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Judicial Activism in Pakistan: Causes and Implications

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Article Information Received: June 01, 2023 Revised: July 22, 2023 Accepted: July 23, 2023 Available Online: July 30, 2023	Abstract <i>The objective of this paper was to take an overview of the causes and implications of judicial activism in Pakistan. Judicial activism has been a prevalent phenomenon in Pakistan since its inception. In the recent past, the judiciary assumed a proactive role in shaping the political and social landscape of the country. The Doctrine of Judicial Review imbibed in the Constitution and its frequent use have implications for the judicial system, legal justice, good governance, and the balancing of powers among various organs of the government. The main research query was; How judicial review does essentially works, and what are the motives and effects of such an excessive use of judicial authority? The research adopted the qualitative research methodology, while data were collected from both primary and secondary sources. For the analysis of the data, the thematic analysis technique has been utilized. The study explored that political instability, weak democratic institutions, and a lack of trust in other state institutions have contributed to judicial activism. It is found that judicial activism has negative and positive implications for the rule of law, democracy, and the judiciary itself. It is suggested that a balance must be struck between judicial independence and respect for other state institutions.</i>
Keywords Judicial Review Suo Moto Judicial Restraint Judicial Overreach Locus Standi Separation of Powers Arbiter	
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1.1 Introduction

Under the Constitution of Pakistan, the principal liability of the state is ensuring justice, liberty, equality, and fraternity for its people. The fundamental rights of individuals and their implementation in line with the Directive Principles of State Policy is one of the key obligations of the state and its government. To make sure that the state cannot evade its responsibilities, the constitution and law have conferred inherent powers on the courts to review the state's actions. This is the real context where the judiciary is supposed to perform its obligations as protector and guardian of the Constitution (Constitution of Pakistan, 2018, pp. 199 & 184).

In compliance with her constitutional mandate, the judiciary has been playing an active role in the enforcement of fundamental rights. Actions or inactions of the state that are considered by the judiciary as unjust, unreasonable, and unfair are examined on the touchstone of the provision of the Constitution. In order to achieve the very end of safeguarding human rights, the judiciary has come to the stage of judicial activism. It has taken into account matters ranging from the rights of working women to implementing the principles of natural justice for attaining the goal of sustainable development. This proactive role of the judiciary in touching almost every aspect of life has proven to be beneficial for neglected segments of society since, the principle of '*Locus Standi*' has been relaxed and shifted to Public Interest Litigation (PIL) (Asghar, 2011).

The power to make laws is an exclusive prerogative of the legislature; enforcement rests with the executive while interpretation of the law is the domain of the judiciary (*Principle of Trichotomy of Powers*). The superior judiciary is mandated to interpret the statutes and provisions of the constitution, according to the rules of language, acting as courts of law (*Literal Rule of Interpretation*). However, in the event of failure of justice, the courts may go beyond literal construction and interpret the law keeping in view the intent of the legislature and the ends of the law (*Golden and Mischief Rules of Interpretation*). Here, courts act as the "Courts of Justice" rather than the courts of law. The judges, while looking into the very objectives of law apply their legal wisdom which paves the way for judicial activism with its multifarious manifestations.

Judicial activism is defined in Black's Law Dictionary as, "philosophy of law-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions". The expression "a philosophy of law-making" has widened the sphere of the judiciary and enabled it to make laws instead of acting merely as an interpreter of law. Our jurisprudence has been influenced by the Latin maxim, "*Fiat Justitia Reticulum*" (let justice be done through Heaven's fall) (Awan, 2014). It connotes that justice should be dispensed with irrespective of what the consequences may be. It has allowed judges to apply their wisdom in expounding the true meanings of law and in such a pursuit, the opinions of individual judges often become precedents for their future compliance. As a matter of this corollary, judicial activism can be understood to mean decisions of judges making precedents wherein they prefer their wisdom over the verbatim of law on policy matters which is otherwise beyond their jurisdiction. This has led to controversy between legislature and judiciary on the one hand and executive and judiciary on the other (Manzar, 2021).

History presents a gloomy picture of a power struggle among the state institutions in Pakistan. The repeated undemocratic moves of dissolving the elected assemblies by the military or bureaucratic establishment with judicial support, and the ouster of elected chief executives by the judiciary, can be witnessed throughout the political history of Pakistan. In the recent past, judicial interventions in the domain of executive and legislature have been frequently witnessed. From core constitutional issues to political decisions, from fixing prices of consumer goods to crime scenes, the superior judiciary has been taking suo moto without any restraint or constraint in the name of glorifying rhetoric of enforcing fundamental rights. The judiciary seems not only active but at times pro-active even to undo what it deems fit to be nullified.

Judicial Activism has become a practice around the world particularly in the developing countries of Asia. But judicial activism in Pakistan is more common than the other democratic states, which has changed the mode of judicial activism to judicial excesses. This judicial activism is divided into two categories, i.e.; limitless jurisdiction of the interpretation of Article 184 (3) and the interference of the Supreme Court in the political decisions of the country (Kamal, 2019). In Pakistan, judicial activism has seen many phases but in the era of the former Chief Justice Saqib Nisar, judicial activism was in full swing. The reason behind the increased

judicial activism is the worst performance of governments/legislatures. In Pakistan, judicial activism can be observed in two phases; one is to make the rule of law applicable by mediating in governmental affairs and the other is to protect the constitutional fundamental rights of the people which other institutions of government have failed to provide (Waseem, 2020).

The history bears testimony to an upthrust in judicial activism since the Musharraf era. By taking suo moto actions without any restraint, the superior judiciary has been overtaking almost all affairs into its hands. In this pursuit, the supreme court has struck down amendments to the constitution, legislative enactments as well as commercial engagements made by the government of Pakistan with foreign investors comprising billions of dollars in investment (Siddique, 2011). Implications of such judicial notices are not less significant to be overlooked.

Suo Moto (action taken by the court on its motion), is a power derived by the supreme court and high courts from articles 8, 184, and 199 of the Constitution (2018), under the doctrine of implied powers to safeguard fundamental rights. Whenever suo moto actions were taken, stratified opinions were witnessed. Superior judiciary got popularity among the masses where it acted to enforce fundamental rights. However, decisions like the ouster of elected prime ministers, validating extra-constitutional coups, and unnecessary interference in the domain of the other organs have had far-reaching impacts on the democratic journey of Pakistan (Bazmi, 2022).

This study attempts to understand the phenomena of judicial activism embedded in the doctrine of judicial review and manifested in the disguise of *Suo Moto*. The paper aims at analyzing the underlying causes and implications of the activist role of the judiciary. The organization of the study is designed to cover an epistemological survey of literature on judicial activism, its historical context, and current wave to present a holistic overview of the whole phenomena. The objectivity of the study is reflected in exploring the causes, and implications and suggesting the way forward by bringing to the surface various strategies, recommendations, and proposals for reforms.

The paper begins with an introduction explaining the issue and the methodology to deal with it. Glimpses of the available literature have been depicted in the literature review. The body contains a detailed discussion on the origin, evolution, causes, and implications of judicial activism. In the end, a conclusion was drawn together with the proposed reforms, furnished by experts and international forums.

1.2 Research Questions and Research Objectives

The research questions for this study are:

1. What does judicial activism mean and wherefrom has it originated?
2. What is the history of judicial activism in Pakistan and how can we trace its underlying causes?
3. Why and when is it perceived to be good and how far judicial activism is detrimental to the rule of law, democracy, and the judiciary itself?

This study is significant because it contributes to the existing literature on judicial activism in Pakistan. It helps to understand the reasons behind the prevalence of judicial activism and its impact on the country's political and social landscape. The study can provide valuable insights for policymakers, academics, and researchers who are interested in the topic.

The present study aims at focusing:

1. To investigate the phenomena of judicial activism as an academic pursuit.
2. To bring forth meanings and perceptions related to the legal terms, “Judicial Review, *Suo Moto*, Judicial Restraint, and Judicial Overreach”.
3. To make probe into the reasons for hyper-activism prevailing in the judiciary.

4. To know whether the current wave of judicial activism is a threat to the democratic process of Pakistan.
5. To put forward in a consolidated form, recommendations for the way forward.

1.3 Literature Review

Various research works have been undertaken to unfold the phenomena of judicial activism, especially after 1990, the post-Darshan Masih era. A lot of work has been evaluated to make a true comprehension of the application of Article 184(3) by the August Supreme Court. Most significant judgments of superior courts have been taken into account while undertaking this study and effort has been made to draw out findings, based on sound, authentic and reliable sources.

Akhtar (2022) in his research article, “*Suo Moto Action, Discretionary Power of the Chief Justice of Pakistan*”, highlights the significance of the suo moto power of CJ and its implications on the judicial system. He identifies flaws in the use of this authority and suggests ways to address it. Bazmi (2022), in her research paper, “*Politico-Judicial Activism in Pakistan: A Historical Overview*”, contends that the constitutional and political history of Pakistan bears testimony to the murder of political rights by the state institutions. The frequent anti-democratic actions like the dissolution of Assemblies by the civil and military bureaucracy with support from the judiciary a gloomy picture of the politico-legal history of Pakistan. She has examined the phenomena historically, by dividing the whole period into three eras: “*Pre-Darshan Masih, Darshan Masih and Post-Darshan Masih*”. By applying the theory of ‘Separation of Powers’, Bazmi concludes that the principal reason behind the fragile democracy of Pakistan is the striking imbalance among the state institutions.

Munir and Khalid (2018) have researched, “*Judicial Activism in Pakistan: A Case Study of Supreme Court Judgments 2008-13*”, wherein, they hold that with the repeated use of judicial activism, the supreme court seems to have taken up almost all matters in its hands. They conclude that it is against the very spirit of parliamentary democracy where the judicial organ seems dominating.

Another study by Manzar (2021) with the title, “*A Concoction of Powers: The Jurisprudential Development of Article 184 (3) Its Procedural Requirements*”, tracks the original jurisdiction of the Supreme Court by evaluating as many as 941 cases from 1973 to 2019. The study is consolidating one, targeting the emergence of suo moto power despite its textual absence in the provisions of the constitution.

Awan (2014), in his research work, “*Judicial Activism in Pakistan in Commercial and Constitutional Matters: Let justice be done through the heavens fall*”, describes that the excessive usage of Suo Moto causes serious concerns as to its legality, effectively, need as well as its impacts on international obligations of the Government of Pakistan. This work appraises the rationale of judicial activism; its foundation and significance concerning public interest litigation in the furtherance of fundamental rights.

Waseem (2020), in his scholarly work (Doctoral Dissertation), “*Judicial Activism and Policy Making Process in Pakistan, 2001-2014*”, finds as a result of his research that the prevailing contention of excessive intervention of Supreme Court in the domain of other state institutions with its negative impacts is not sound. He concludes that notwithstanding certain exceptions where decisions were suspicious as to judicial excesses, mostly the courts have acted as guardians of the fundamental rights of the citizens.

International Commission of Jurists’(ICJ) Report, “*Authority without accountability: The search for justice in Pakistan*”(2013) presents a detailed account of the exercise of original jurisdiction of SCP, its role in validating military coups, failure to provide justice, human rights violations and lastly, the report furnishes recommendations for the way forward. To Cheema, the apex courts have become political institutions due to wholesome political issues and constitutional controversies (Cheema, 2018).

Sultana (2012) in her work, “*Montesquieu's Doctrine of Separation of Powers: A case study of Pakistan*”, identifies that the 1973 constitution of Pakistan prescribes upholding the

principle of separation of powers but the doctrine has never seen its compliance throughout the history of Pakistan.

All the literature examined during this work manifests this reality that all such efforts are piecemeal; either they are time specific or most of them cover any one of the aspects of judicial activism. This paper attempts to fill this gap. The novelty of this paper is its primary goal to study the issue with a retrospective context and suggest prospective remedies.

1.4 Research Methodology

A qualitative research method has been utilized here in this study for exploring the phenomenon under study. This approach allows an in-depth probe of a specific issue or phenomenon, with the objective of getting a deeper understanding of its causes and implications. Data has been collected by reviewing scholarly works and the Case Law that help to appraise, find and synthesize data. The documentary analysis approach has been utilized. Documentary analysis is an organized process of reviewing and evaluating printed and electronic documents. This approach helps a political scientist in interpreting specific events. Documentary analysis is visual, written, or oral material that provides information about social change and human behavior (Mangal, 2013). In documentary analysis, the purpose is to select the data instead of collecting the data (Rappley, 2007). In qualitative research, data is explained, interpreted, and inspected in order to obtain knowledge and gain understanding (Strauss, 2008). The thematic analysis technique, which involves identifying patterns and themes in the data, and interpreting their meaning in relation to the research questions, has been adopted for data analysis in this study. The flexible element in qualitative research furnishes an opportunity to transform existing ideas (Silverman, 2011). Case Law has been analyzed, appraised and evaluated in terms of its implications so as to draw logical conclusions.

1.5 Meanings, Origin, and Evolution of Judicial Activism

The term, “judicial activism” is an antonym of the term, “judicial restraint.” These terminologies are used to represent the assertive nature of judicial power. Usage of these expressions denotes courts leaning towards either of the opinions to play their proper role. Some other terms like, “judicial supremacy”, “judicial absolutism”, and “judicial anarchy”, are used interchangeably, in the USA for “judicial activism”.

Black’s Law Dictionary defines judicial activism as, “a process of the formulation of law where judges resort to their reasoning while deciding the matters of public interest litigation”. This definition provides the judges an opportunity to adopt personal opinions and apply individual wisdom in interpreting the law. According to the Encyclopedia Britannica, “judicial activism is an approach to the exercise of judicial review, or a description of a particular judicial decision, in which a judge is generally considered more willing to decide constitutional issues and to invalidate legislative or executive actions”.

‘Judicial activism’ has no statutory definition hence, it has various definitions and meanings expressed by jurists and legal scholars. Those who favor it, regard it as an appropriate exercise of judicial review. Contrary to such a claim, Thomas Jefferson is referring to it as, the “despotic” power of “Federal Judges”. According to V.D. Kul Shrestha, “judicial activism occurs when the judiciary is charged with actually participating in the law-making process and subsequently emerges as a significant player in the legal system” (Kulshrestha, 1977)

Waseem (2022) is of the view that as per prevailing notions, the term, “judicial activism” is spoken of correcting the faults of the executive by the judiciary while using democratic authority prescribed in the constitution. He further holds that ‘judicial activism’ authorizes judges to perform their obligations as “policymakers and trustees” for the protection of the rights of citizens. In common parlance, this power refers to the pro-active role of the judiciary in addressing the loopholes left by the legislative and executive pillars to ensure coordination more efficaciously (Sultana, 2012)

‘*Activism*’ is a term used in academic research as well as political rhetoric. In academia, ‘*activism*’ commonly signifies only the inclination of a judge towards striking down administrative actions and enactments or overruling previous judgments of courts without having

regard as to the correctness of such a decision. Activist judges get their judgments enforced notwithstanding any contrary view of other branches of government (Bazmi, 2022) Considering this definition, “*activism*” is quite opposite to “*restraint*”. The foregoing discussion makes it clear that judicial activism is a broader concept. The meanings of the phrase are ambiguous and leave no room for a single precise and comprehensive definition.

The proper role of the judiciary has been the subject of debate since the time of the founding fathers of the American Republic. The word, “*judicial activism*” has been coined by the American historian, Arthur M. Schlesinger, in his article published in ‘*Fortune*’ in the year 1947 (EB, 2023).

Judicial activism stems from judicial review which is manifested in *Suo Moto* as an overreach and is contrary to judicial restraint. All these legal expressions have their particular legal meanings and implications; hence their detailed explanation becomes imperative at this stage.

It is a doctrine about the power of the judiciary of ascertaining the validity and legality of laws on the touchstone of the provisions of the Constitution. It is an exercise of constitutional authority by the judiciary whereby actions of the legislature and executive are reviewed. It determines:

1. The validity of any primary or subordinate legislation because of constitutional parameters.
2. The lawfulness of a decision, action, or inaction of a person or body importing a public function (Tariq, 2020).

1.6 Historical Perspective of Judicial Activism in Pakistan

A holistic view of the historical background is imperative to make a rational point of judicial activism and its impacts on democracy and the conditions of the rule of law. For a successful democracy, each organ of government including the judiciary, bureaucracy, and military plays an active role which ultimately strengthens the state. Pakistan is considered a weak democratic state due to a perpetual rift and disharmony among the institutions of government (Bazmi, 2022). The repeated undemocratic acts/episodes of dissolving the elected assemblies by the military or bureaucratic establishment with the aid of the judiciary are found rampant throughout the political history of Pakistan.

The Judicial interventions in the political arena commenced with Maulvi Tammiz-ud-Din Khan’s case (PLD 1955 FC 240) and it goes on till today. The political and constitutional history of Pakistan is replete with examples of judicial activism especially emanating from the doctrine of “*State Necessity*” which in itself is considered by the jurists as a “*black hole*”. The democracy in Pakistan has been confronted with many challenges mostly, due to the striking imbalance among state institutions. Weak representative institutions helped the judiciary to come out with more power and establish its hegemony.

The constitutional foundation of judicial review in Pakistan lies in Articles 199 and 184(3) of the Constitution of Pakistan 1973. The doctrine has been derived from British jurisprudence which is based on the principle of “*ultra vires*”, meaning “*beyond power*” (Awan 2014). Since the authority of public office holders is limited by law hence, any transgression amounts to ‘*ultra vires*’ to the Constitution which is liable to be challenged in courts (Article 8).

The model of the Constitution of Pakistan is a partial reflection of the the British and US Constitutions. It prescribes a government bound by law. The doctrine of ‘*judicial review*’ was for the first time introduced in the Constitution of 1962 (Article 98). The current constitution of Pakistan enshrines it in Article 199 which seems a successor of Article 98 of the 1962 constitution since both the articles are substantively the same in their letters and spirit. High Courts are empowered under this article to take judicial notice of any “*ultra vires*”. The power of judicial review of the Supreme Court of Pakistan is contained in Article 184(3) of the Constitution which confers original jurisdiction to entertain a matter of public importance involving infringement of fundamental rights provided in Chapter-1, part II of the Constitution. Article 184(3) of the Constitution has been in existence since the inception of the constitution. The plain reading of this constitutional provision provides only a mechanism of protection of

fundamental rights as a matter of public interest litigation but, as time passed, the supreme court assumed 'suo moto' powers by misconstruing constitutional provisions hence, the power of 'suo moto' was for the first time adjudicated in 1990. The text of the article 184(3) runs as:

“Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the fundamental rights conferred by chapter 1 of part II is involved, have the power to make an order of the nature mentioned in the said article” (Article 184-3).

The supreme court of Pakistan exercised its original jurisdiction under 184(3) for the first time in the year 1975 in the case titled, “*Manzoor Elahi v Federation of Pakistan*”. (PLD 1975 SC.) Chief Justice Hamood-ur-Rehman led the bench in this case. The point to be noted in this case is that none of the judges made even an accidental reference to the “*suo moto*” power or meddled with the standard rules of procedure (Manzar, 2021).

Public interest litigation under the shadow of Judicial review reached the watershed stage amidst cases of dissolution of assemblies under article 58(2)(b). Discretion of the executive was made subject to judicial re-examination firstly in the case, “*Khawaja Muhammad Sharif vs. Federation*”, wherein the Lahore High Court declared the presidential order of dissolution of the national assembly ultra-constitutional and void. It was upheld by the Supreme Court which laid it down:

“The President cannot exercise his powers..... on wish or whim. He has to have facts, circumstances which can lead a person of his status to form an intelligent opinion requiring the exercise of discretion of such a grave nature..... His action must appear to be called for and justifiable under the constitution if challenged in a court of law” (PLD1988 LAH.725).

The Supreme Court continued to develop the procedure for invoking its jurisdiction under Article 184(3) for 25 years. Generally, the court seemed reluctant and adopted a restrictive policy by entertaining only such petitions which fulfilled the criteria of public interest litigation (Manzar, 2021)

Another noteworthy case concerning judicial review is of ex-prime minister, Benazir Bhutto's case of 1988. The Supreme Court declared that the party filing the petition did not need to suffer instead, it was held sufficient that the party was at risk for any future harm. Here the principle of procedure, “locus standi”, (reason and justification for invoking the court's jurisdiction) was dispensed with in favor of public interest. It was also held that concerning the violation of fundamental rights, the aggrieved party didn't need to prove an actual violation. It was regarded as sufficient that if an executive or legislative action was capable of enforcement, the requirement of judicial notice of such action was complete. Thus, the probability of an unjust and oppressive action was held competent for judicial notice (PLD 1988 SC.416).

The history of public interest litigation in Pakistan traces the first ever origin of exercising 'suo moto' by the supreme court to the case of *Darshan Masih vs. The State* (PLD 1990 SC.513). This case is famously named as 'Bonded Labor Case' and is considered a turning point in judicial activism. The decision of the court, in this case, is contended to be an adherence to the precedent set under Benazir Bhutto's case of 1988. In this case, the Chief Justice of Pakistan took notice of a telegram message alleging forced labor and illegal detention of complainants by their employer in brick kilns. The applicant requested CJP to help get them released. Taking the matter as of public interest and enforcement of fundamental rights, the CJP, by relaxing the standard procedural requirements heard the matter under article 184(3) and granted relief. The Supreme Court had to answer these unprecedented questions:

- (i) Whether the court can initiate court proceedings based on a telegram received instead of a petition
- (ii) Whether the proceedings initiated based on this telegram are maintainable
- (iii) What is the nature of the remedy provided under this petition? (Manzar, 2021).

The court held that concerning the public interest, proceedings could be initiated on receiving a telegram since the text of article 184(3) did not provide a procedure hence, the matter was declared entertainable. The court, while making reliance on Benazir Bhutto's case of 1988 held that the risk of violation of fundamental rights was sufficient to make an application

competent for taking up the matter. Furthermore, it was held that the orders issued by the Supreme Court under article 184(3) were having the same scope and nature as those of High Courts' orders under article 199. Inferring and relying on article 199, the supreme court continued widening and expanding its *suo moto* powers (Manzar, 2021).

Judiciary kept on working from the driving seat of the political system of Pakistan. Judicial activism turned into judicial adventurism on the emergence and with the rise in '*suo moto*' notices especially in a time span of Justice Iftikhar Muhammad Chaudhary, acting as the Chief Justice of Pakistan. His reinstatement as a result of the Lawyers Movement of 2007-09 provided boost to the judiciary in showing activism. Following this precedent, his successor, Chief Justice Saqib Nisar ushered it to its peak. (Waseem,2020) The practice goes on with the present Chief Justice Umar Atta Bandiyal but, in view of the condemnation of judicial activism by politician, members belonging to general public, members of bars and even judges from the bench have come out opposing this continuous and unchecked practice, the Supreme Court now, seems somewhat reluctant. However, *suo moto* action is still considered by the Supreme Court as falling into its discretionary domain. From the very beginning of this activist movement, the policy of the Supreme Court seems crystal clear that the High Courts are not competent to invoke *suo moto* jurisdiction, it is the purview of the Supreme Court only (Munir and Khalid, 2018).

Thus, at this stage, it can be said that judicial activism as manifested in '*suo moto*' action has been an evolutionary phenomenon that has developed over precedents. (Akhtar, 2022) The power being exercised by the Supreme Court, especially in the form of '*suo moto*' action, has been criticized vehemently by various segments of society.

1.7 Causes of Judicial Activism In Pakistan

Several factors have contributed to the rise of judicial activism in Pakistan. One of the key factors is the political instability in the country, which has often resulted in a weak executive and a difunctional legislature (Awan, 2014). As a result, the judiciary has been seen as a more reliable and independent branch of government that can hold the other branches accountable.

Incidents like violation of law and constitution, arbitrary exercise of state power, unlawful acts of commission and omission, mala fide practices, improper discharge of obligations, nepotism, favoritism, corruption and negligent conduct of the state functionaries towards citizens, paves way for judiciary to act hyperactively amidst multifarious litigation. The foremost protagonist of judicial activism, Mr. V.R. Krishna layer, the former justice of the Indian Supreme Court is reported to have said, "The Judicial activism gets its highest bonus when its orders wipe some tears, from some eyes" (Shruti, 2002). The poor and downtrodden masses in the countries like India and Pakistan seek homage to their apex courts as the last resort for getting relief against the privileged classes and rulers belonging to elites.

The role of media and civil society in reporting governance issues and accountability failures has worked as one of the major factors in judicial hype. Both, electronic and print media have played significant roles in bringing to light human rights abuses and corruption in public money. It has added pressure on the judiciary to play its part as a watchdog (Munir and Khalid, 2018). Social media is in excessive use in Pakistan which has further ushered public awareness regarding the role, responsibilities, and performance of public sector institutions.

Another factor that may be considered is the role of the judiciary itself as an interpreter of law and constitution. The statutes are enacted by the legislature and sub-ordinate legislation is made by the executive exercising delegated power. The tragedy with legislation lies in the eruption of ambiguities, latent or patent which enhance the role and significance of the judiciary. A statute or any of its provisions is meant what the judiciary exposes it to mean. Therefore, the inability of the legislature to foresee all possibilities of the future and leaving the matter to the judiciary makes it sure that judges while interpreting law use their personal wisdom viz-a-viz opinion in furtherance of delimiting powers of the other branches of the government (Siddique,2011).

It is also asserted that application of law in its literal context only, does not serve the cause of justice. Therefore, cases where legal complications are involved, judges are supposed to exercise their judicial and legal wisdom. They consider the matter with its subjective and objective tests. Hence, a vibrant, vigilant, and active judiciary is considered crucial to deal with

peculiar events occurring in societies where privileged section manure laws favoring its interest by taking advantage of the unawareness of the general public about their rights. Such tactics of the privileged class usually prompt the judges to act pre-emptively for filling the vacuum left behind by the executive. Thus, failures of the executive to enforce and guard the fundamental rights of the citizens has given birth to judicial activism (Waseem, 2020).

It is also argued that the people of Pakistan expect, with greater optimism from the judiciary to come out for their rescue when other organs of the state fail to deliver (Iqbal, 2010). Massive uprising and launching of a full-fledged movement for the restoration of judges firstly in 2007 and later on in 2009 speaks volumes to the public confidence in judiciary as a guardian and protector of the constitution (Masood, 2009). The generous support from lawyers, civil society and media to the judges of the superior judiciary in times of crisis shows significance of judicial activism in socio-political circumstances of Pakistan (Uzair, 2010). Since the restoration of judges as a result of judgment of apex court, judicial activism reached its zenith (PLD 2007 SC.578). The Supreme Court has widened the scope of public interest litigation by forming the Human Rights Cell in the Supreme Court building. It is considered as an abode for '*suo moto*' actions. Previously, the HRC used to receive 500/day applications approximately, but after the reinstatement of judges in 2009 the number of applications for *suo moto* reached to 139906 in just two years-2009-2011. The Supreme Court entertained and granted relief on 85489 applications during this period by directing concerned departments to do the needful. The chief justice himself heard 87 HRC and PIL matters directly in his court room (Asghar, 2014).

The event of reinstatement of judges of superior judiciary instilled a ray of hope among the masses. They started expecting quick and less expensive justice, rather cost-free justice and at their doorsteps. The lawyer's movement rejuvenated judiciary which responded immediately without any restraint. It accelerated judicial activism to new heights.

Those who are supporting public interest litigation by the Supreme Court while exercising its *suo moto* powers, hold that PIL ensures enforcement of fundamental rights and upholds the principle of rule of law. It is therefore, imperative to keep this power intact with the judiciary. The authority of the Supreme Court is not only mandatory for dispensing justice but it favors the poor segment of the society. The traditional legal system does not allow lower classes of the society to get relief amidst the most influential and dominating elites. PIL in this context, is the only remedy left to them. Complicated procedural requirements and other legal barriers are abridged by the superior judiciary by taking up matters of public importance directly. This phenomenon has led to the excessive use of judicial power by the apex courts (Asghar, 2014).

There is yet, another argument put forward as a justification of judicial activism by contending that the supreme court is the only institution whom public has trust in, rest of the institutions have lost their credibility and integrity among the people for their failure to come up to the expectations and hopes of the people. Invasions on the fundamental rights can only be guarded against by the superior judiciary hence, public interest litigation should continue to have its currency (Khan, 2012).

Public interest litigation has its charm among the judges who seem desirous to remain in lime light and whose '*obiter dicta*', (remarks by the judges during the course of judicial proceedings/a form of precedent) becomes headline of race driven T.V channels. Judges having such an aptitude usually turn out to be political as we witnessed ex-chief justice, Iftikhar Choudhary who, after his retirement, got his political party registered even with the name of, "Pakistan Justice and Democratic Party".

The factors highlighted above as causes and justifications of judicial activism have their implications as well as limitations. Judges of the superior courts in return, respond to such voices and act accordingly, although the results of such judicial actions show different scenario where its pros and cons go hands in hands.

1.8 Implications Of Judicial Activism: A Critical Analysis

There has been significant criticism of judicial activism in Pakistan, particularly from political parties and interest groups that feel that the judiciary has overstepped its bounds. Some critics argue that judicial activism has resulted in judicial overreach, with judges making decisions that should be left to elected representatives.

The implications of judicial activism are complex and multifaceted. On the one hand, judicial activism has been seen as a positive force for accountability and good governance. Judiciary is reported to have taken bold steps to curb corruption, protect human rights, and strengthen democratic institutions. On the other hand, its negative consequences are vociferously criticized and lamented by the critics. There are concerns that judicial activism can be counterproductive and undermine the democratic process. Some critics argue that the judiciary's activism has led to the concentration of power in the hands of a few unelected judges, and that this can undermine the principle of separation of powers (Akhtar, 2022).

Studies show that implications of extensive construction of article 184(3) with concession in its procedural preconditions, are overlapping the number of cases which supreme court had to entertain. Such a construction has caused transformation of role of supreme court from acting as an arbiter of question of law to an umpire, deciding political questions. This is a clear transgression from the *political question doctrine* (Manzar, 2021). According to 'political question doctrine', courts are required to remain aloof being '*apolitical*' body instead of becoming political. "Suo Moto" actions taken in the recent past either by the chief justice Iftikhar Choudhary or by the CJ Saqib Nisar were against the principle of dichotomy. They were politically motivated or at least, had political impacts (Munir & Khalid, 2018).

The issue of judicial activism is further criticized on the ground of lack of expertise on the part of judges who take up the matter which is otherwise demanding technical knowledge and professional skills. In this context, the actions taken by the two chief justices in the recent years i.e Justice Iftikhar and Justice Saqib Nisar are referred as glaring examples of lack of expertise and long-lasting financial implications. In cases like fixing and regulating prices of articles of usage establishing fund for construction of dams, the judges appeared to have acted as '*policy experts*' which they were actually not since it required technical knowledge and professional experience (Manzar, 2021). Judicial dictations in such matters are viewed not only as an encroachment in the domain of other institutions but such pursuits were also made susceptible to risk of being poorly managed by those having little knowledge and skills about projects like dams.

It is contended that unrestrained application of judicial power manifested in '*suo moto*' actions causes dependency on not only non-representative bodies but, also on unelected judges whose authority has no mechanism of check and balance. It is argued that the Supreme Court does not take into account that its intrusions in the sphere of other branches of the government, are detrimental to the already weak and fragile democracy (Akhtar, 2022). Furthermore, few political elements are making their endeavors to use judiciary for their meager and nefarious ends by filing cases or calling Supreme Court to take up '*suo moto*' against their political opponents for getting judgments in their favor. Such efforts have politicized the judiciary which has ultimately polarized as we witness it today. It has caused damage to public trust in judiciary.

'*Suo moto*' power has been derived by the supreme court from article 184(3) by implication in the absence a clear text for such an effect. This is considered by the experts in law as an over-extensive interpretation amounting even to legislation. The Supreme Court should restrain itself in this connection instead using it as a legal instrument to justify its activism. Some of such like critical views are as follows.

A former judge of the supreme court of Pakistan, *Justice Fazal Karim* is reported to have labelled '*Suo moto*' as "*self-created*", while opining over it keeping in view constitutional context of Pakistan. He has regarded it absolutely repugnant to the constitutional scheme devised for the exercise of judicial authority. He has not only expressed his disapproval of this practice but also suggested amendment to be made in the constitution (Manzar, 2021).

One of most sounding voices against judicial activism in Pakistan is that it has compromised the rule of separation of powers viz-a-viz constitutional design of tracheotomy of powers, among the three branches of the government. Critics have made an assertion that the judiciary has stepped into the lands of executive and legislature whereby power seems to have been concentrated in the hands of non-representative elements who are neither liable to anyone nor their actions can be accounted for (Munir & Khalid, 2018).

A senior Advocate of the Supreme Court of Pakistan, Mr. Muhammad Waqar Rana who has acted as former additional attorney general also has expressed his apprehension over the

matter of judicial activism, stemming from excessive application of ‘*suo moto*’ powers. He regards ‘*suo moto*’ jurisdiction of the supreme court as, “*a threat to the rule of law*” (Rana, 2021). It creates populous aptitude of judges and fosters sense of competition among them which indeed, mars transparency in dispensation of justice. It goes against the principle of natural justice that is, “*Nemo Jus Sua Causa*”, (None can be a judge of his own cause). Thus, a judge, with a view to gaining popularity becomes an arbiter of his own cause. Principles of ‘*fair trial*’ and ‘*due process*’ of law are compromised in such a situation. Since such cases are taken up by the Chief Justice who is the head of bench which fact creates ‘*envy and discord*’ among rest of the judges. Mr. Rana concludes that the supreme court has widened its jurisdiction by interpreting articles of the constitution in a manner which amounts to transgression and which neither intended by the founding fathers of the constitution nor meant to be conferred on it. It seems that Mr. Rana happens to be a true representative of actual position of members of bench. We have quite recently observed a divide among judges of the supreme court over a *suo moto* action taken by the Chief Justice Umar Atta Bandiyal for holding of general elections to the provincial assemblies of Punjab and Khyber Pakhtunkhwa. (Suo Moto Case No.1 of 2023)

Pakistan, India, Bangladesh and Nigeria are the countries where the courts enjoy *suo moto* powers which is a manifestation of judicial activism. Rest of the world follows the due process of law. The due process of law requires for a person to come up with a petition for invoking jurisdiction of court where after establishing his ‘*locus standi*’ and satisfying the court as to the validity of his claim, he gets entitled to the desired relief (Rana, 2021).

The report of the International Commission of Jurists (ICJ) has also found that the exercise of *suo moto* is an improper application of Article 184(3) which would have far reaching implications. The said report has brought forth concerns pertaining to the right of appeal of an accused which is a bar on fair trial (ICJ,2013).

Another view, appraising the phenomena of judicial activism states that it is an impediment to judicial efficiency since the judges take up *suo moto* on priority basis with regular hearing even and resultantly, the pendency level of other cases keeps on increasing. It further lowers the status of judiciary and its ranking as a forum of justice. The author further analyses that there are some countries where *suo moto* power is used and Pakistan is listed in those few, unfortunately. This power should be used to administer justice instead of using it as an instrument used arbitrarily by the non-democratic hands (Jamshed, 2023).

Barrister Ahmed Uzair has enumerated multiple reasons for which jurists do not favor political role of judiciary. He is of the view that activism on the part of judges is in confrontation with jurisprudence developed over the period of first fifty years (Uzair,2023). Moreover, it is also argued that taking matters directly by the superior judiciary bypasses the due process of law. People look for this short cut and cause further delay in already pending cases. Last of the jurists’ argument goes on to hold that policy matters should not be handled by non-democratic elements instead; such matters should remain inside the domain of elected representatives.

Debating over judicial activism, witnessed after restoration of judges in 2009, critics have expressed sorrow over *suo moto* actions having been limited only to constitutional issues. Such an activism couldn’t be transmitted to the lower judiciary where public remains mostly entangled and is confronted with sufferings. This situation has caused frustration among common people. A reputed columnist, Javed Choudhary wrote, “...the Judges were restored but justice is still suspended” (Choudhary, 2011).

Judicial activism in Pakistan has had both positive and negative implications for the country's governance and democratic institutions. As a matter of fact, the judiciary has been playing an important role by holding other branches of government accountable and upholding constitutional provisions, however, there are also concerns about the potential for judicial overreach. More research is needed to fully understand the causes and implications of judicial activism for carving out strategies as to how judiciary should be made accountable and responsive to the expectations of the people of Pakistan.

At present, when these lines are being written, the issue of judicial activism is at the forefront. Premature dissolution of Punjab and KP Assemblies has given birth to another *Suo Moto* action. The Supreme Court has taken up notice of delay in conducting elections later than 90 days. The bench constituted by the CJP has divided opinion on such a *suo moto*, hence it has

been re-constituted twice. In between this legal debate, the parliament has passed a bill, (The Supreme Court Practice and Procedure Bill, 2023) regulating the powers of CJP under Article 184(3) which has been declared inoperative even before turning it to become law. The controversy goes on unabated.

1.9 Conclusion

The term, 'judicial activism' has attained the status of a misnomer, hence its meanings are so broad that there does not exist any precise definition. Judicial activism stems from the concept of judicial review which is a constitutional doctrine where the superior judiciary acts as the guardian of the constitution by upholding the rule of law and fundamental rights of the citizens. Such a role of the judiciary sometimes, not only touches the boundaries of the judicial domain but on occasion, it crosses limitations and turns into "*judicial activism*". It is considered a safety net against the encroachments of legislative and executive organs of government.

However, it is contended that the courts should exercise care and caution while implementing the concept. Protagonists of separation of powers hold that judges should exercise restraint and restrict their interference with other organs. Enthusiastic judges tend to exceed constitutional limits which ultimately affects the traditional role of the courts. As a result, '*judicial activism*' turns out to be '*judicial overreach*' that destabilizes the judiciary. National security, maintenance of law and order, welfare, and prosperity of the people are the goals for which the government is supposed to work with stability and effectiveness. These ends can best be achieved provided that the institutions of the state perform their respective functions in complete mutual harmony. Each organ is required to do its work quite efficiently, leaving no room for the judiciary to rectify the errors of one and supply the omissions of the other. Judicial activism being a delicate subject should be least resorted to otherwise, the safety and integrity of the whole system is made susceptible to be compromised.

This study finds that the judicial power exercised under *suo moto*, has accelerated the pace of judicial activism in Pakistan. The Supreme Court has conferred this authority on itself by relaxing the textual interpretation of Article 184(3). The Court declared in its judgment in Darshan Masih Case that the text of the said Constitutional provision lacks the procedure for initiating proceedings, therefore, the Court is free to initiate a case against any party either based on telegram or also 'on its own motion'. The precedent set forth in this judgment has opened a gateway to '*judicial activism*'. Such an assumed authority has been criticized on a large scale keeping in view the principle of constitutional law that the courts can exercise only those powers which are conferred expressly on them. The decision of the Supreme Court, in this case, has, although buried the '*Doctrine of Necessity*', it has also simultaneously buried the due process of law. By misinterpretation and consequently misapplication of constitutional provisions, it has threatened the already feeble democracy of Pakistan.

Keeping the foregoing discussion in view, the conclusion can be drawn that "*suo moto*" action is a valuable constitutional device that needs to be utilized in extraordinary circumstances for extraordinary objectives subject to and in consonance with the spirit of the constitution. It has been observed that the Supreme Court has bypassed very often, the procedural requirements for invoking its original jurisdiction. Despite the textual absence of '*suo moto*' power, it has been deemed as conceded impliedly, associating its nexus with, "matters of public importance". Constitution has delegated authority to the Supreme Court via Article 191 for making rules, in order to regulate its original jurisdiction. Rules, nonetheless, have not been made so far and the procedure rests on precedents. Disregard for setting a specific procedure and its compliance has had serious consequences, doing away with '*locus standi*', due process, elimination of the right of appeal, apprehension to the right of fair trial, apprehension to rule of law, and interference in the purview of executive and legislature. Thus, the superior judiciary of Pakistan needs to extend due regard for the principle of tracheotomy of powers and consider the recommendations of national and international jurists, as summarized in this paper.

The implications of judicial activism in Pakistan for the judiciary are also significant. The judiciary has been seen as an important factor in the country's governance, and its activism has helped to shape public policy and enforce constitutional provisions. However, the judiciary also faces several challenges, including the need to balance its role as an independent branch of government with an efficient mechanism of accountability. Moreover, the courts need to make sure that such activism does not undermine the impartiality and independence of the judiciary.

This requires a commitment to transparency, accountability, and due process as well as a willingness to engage in constructive dialogue with the other branches of government and civil society.

To sum up, this research paper explored the phenomenon of judicial activism in Pakistan, examining its causes and implications. The judiciary in Pakistan has played an active role in shaping the political and social landscape of the country, particularly in response to the perceived failures of other state institutions. However, this activism has also had negative consequences, including the erosion of the separation of powers, validating unconstitutional steps of anti-democratic forces, legitimizing military coups, and the perception that unelected judges are making policy decisions. For this very reason, the criticism of judicial activism overlaps its appreciation.

The implications of this study are significant for policymakers, legal scholars, and members of the general public. The study highlights the need to strike a balance between the legitimate role of the judiciary in promoting accountability, and democracy and the importance of maintaining the independence of other state institutions. The findings suggest that efforts should be made to strengthen democratic institutions, build trust in other state institutions, improve the judicial process, and maintain the independence of the judiciary.

Future research in this area should explore the impact of judicial activism on specific policy areas, such as human rights or economic development. Additionally, studies should examine the role of the media and civil society in shaping public perceptions of judicial activism, or the impact of international legal norms and standards on judicial behavior. Finally, studies may explore the experiences of other countries in managing the balance between judicial activism and the independence of other state institutions, in order to identify best practices and potential areas for reforms in Pakistan.

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