freely.

In the words of Lord Denning, a revolutionary British Jurist, "*The role of the Judiciary is to interpret the law and mould it to meet the needs of changing time... (while remaining) outside the sphere of Politics*" (Lord Denning, 1966). In a nutshell, the Judiciary should dispense Justice without participating in law-making and maintaining an apolitical approach while deciding any legal matter.

Evolution of Judicial Activism

The existence of the notion of judicial activism is older than the inception of terminology (Michael J. Gerhardt, 2002). Before the 20th century, jurists and legal scholars had differing views on the idea of judicial activism, which was only considered as judges developing positive law (Thayer, 1891). The origin of Judicial Activism in the context of judicial review can be traced all the way back to the unwritten constitution of Britain during the Stuart period (1603-1688). In 1610, Chief Justice Coke first exercised judicial review through the activism of Justice in Britain. He ruled that the courts of law can review and declare any enacted law null and void if it violates the principles of "Common Law". The theory of judicial review given by Coke was also restated by Sir Henry Hobart in the year 1615 and by Sir John Holt in 1702. In the USA, *Marbury v. Madison* (1803) was the first case of judicial review in which an act of congress was struck down as unconstitutional. Since then, the Federal courts are exercising their authority of judicial review. The Supreme Court of the USA has declared that the federal courts can review the constitutionality of the acts of congress and declare them null and void if found inconsistent with the constitution (Kishwar Munir & Iram Khalid, 2018).

REVIEW OF LITERATURE

Judicial activism in Pakistan has been a topic of significant discussion. Newspaper articles and research papers discussed the matter several times, but there is a lack of literature regarding the comparison of the two most populist Chief Justices of Pakistan. This research explores the relation of judicial activism with the doctrine of separation of power. There is a huge literature gap on this domain of judicial activism along with a comparative analysis of two important eras i.e., Justice Iftikhar Chaudhry and Justice Saqib Nisar.

Kishwar Munir and Iram Khalid (2020) examined the Supreme Court Judgments during 2008-2013 and analysed their impacts on the social and political landscape of Pakistan. They asserted that the Superior Judiciary of Pakistan takes up constitutional cases, involving petty and inconsequential matters. This proactive role of the judiciary caused apprehensions not only in Pakistan but also at the international level. The research focused on the origin and scope of judicial impact in Pakistan and its impact on the political, democratic and constitutional process. The study concluded that the Parliamentary democracy of Pakistan is based upon the doctrine of separation of power, but the proactive approach of the judiciary is violating this principle by exceeding its constitutional limits. Strict adherence to the doctrine of separation of Power can build a strong political and democratic system.

According to Waseem (2012), the practice of judicial review is becoming more common nowadays. Initially, the scope of judicial review was limited to constitutional matters alone, but it has now extended to the affairs of governance. The study concluded that sometimes, the judiciary compels the executive to reverse its decisions taken in an administrative capacity. While in some cases, the judiciary of Pakistan validated the unconstitutional acts of dictators.

Sajjad Ahmad Jatoi, Ghulam Mustafa and Saqib Kataria (2022) conducted a case study to analyse the decisions of Chief Justice Saqib Nisar during his tenure. They initially elaborated on the concept of separation of powers and constitutional limitations of each organ of the state. Under the purview of judicial activism, the judiciary takes up constitutional matters and issues pertaining to fundamental rights and if found inconsistent with the Constitution then declares it null and void. The popular judicial actions taken up by Chief Justice Saqib Nisar were somehow the exploitation of its powers. The study concluded that his era was the extreme of judicial activism in Pakistan and such activism posed a serious dent in the democracy of Pakistan. Abdul Rasheed (2020) discussed the role of the Judiciary in the important constitutional matters of the state. The frequent use of Suo-motu power by Ex-Chief Justice Saqib Nisar highlighted the concept of judicial activism among the populace. He also critically analysed the role of Justice Saqib Nisar as a populist judge. Nauman Reayat (2021) established a relationship between judicial activism and its impacts on good governance. As judicial activism plays a significant role in shaping the political contexts of the countries but it seems to be

selective and short-lived in nature. The researchers contended that poor governance and malpractices of the executive do not allow the judiciary to surpass its constitutional limits. The research also has some suggestions for judicial reforms in Pakistan to limit the use of Judicial activism keeping intact the constitutional boundary of every organ of the state.

Judicial Activism in Pakistan

The role of the Judiciary has been offset by the rise of a new phenomenon known as “Judicial Activism”. The precise definition of the phrase is still up for debate among the legal fraternity however the definition of George W. Bush is widely accepted as it refers to it as Judges; proclivity “to legislate from the bench” (Keenan D. Kmiec, 2004). As a result, judicial activism is defined as the usurpation of executive and legislative powers by the judicial branch of the state to extend its authority.

Since the Independence of Pakistan, the higher Judiciary has actively involved itself in political issues. The first constituent assembly was dissolved by Ghulam Muhammad in 1954, and when the matter made it to the Federal Court of Pakistan, such an act of dissolution of the assembly was endorsed (*The Federation of Pakistan v. Moulvi Tamizuddin Khan* PLD 1955 FC 240). Following that, in October 1958, General Ayub Khan abrogated the first Constitution of Pakistan. Under the auspices of judicial activism and intervention in Political affairs, this case of sheer constitutional abrogation was also endorsed by the Honourable Supreme Court of Pakistan (*The State v. Dosso and others* PLD 1958 SC 533). General Ayub Khan was succeeded by General Yahya Khan in 1969, which also abrogated the Constitution. This case also reached the Apex Court of Pakistan, declaring the abrogation of the Constitution by General Yahya Khan unconstitutional and ultimately overturn it. But by the time court dismissed the abrogation of General Yahya Khan, he had already lost his position of authority (*Asma Jilani v. The Government of Punjab* PLD 1972 SC 139). Furthermore, General Zia-ul-Haq also sacked the democratically elected Government and suspended the Constitution of Pakistan in 1973; the Supreme Court of Pakistan in this case, also endorsed the suspension of the Constitution (*Begum Nusrat Bhutto v. Chief of Army Staff and Federation of Pakistan* PLD 1977 SC 657). In 1999, Following the legacy and footsteps of past Generals, Pervez Musharraf also suspended the Constitution. When the matter was taken up by the Supreme Court, the result was no different from the endorsement of the suspension of the Constitution of Pakistan, but in addition to that General Musharraf was allowed to make amendments (*Syed Zafar Ali Shah v. General Pervez Musharraf, Chief Executive of Pakistan* PLD 2000 SC 869). The history of Pakistan is marred by continuous military interventions over the realm of Government (Hamid Khan, 2010), and the cover provided by the Superior Judiciary of Pakistan proved detrimental to the development of democratic norms of the country. It demonstrates that the Judiciary of Pakistan has been involved in the political affairs of the country encroaching upon the domains and jurisdiction of the Executive and Legislature (Waseem, 2012).

Judicial Activism characterizes the extensive use of Judicial Review against the actions and policies of the executive, legislature and sometimes military. This significant use of Judicial review impacts the principle of Separation of Power in Pakistan (Justice Fazal Karim, 2019). In General Musharraf’s era, an important change was observed in the Political discourse of Pakistan as the rules of the game were redefined at the end. This change is the outcome of both coincidence and design. The coincidence in this regard attributes to the actions of Political players that led the events beyond their authority and control thus impacting Pakistan’s Political Landscape. While, the intentional design of such transformation can be attributed to premeditated actions of important national institutions such as the Pakistan Army, executive, legislature, Supreme Court of Pakistan, etc.

In the twilight days of the Musharraf regime, the leading political parties of Pakistan signed the “*Charter of Democracy*” in order to set aside the political differences against each other and to create a united front to restore democracy in the country. Aside from the political agreement between PMLN and PPP, the relationship between the Supreme Court of Pakistan and the Pakistan army was also extremely turbulent. This breakdown led to the removal of Chief Justice Iftikhar Chaudhary by General Pervaiz Musharraf, the then-Chief Executive of Pakistan.

Judicial Activism in Pakistan has its roots in the Lawyer’s Movement of 2007, which strove to reinstate Mr Iftikhar Chaudhary, the then Chief Justice of Pakistan. He was dismissed during the dictatorial regime of General Pervez Musharraf. As a result, when lawyers entered into the murky domain of politics, it was the first sign of resistance against the authoritarian regime. After this struggle and movement by the lawyers and political parties, they succeed to restore Iftikhar Chaudhary but after

his reinstatement, he redefined the rules of the game among parliament, SCP and the military. This change was evident through the activist approach in the form of bold decisions in political cases.

However, the situation further deteriorated when CJP Iftikhar Chaudhary, after his reinstatement dismissed over 110 judges with a single stroke of his pen, because they refused to tender their resignation after he was ousted as CJP. This act demonstrates that the judicial activism in Pakistan is willing to damage the democratic process to further their ultimate political aspirations along with suppressing any dissent within their ranks. According to Article 209 of the Constitution of Pakistan, the procedure prescribed to remove a judge of higher courts contains the process of removal of judges of higher courts. A report is presented to the Supreme Judicial Council, which decides whether sufficient evidence of mental incapacity and misconduct is available to remove a judge from his position.

The Suo Motu Powers

The proponents of Judicial activism claim that the judiciary only aims to safeguard the rule of law in Pakistan, but the precedents and recent developments in the country demonstrate that the Judiciary is trying to widen the scope of its jurisdiction and to support its political allies to settle their personal scores.

Judicial Independence has been achieved after a long struggle in Pakistan, yet judicial impartiality is a matter of great concern. It can be attained if the Higher Courts use their Suo-motu powers on actual socio-legal problems rather than politically charged cases. In order to understand this judicial prerogative, it is essential to understand the limitations of suo motu power exercised by the Supreme Court of Pakistan.

Under Article 184(3) of the Constitution, the supreme court of Pakistan exercises its original Jurisdiction to hear cases on its own often referred to as Public Interest Litigation. To invoke article 184(3) there are two prerequisites which must be fulfilled (Justice Fazal Karim, 2018).

1. The matter in question must be of Public importance. And;
2. There is a violation of a fundamental right as enunciated in the Constitution.

The Constitution of Pakistan provides the procedural requirements to invoke the Judicial Powers of Judicial review, however, the judiciary has relaxed these requirements to “*make general recommendations*” to other organs of the state (Shayan Manzar, 2021). According to leading legal experts, the judiciary primarily imposes its will over state institutions under the disguise of protecting fundamental human rights.

In fact, these viewpoints have found credence within the judicial circles, as in *Chief Justice Iftikhar Chaudhry v President of Pakistan*, Justice Ramday admitted that “*Courts are (more) inclined to extend their jurisdiction instead of Curtailment.*” This blatant admission of judicial intervention further cements the criticism of adversaries of Suo moto powers (Kishwar Munir & Iram Khalid, 2018).

Justice Fazal Karim elaborated that the superior judiciary not only disregards the doctrine of separation of powers but also exercises “*subversion of the constitutional mandate*”(Justice Fazal Karim, 2019). However, the Judiciary has not been alleged with extra-constitutionalist behaviour in the country’s 75-year history.

Encroaching upon Executive and Legislative Domains

In order to understand the significance of such accusations, one must analyse the Suo motu legacy that Iftikhar Chaudhry left behind. During his tenure as a Chief Justice, he not only asserted judicial authority in petty matters but also took suo motu of the cases in which the Apex court had never intervened before (Shayan Manzar, 2021). At its zenith, Chaudhry’s court started dealing the trivial issues ranging from regulating the prices of street food to the taxation on mobile services (Umair Javed, 2021). Following his legacy, the successor of the office of the Chief Justice of Pakistan, Justice Saqib Nisar also committed these judicial acrobats by involving the apex judiciary to address the water crises of Pakistan.

Justice Saqib Nisar’s inclinations as Chief Justice have brought him into conflict with the political elite of the country. For instance, while taking the suo motu of dual nationality of Politicians, there were public outcries against the political ambitions behind this action (Hasnaat Malik, 2021). His activism, however, extended beyond condemning the political establishment of the country for maladministration or spreading awareness of water scarcity. In an effort to remind the nation of his role as the proverbial “grandfather”, he visited hospitals in a Mother-Teresa-like manner. (Atika Rehman, 2019).

Regrettably, neither Justice Saqib Nisar nor his predecessor realised that this encroachment upon the authority of the executive and legislature rendered more harm than good to the country. These interferences not only undermined the role of elected representatives and parliament but also placed the Judiciary on the verge of criticism on accounts of interference within the political amphitheatre (Umair Jamal, 2018).

Compromising Judicial Independence

The populist tendencies and willingness of the Judiciary in Pakistan to accede to the whims and wishes of the people give validity to the claims of judicial impartiality. Former Chief Justice of Pakistan, Justice Jawwad S Khwaja once defined the honourable judges of the Superior courts as “*the representatives of the will of the people*”(Yasser Kureshi, 2019). These viewpoints are detrimental to the parliamentary democracy as the political mandate of the will of the people vest in parliament is undermined by the judiciary and the likelihood that the court will rule in the favour of the majority is increased.

In *Allah Wasaya Case* (PLD 2019 Islamabad 62), the Islamabad High Court decided the case pertaining to the religious identity of the “*Ahmadi faith*” according to the populist views of Sunni Ulemas. The court forbade the disciples of the Ahmadi faith to conceal their identity compromising their fundamental right of religious liberties to favour the majority or populist opinion. Such decisions by the Court of law, influenced by the motive to appease the populist discourse are detrimental to the marginalized and underprivileged segments of the country having little or no influence over populist rhetoric. Therefore, Activist judges sometimes overlook their fundamental responsibility of safeguarding the rights of the oppressed against authoritarian forces by falling victim to the whims of the populist narrative (Yasser Kureshi, 2019).

One of the fundamental issues associated with judicial activism is biased rulings or prejudicial proceedings. It has been observed by the researcher that often the activist judges have imposed comparatively harsher punishments in the cases of their “ideological foes”, while their cronies go scot-free. A significant contrast can be made between the judgment of the Islamabad High Court over derogatory and contemptuous remarks by Talal Chaudhry and Former Prime Minister Imran Khan.

Imran Khan, in an address to the nation, expressed that the Courts in Pakistan treat the rich and poor differently, however, the Islamabad High Court ruled that these comments were “Mere Criticism, not contempt”(Tahir Naseer, 2019). On the contrary, when similar remarks were given by Talal Chaudhry, the court decided that such statements are not only contemptuous but it also “scandalized the court”, thus Mr Chaudhry faced harsh punishment (Tahir Naseer, 2019). These disparities harm the public perception of judicial impartiality in Pakistan (Asfand Yar Katchela, 2022). Moreover, the removal of Nawaz Sharif from the office of Prime Minister is an ideal example of judicial victimization of their “ideological foes”.

Judicial Activism in CJP Iftikhar Chaudhry’s Era

In order to change the historical trajectory and public narrative of the Supreme Court, CJP Iftikhar Chaudhry vigorously exercised the authority under Article 184(3) to fulfil public desires and support his political allies. After his restoration, the Supreme Court initiated a plethora of Suo-motu proceedings on varying issues under the authority of Judicial Review. However, most of the cases taken up by the Chaudhry’s court were beyond its domain and fell within the purview of legislative and administrative authorities. The Court questioned the agreement between the Multi-professional cooperating housing society and the Capital Development Authority (CDA) regarding the development of the E-11 Sector of Islamabad. The court rules some provisions of the contract illegal and directed the Capital development authority to complete the development project. Although the issue was the sole discretion of administration and governance, the court found space for its intervention to assert itself in governance-related matters and compelled desired changes in the contract within the prescribed time limit. It is the responsibility of the executive to ensure the implementation and consistency of contracts but the interference of courts in such matters encroached on the executive domain, significantly denting the doctrine of separation of powers.

In an attempt to extend their Judicial Authority, the era of CJP Iftikhar Chaudhry is marred with various instances of executive encroachment. The Supreme Court took Suo-Moto to probe the corruption allegations in the Annual Hajj program in Saudi Arabia (*Suo-Motu case No 24 of 2010(2011)* PLD SC 963). It came out that public officeholders and government officials committed malpractices during Hajj (pilgrimage) program and the Court ordered to arrest of the Federal Minister for Religious Affairs Hamid Saeed Kazmi on account of his malpractices for not providing appropriate

accommodation and arrangements to the Pilgrims under Hajj Program. The Supreme Court of Pakistan, under the leadership of CJP Iftikhar Chaudhry also took cognizance of rampant corruption in Pakistan Steel Mills. In 2008-2009 alone, Pakistan Steel Mills suffered a huge loss of 26 Billion rupees (Khan, 2009). The Supreme Court of Pakistan directed Federal Investigation Agency (FIA) to forward this case to National Accountability Bureau for investigation and prosecution (*Suo Motu Case No 15 of 2009* (2012) PLD SC 610). Although the issue was related to bad governance and accountability, the court directed to initiate the investigative proceedings, which was beyond the Court's Jurisdiction. Iftikhar Muhammad Chaudhry exploited the Contempt of Courts Act to prosecute political adversaries, which led to the disqualification of democratically elected Prime Minister Yusuf Raza Gilani. The ousting of the elected prime minister by the appointed Chief Justice arose a political crisis in the country. He also ruled over a number of cases involving Politicians, Military Generals and Media Tycoons (Moeen H. Cheema, 2016).

Politicians, on the other side, also resorted to judicial solutions for the settlement of Political disputes like the "Memo-gate scandal" and petitioned Supreme Court to issue directions to the government to investigate the matter. Similarly, the Pakistan Army was charged with illegally and forcibly detaining thousands of people in the war against terrorism. This resulted in the submission of mercy petitions before the Supreme Court of Pakistan, which became known as, "*The Missing Persons' Case*". Taking advantage of the chance, the Supreme Court of Pakistan, headed by Justice Iftikhar Chaudhry, decided to adjudicate this matter because it included the Generals of the Pakistan Army. The willingness of the court to adjudicate this matter appears to have been driven by Justice Iftikhar Chaudhry's personal grudge and grievance against Pakistan Army. It enabled Justice Iftikhar Chaudhry to compel the presence of serving and retired generals in the court (Cheema & Gilani, 2015). Ideally, the issue of *Missing Persons* could have been settled outside the court or should have been resolved by District and Sessions Court or High Court, but instead, it was taken up by the Apex Judiciary of Pakistan. Although the intervention of the Supreme Court appears appropriate it also highlights fissures in the governance system of the country.

Judicial Activism in CJP Saqib Nisar's Era

Justice Saqib Nisar served as the 25th Chief Justice of Pakistan from 31st December 2016 till the 17th of January, 2019. This was possibly the first time in the history of Pakistan when the Chief Justice also heard the cases on weekends. The Primary concern of Justice Saqib Nisar was "health, education, water and population control". In the Lahore Registry, he ruled over a plethora of cases of public interest. Justice Nisar resolved cases of public importance along with the inspections of prisons and hospitals.

Justice Saqib Nisar started a campaign to seek funds to build dams in Pakistan, and despite the reservations of different strata of society, the public applauded him for bringing up the issue of water scarcity in Pakistan (Ibrahim Yahya & Hasnaat Malik, 2019). It is noted that his "judicial activism" has overwhelmed his previous pro-parliamentary and executive approach termed as "judicial restraint". One he claimed at a literary festival that the purpose of fund donations is not intended to build dams but to aware the masses (Atika Rehman, 2019). He was sceptical of the requirements of judicial review under Article 184(3) of the Constitution, but afterwards, become a fervent supporter of exercising suo-motu powers (Yasser Kureshi, 2019). He believed in the independence of the Judiciary and judicial supremacy (Ibrahim Yahya & Hasnaat Malik, 2019) and was strict with media officials and political leaders. However, his orientation towards military rule did not observe any shift but one school of thought criticised him for undermining civilian supremacy. On the other hand, the second school of thought believed that he highlighted the corruption of the political elite of the country.

Compared to CJP Iftikhar Muhammad Chaudhry, who questioned General Musharraf's authority and wrangled against the government while resolving pertinent issues such as declaring the "National Reconciliation Order (NRO)" unconstitutional, taking up memo-gate scandal and cases of missing persons, the CJP Saqib Nisar also resolved the matters of greater public importance keeping him ahead of contemporaries Chief Justices.

One of the important issues addressed by CJ Saqib Nisar during his apparently decent career was the water crisis. Undoubtedly, Pakistan's water reserves are depleting significantly and research has raised concerns, but tragically no one paid attention. Justice Saqib Nisar popularised the water issue among the masses through his speeches and also aided in the creation of a fund for the construction of dams. He not only urged Pakistanis to donate vehemently to this cause but also travelled to England for fund-raising dinners. Some segments of the state criticized that this activism does not fall within the

jurisdiction of the judiciary, but Justice Saqib Nisar threatened to prosecute these opponents under Article 6 of the Constitution (Ameena Tanveer, 2019).

Justice Saqib Nisar was a populist judge who had done anything to keep himself as a saviour of the public at large while avoiding restructuring and reforming his institution. As a result, the number of pending cases increased to more than 40 thousand in 2018, as compared to 38 thousand in 2017, before the Supreme Court of Pakistan. Moreover, the number of cases pending before the subordinate or lower courts reached millions. The opponents asserted that despite holding the office of Chief Justice for more than two years, he failed to reform and restructure Judiciary but merely relied on taking *Suo-motu* actions (Ameena Tanveer, 2019).

The era of Justice Saqib Nisar will be remembered because his judicial activism not only intervened in the authority and domain of the executive but also disturbed the political leadership of the country through contentious rulings. He significantly encroached upon the jurisdiction of other organs of the state, posing a detrimental impact on the doctrine of separation of Power.

Judicial Activism and the Doctrine of Separation of Power

The Separation of Power addresses the mutual relations among the three organs of the state i.e., legislature, executive and judiciary. The idea dates back to the era of Plato and Aristotle. Aristotle was the first philosopher to divide the functions and duties of the Government into magisterial, deliberative and judicial classes. John Locke also divided the Government's powers into three categories such as discontinuous legislative power, continuous executive power and federative power. Montesquieu also elaborated on the principle of separation of power in his book (Montesquieu, 2002). Several countries around the world do not recognize the idea of separation of power because it is very rigid if applied in its true sense. According to Montesquieu, the prime objective of this doctrine should be the adherence to rule of law instead of the personal biases of the officials while running the affairs of the state. The doctrine also emphasises the independence of the judiciary, and it should be free from the interference of other organs in order to deliver justice effectively. Although the constitution of Pakistan outlines the jurisdiction of different organs of the state, the doctrine of separation of power is not present in Pakistan in a strict sense.

The activist approach by Chief Justice Chaudhry and Justice Saqib Nisar in most of the cases asserted a dominant position of the Supreme Court in the National Politics of Pakistan. However, Article 68 of the Constitution of Pakistan outlaws the discussion and debate on the judicial conduct of Judges of the High Courts and Supreme Court. In a similar vein, under Article 69 of the Constitution of Pakistan, the proceedings of the Parliament are exempted from the Courts' Jurisdiction. But the Supreme Court of Pakistan intervened in the parliamentary proceedings in several instances, as recently it ignored and overlooked the ruling of the Speaker of the National assembly regarding the disqualification of an elected Prime minister on accounts of contempt of court. Subsequently, the elected prime minister was convicted and disqualified by the Supreme Court. Such disqualification polarized the public and political classes into two schools of thought. According to one school of thought, the Supreme Court went too far in terms of judicial activism to disqualify an elected Prime minister and misused its constitutional powers to gain dominance over the executive and Parliament. While the other school of thought contended that the decision was just and fair because the executive and legislative branches have failed significantly to perform their duties efficiently towards promoting good governance, preserving the constitution and providing service delivery to the citizens. Resultantly, the Supreme Court has invaded to resolve the social and political crises of the country.

The Supreme Court of Pakistan, through their rulings intended to convey the message of rule of Law, equality before the law and constitutionalism to the public of Pakistan. Unfortunately, when it comes to applying similar standards to the conduct of Judges and institutions as a whole, the Apex Court and High Courts have been selective and inconsistent. The doctrine of separation of power has been compromised by the judicial branch for a very long under the auspices of judicial activism. In a politically and economically fragile nation like Pakistan, their role as a guardian of the constitution is essential to promote rule of law, democracy, good governance and constitutionalism, but their contribution in this regard is negligible. Therefore, it is pertinent to evaluate and analyse their decisions in Constitutional and public interest litigations, in which the Judiciary has invaded the domain of the executive and legislature.

The proactive involvement of the Supreme Court in the affairs of state and public policy has prompted significant questions on the constitutional role of the Supreme court, and its domain of

authority in social, political and economic issues of Pakistan. The research critically analysis the recent trends of Judicial activism and its impact on the doctrine of Separation of Power.

Judicial Reforms

The Judicial institutions in Pakistan will ultimately lose their last vestiges of Public faith if assertive actions are not taken against these expansionary proclivities. Thus in order to reinstate the Public faith in the impartiality of judicial institutions, and to prevent the exercise of extra-constitutional authority, it is pertinent to revise the existing judicial structure of Pakistan.

- First and foremost, the Higher Judiciary of Pakistan must adhere to the procedural and constitutional requirements regarding the use of Suo-moto powers. This lenient interpretation of Suo-moto allowed the Higher Courts to widen its jurisdiction from “arbiter of law” to “arbiter of Political questions”(Shayan Manzar, 2021). The issue can be addressed by enacting laws that restrict the use of Suo moto powers and only allows them to be used when any pertinent question of law arises.
- Secondly, judicial impartiality cannot be ensured without Judicial Transparency, thus it is pertinent to emphasize the promotion of transparency in judicial decisions of Higher Courts in Pakistan. The judgements passed through obscure mechanisms are likely to raise doubts about their impartiality. Similar to that, it is necessary to make the appointment process of Judges transparent. This can help to disprove any misconceptions about affiliations and preconceived political biases of the Judges and will eventually increase the credibility of judicial decisions.

The Implementation of these reforms can significantly enhance the stature of the Judiciary in the Public domain. Nowadays, the judicial institutions of Pakistan are facing a dearth of public trust and confidence, thus it is the right time to reinstate the perception of judicial independence and impartiality. In light of the above research, it can be concluded that judicial activism has seriously undermined the notion of an impartial and independent judiciary.

The Judiciary’s growing lust for power and influence amalgamated with political motives has raised serious doubts about its competence to adjudicate impartially and fairly. This might lead to a severe deficit of Public confidence in the integrity of these institutions, thus immediate actions shall be undertaken to prevent the unwarranted expansion of judicial prerogative. Therefore, it is essential to implement judicial reforms to limit such activist tendencies and to maintain the reverence between public and judicial institutions.

CONCLUSION

Pakistan is a parliamentary democracy where the doctrine of separation of power is a fundamental cornerstone. It is essential to ensure constitutionalism in a country in which principles of equality before the law, rule of law, and independence of judiciary prevail. The judiciary exercises the power of judicial review, and this tool acts as a check and balance on the functioning of the executive and legislature. The poor governance system can be attributed to a dysfunctional conflict resolution mechanism to fix such pertinent governance issues. Resultantly, the Judiciary intervenes in the functioning of the state to resolve the disputes of fundamental rights and in other constitutional matters.

In Pakistan, the Higher Judiciary has intervened several times in matters of governance and compromised this doctrine of Separation of Power. Many a time, it validated the unconstitutional acts of military dictators and took suo-motu on petty matters. Consequently, the Supreme Court of Pakistan has been severely criticised for adopting Judicial Activism to resolve the country’s governance problems. The apex court also faced criticism for failing to address and resolve the deep-rooted systematic problems in the Judicial System of Pakistan. It lacked to formulate Policy guidelines to eradicate the backlog of cases, rampant corruption, and delay in the administration of Justice at all levels of the judicial hierarchy. The role of the Supreme Court in cases pertaining to the political affairs of the country since 1947 is also debatable and controversial. Spanning from the decision of the Moulvi Tamizuddin case to Zafar Ali Shah’s case, the Supreme Court validated the undemocratic and authoritarian regime in the country leading to political instability.

The comparison of two populist judges, Justice Iftikhar Chaudhry and Justice Saqib Nisar shows that their activist approach significantly encroached on the jurisdiction of the executive many times. The former Judge tried to take revenge on the institutions that play their part in his dismissal. His approach to Suo-motu and judicial activism maligned the credibility, integrity and partiality of the Supreme Court. But the legacy continued by the later judge was no different. He favoured political

parties, and interfered in the functioning of the administration and executive, but failed to reform the judicial structure of the country. In his era, the number of pending cases increased significantly.

From the above discussion, it can be concluded that judicial activism or judicial review is an important mode of Check and balance by the judicial organ of the state. But judicial activism cannot be allowed at the cost of judicial impartiality, and separation of Power. The suggestions should be considered to streamline the process of judicial review keeping intact the constitutional limits of the executive and legislature.

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