



RESEARCH PAPER

**Institutional Imbalance: Implications on Governance and Economy: A Case Study of Judicial Activism during the Period of Iftikhar Muhammad Chaudhry**

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ABSTRACT

The 1973 constitution envisages Pakistan a federal form of government having three organs, i.e. legislature, executive and judiciary. Judiciary is vital for the development of economy, democracy and good governance. Problems occur when judiciary becomes proactive due to the judicial review and *Suo Moto* powers. It interferes in the legislative and executive domains. The objective of this study is to find out the repercussions of judicial activism on the governance matters and economic development. Constitutional and political history of Pakistan shows that judicial activism led to political instability that hindered good governance and economic development. Qualitative research design with inductive reasoning and case study method is used in this paper. Secondary sources such as published books, journals, and articles in newspapers are also used in it. Judicial activism during the period of Iftikhar Muhammad Chaudhary undermined the governance and economic development in Pakistan. So, only strong system of check and balance under the principle of separation of power can prevent judicial activism.

**KEYWORDS** Economic Underdevelopment, Governance, Institutional Imbalance, Judicial Activism, Political Instability

Introduction

Judicial activism is a legal term. It means the rulings and verdicts of the judges based on their personal and political factors over the issues rather than on the existing laws. It is the legal tool of the judiciary to make ineffective all extra-constitutional acts and policies of the administrative, executive and legislative authorities (Shahid & Muhammad, 2021). Pakistan has inherited the colonial legacy where one state institution dominated the other institutions. Executive organ of the government was the dominant organ during the British Empire in the united India. The functions of the legislature and the judiciary were undermined due to the proactiveness of the executive. Its reason was that only strong executive could strengthen the rule of the British on the Subcontinent. Similar the case has been witnessed in Pakistan since its independence. Executive organ of the government has remained the most powerful organ in Pakistan for many years. During the military regimes, it became more powerful. Its powers extended from noncompliance of the legislature's acts and its dissolution to the defying the judicial decisions and removal of the judges. Judiciary remained handmaiden for the executive. Ullah (1997) says that there is close nexus between the executive and the judiciary since the colonial period and has extended till present. It rectified the executive decrees whether they were constitutional or *ultra vires*. It affirmed the Governor General Ghulam Muhammad's decision of the dissolution of the first constituent assembly and approved martial laws imposed by Ayub Khan, Yahya Khan, Zia-ul-Haq and Pervez Musharraf. Civilian executive also get approved its decrees by exerting undue pressure like intimidation to the judges and their families.

Judiciary, being the third organ of the government, has strengthened itself gradually. The 1973 constitution declared that Pakistan would be a federal state. It enshrined the constitutional boundaries of each organ of the government. Yet, judiciary has additional power as being the guarantor of the constitution and the power of the judicial review. That is why; it has advantage over the other organ of the governments. It, sometimes, undermines the jurisdictions of other institutions because of its *Suo Moto* power. The *Suo Moto* powers are given to the Supreme Court through the article of 184(3) of the constitution of 1973 Invalid source specified.. By using this authority, apex court has taken notices from kite flying to the corruption cases for the interests of the public. But judicial activism saw its climax under the period of Iftikhar Muhammad Chaudhry. He took *suo moto* notices on the trivial issues and dismissed Yousuf Raza Gillani from the premiership. So, judicial activism enabled the judiciary to interfere in the executive and legislative affairs. It undermined the democratic process and hence resulted in political instability. It also impacted the governance affairs. Political instability and bad governance further undermined the economic development. However, the solution of it lies in the following the theory of separation of powers under the check and balance system and strictly adhering to the constitutional boundaries.

### **Literature Review**

This part of research represents the views of the several scholars on the judicial activism and its impacts on the governance and economic development. Cohen (2005) says that judicial powers started to decline when Governor General Ghulam Muhammad dissolved the first constituent assembly and ousted the government of Muhammad Ali Bogra. The then apex court under the leadership of Justice Munir declared that act as unlawful but justified it necessity made it lawful. It has been known as doctrine of necessity which further justified coups imposed by Yahya Khan, Zia ulHaq and Musharraf. Though Pakistani courts follow the myth of constitutionalism and exercised judicial review of government policies but they only legitimate the illegal acts of the civilian government.

Lindquist and Cross (2009) and Muzaffar, Choudhary, (2017) investigated the various dimension of judicial activism and its repercussions on the governance. They searched the role of the several judges of the American Supreme Court. They often used their own policies and verdicts when some issues related to governance were set in front of them. They say that judicial activism in America also creates hindrance in the American governance system.

Dahraj (2010)) says that judiciary should be free from all kind of fear. Only independent judiciary can get the trust of the public when it dispenses social justice with regard to public interests and public policies. He says that the power of judicial review of the apex court leads to judicial activism. He says that independent judiciary is vital for the development of democracy as it is the guardian of the constitution and upholds laws and rules and regulation. So, it should work effectively in order to develop its good image in the public eyes and but to minimize it interference in political matters.

Rizvi (2012) says that institutional imbalance hinders the development of democracy in Pakistan. The non-elected institutions such as bureaucracy and judiciary are the major obstacle in the democratic process. Both supported the nondemocratic forces in Pakistan. Judiciary always supported the military regimes and gave constitutional cover to the military's actions (Muzaffar, Fern, & Yaseen, 2024) It overrides the powers of the legislature when it sent an elected prime minister to home. He says that it is impossible to uphold democracy in Pakistan if one institution dominates the other institutions.

Hussain (2013) says that judicial activism means when the judges of the courts decide the matters related to the governance and public interests on the bases of their whims, personal convictions instead of the prevalent laws. It is the routine matter for the

judges of the apex court of Pakistan to take *Suo Moto* actions about the issue of public interest and policies. He says that in this way judiciary deviates from the principle of separation of power and the original spirit of the 1973 constitution.

Ahmed (2017) says that the failure of the executive and the legislature to dispense the matters of public interests and the public policies promotes judicial activism in Pakistan. Under the powers of the 1973 constitution, though judiciary cannot interfere in the executive matters, yet it can provide guidance and force the government to protect public interests and public policies.

The mentioned above literatures highlight the pro-active role of judiciary and its impacts on the political system. Ascending order and thematic way is used in it.

The focus of this research article is to investigate the impacts of the institutional imbalance particularly the judicial activism on the governance and economic development. Though there are many books and articles have been written about judicial activism, yet there is no particular work has been written about its impacts on governance and economic development. So, the aim of this paper is to search out different data that address the issue of judicial activism and its impacts on governance and economic development. It will open a new source of learning for the researchers in the days ahead.

### **Theoretical Framework**

Montesquieu was a great French Political philosopher of the 18<sup>th</sup> century. He visited several European countries and saw their political system. The British political system highly impressed him as there were three organs of the government which were working separately and smoothly. He came to know that British political system was stable due to the separation of powers. So, he propounded the theory of 'separation of powers'. He also suggested a strong check and balance system to restrict all the organs within their allocated domains. Similarly, Hamza Alvi and Hassan Askari founded the theory of overdeveloped state structure and institutional imbalance respectively. They say that domination of one institution on the other institutions undermines the democratic process, governance system and economic development. All the state institutions should remain in the allocated boundaries of the constitutions.

### **Material and Methods**

This study has used the qualitative research design to conduct interpretive and explanatory research. Through interpretive research technique, it is tried to understand the various impacts of judicial activism on the governance and economic development. This research covers a specific period of judicial activism under the Iftikhar Muhammad Chaudhry. So, case study method is used in it. Secondary sources such as published books, journals, reports, newspaper, etc, are also used in it. Independent and dependent variables are used in it. Political instability breeds economic instability. So, political instability is independent variable whereas economic instability is dependent variable. This study justifies hypothesis that institutional imbalance in the form of judicial activism promotes political instability that further undermines governance system and economic development.

### **Results and Discussion**

The controversial role of the judiciary is not a new issue rather it has been coming since the independence of Pakistan. "The constitutional and political history of Pakistan witnessed judicial activism on the ground of necessity that proved to be a legal black hole" Invalid source specified. The 'doctrine of necessity' was laid down by justice Muhammad Munir to rectify the illegal action of Governor General Ghulam Muhammad's dissolution of

the first constituent assembly of Pakistan in 1954. He declared the decision of the Sindh High Court illegal saying that it did not fall in its jurisdiction. He approved the action of the Governor General on the theory of 'doctrine of necessity'. Since then judiciary had been endorsing the illegal actions of the military Generals in toppling down the civilian governments. It endorsed the martial law of Ayub Khan of 1958 in the case of 'The State vs. Dosso and others 1958'. The apex court also validated the martial law of Yahya Khan in the case of 'Miss Jilani vs. the Government of the Punjab, 1970'. In the case of 'Nusrat Bhutto vs. Chief of the Army Staff and Others, 1977' it endorsed the martial law imposed by Zia ul-Haq. Moreover, judicial activism started from the period of Zia-ul-Haq when the Shariat court was given the power to declare null and void any actions of the legislature and the executive contradictory to the Islamic principles (Shahid & Muhammad, 2021). It further validated the martial law imposed by General Pervez Musharraf in the case of 'Zafar Ali Shah vs. the Chief Executive of Pakistan General Pervez Musharraf, 2000'. This controversial role of the judiciary in endorsing the illegal steps of the dictators had eroded the trust of the public on it (Nauman Reayat, et al. 2021).

The 1973 constitution of Pakistan provides the principle of separation of powers. Each organ of the government has its constitutional limitations and restricts each one to remain within its allocated boundaries. Legislature has the power to enact laws. Executive has the power to execute laws and to administer the affairs of the state. Judiciary has the power to adjudicate laws, protect the rights of the citizen and to safeguard the sanctity of the constitution. Under the constitution of 1973, judiciary has been given the power of judicial review. Under it, judiciary can declare any steps of the legislature and the executive as null and void. 'It has legal tools to make ineffective and extra constitutional acts and policies of the legislature and the executive' (Shahid & Muhammad, 2021), (Soomro & Masudi, 2023). Moreover, article 184(3) of the 1973 constitution of Pakistan provides the power of *Suo Moto* to the apex court. This power enables the judiciary to dominate as well as interfere in other organs of the government. Therefore, judicial activism is usually found when governments are weak and the governmental agencies are non-democratic, non-functional and unresponsive to the public perceptions (Jatoi & Mustafa, 2022), (Bazmi, 2022). Iqbal (2018) says that in the past politicians had taken such decisions from the apex court for the sake of their motives, but it effected the constitutional powers of the legislature. Thus, its interference in the legislative and executive affairs is not good omen for the development of democracy and political stability of Pakistan. It hinders good governance and develops political instability in Pakistan. It influenced politics with its impartial decisions and caused bad governance and destabilizes democracy in Pakistan (Ibid) (Soomro & Masudi, 2023). Political instability hinders economic development due to widespread corruption and low foreign direct investment.

Judicial activism has witnessed several phases but it witnessed climax and full swing during the period of Iftikhar Muhammad Chaudhary. Invalid source specified. Iftikhar Muhammad Chaudhary became judge of Supreme Court under the Provisional Constitutional Order (PSO) when Musharraf imposed martial law and removed many judges. He was elevated to the chief justice of Pakistan later on. Judiciary from top to bottom continued to rectify every action of the Musharraf's government. Clashes between the executive branch and the judiciary started when issue of Musharraf's military uniform and his presidential election emerged. When Musharraf had seen resistance from the judiciary, he imposed emergency and removed Iftikhar Muhammad Chaudhary along with several other judges. Lawyer's community came into front and started movement for the restoration of judges and the independence of judiciary (Rizvi, 2016). Gradually, civil society, media and political parties also joined this movement. Finally, deposed judges had been restored after the country wide movement. Iftikhar Muhammad became again the chief justice of Pakistan's Supreme Court.

After restoration, judiciary became pro-active. Iftikhar Muhammad Chaudhary started to take *Suo Moto* actions in the matters involving public interests and public policy

(Akbar & Malik, 2019). The purpose of such moves by apex judiciary had to develop the trust of the public on the judiciary. Soomro and Masudi (2023) say that the apex court of Pakistan have gained public trust via judicial activism especially at the moment when legislature and executive exceed their limitations. Public welcomed it as their rights and issues were tackled but it destabilized the entire political system of Pakistan (Bazmi, 2022). Iftikhar Chaudhary took *Suo Moto* powers to settle social, constitutional and political matters ranging from kite flying, fund raising and to the corruption cases (Jatoi & Mustafa, 2022). He took *Suo Moto* actions on the corruption charges in the Capital Development Authority and corruption in Hajj Scam under case No.24 of 2010 under which Hamid Saeed Kazmi was sent behind the bar (Reayat, et al. 2021). He also took *Suo Moto* notice of huge corruption in Pakistan Steel Mill case No. 15 of 2009. He directed National Accountability to take strict actions on the persons being involved in it (Ibid). He even did not spare prime minister, Yousuf Raza Gilani, when he ordered him to write a letter to Swiss government and to open corruption cases against the leadership of Pakistan's People Party (Jatoi & Mustafa, 2022). Yousuf Raza Gillani did not act upon it. Speaker of National Assembly of Pakistan also gave its verdict that Prime Minister had immunity to present in the court. But Chief Justice Iftikhar Chaudhary declined it and laid down the contempt of court on him. He sentenced him with the punishment to remain silence for thirty second. On this ground, he was dismissed. In this way, apex court intervened in the affairs of the legislature and the executive branches.

Judicial activism under Iftikhar Muhammad Chudhaary undermined the political stability of Pakistan. It underlies the deep cracks in the governance system and effected the already dysfunctional institutional framework for conflict resolution and to resolve governance issues (Reayat, et al. 2021). The popularly elected Prime Minister, Yousuf Raza Gilani, was removed. This change of government created political uncertainty in Pakistan. Executive and judiciary became opponent to each other. No one was following the verdicts of each others. This political chaos impacted the governance system and derailed the democratic process in Pakistan (Bazmi, 2022). Governance system was effected by two ways. On the one way, control of the political leadership on the governance became weak due to the frequent changes of the government by the Supreme Court. On the other way, the consistent meddling of the judiciary in the governance affairs such as price control, corruption, etc. also restricted the political government to govern the state affairs smoothly. So, political instability and fragile governance system effected the economic development. Economic development was effected by the two major causes. One, weak governance system promoted corruption that highly undermined economic development. Corruption became widespread. Corrupt officials remained scot free. Huge national exchequer was looted. Second, political instability slowed down the foreign direct investment in Pakistan. Apex court of Pakistan under Iftikhar Muhammad Chaudhary annulled commercial deals involving billion of dollars of FDI Invalid source specified.. So, it effected FDI, Bilateral Investment Treaties (BIT) and commercial agreements signed by the government of Pakistan (Ibid). Foreign investors were hesitant to invest their money in Pakistan. They did not have trust on the system as they face judicial constraints in their business and thus they hesitate to invest in the economic sector (Gul, et al. 2018). They were also afraid that their wealth might not become wastage due to this political instability. So, the excessive use of judicial activism has hampered international investment and hence slowed down the economic activity in Pakistan (Soomro & Masudi, 2023). Moreover, Chaudhary's striking down the privatization deal of the Pakistan Steel Mill earned nothing other than loss (Awan, 2014) (Waseem, et al. 2019). Similarly, judicial activism under Chaudhary over the corruption scams of RPP, Oil and Gas Regulatory Authority, Liquefied Natural Gas and decision on Riko Diq sabotaged billions of foreign direct investment in Pakistan (Ibid) (Gul, 2018). Owing to these constraints, economic activities became slow in Pakistan. According to the World Bank, Enterprise Survey, 38 per cent Pakistani firms find the court system a major constraint in doing business in Pakistan as compared to 14 per cent in South Asia (Hussain, 2018).

## **Conclusion**

The 1973 constitution declared Pakistan as federal state. All the three organs of the government, i.e., Executive, Legislature and Judiciary, have their constitutional domains that restrict them to interfere in each other affairs. However, the federal nature of the state provides judiciary the powers of judicial review and the *Suo Moto* under the article of 184(3). Supreme Court uses these constitutional powers to grab more powers itself over the parliament and the executive (Reayat, et al. 2021). That is why; judiciary intervenes in the affairs of the executive and the legislature. It can declare any action of the executive and the judiciary null and void. It can also interfere in the governance matters on the bases of public interests and public policy. It reviewed several malpractices in the domain of public policy and governance which increased its popularity and legitimacy (Ibid). These are the powers that promote judicial activism. Moreover, judiciary intervenes only when legislature does not safeguard the rights and liberties of the public and executive becomes lethargic (Shahid& Muhammad, 2021). The history of judicial activism has a long history. But under the auspices of Iftikhar Muhammad Chaudhary, it had become more active and vibrant. He took more *Suo Moto* actions as compared to the other judges of the past. For the sake of public interests and public policy, he took *Suo Moto* notices and interfered in most of the governance matters. The removal of the government of YousufRazaGilani was also the consequence of it. So, this judicial activism undermined the functioning of the executive and the legislature. It hampered the process of democracy and created political instability in Pakistan. It also weakened the writ of the government on the governance affairs. So, political instability and bad governance promoted corruption and discouraged foreign direct investment. The widespread of corruption and reduction in foreign direct investment further slowed down the economic development of Pakistan.

## **Recommendations**

Pakistan can come out from this quagmire if the following recommendations are pursued:-

- Needs balance of power among all the institutions
- Every institution must perform positive role within the domains of the constitution
- Judges should harmonize authority and liberty
- Unbiased independent judiciary is needed for the political system
- Each institution must respect the democratic norms
- Balance must be developed between the judicial activism and the judicial restraints
- Judicial reforms are mandatory to bring structural changes in judicial system of Pakistan
- Reforms are needed to make governance public service delivery institution
- To develop a proper and strong system of checks and balances under the umbrella of ' separation of power' theory in order to restrain each institution to use unconstitutional powers
- Judiciary should be unbiased to interpret the legislature actions
- The excessive use of judicial review is to be restricted
- Three organs of governments should cooperate with each others for the sake of democracy and future of Pakistan
- Last but not the least political leadership should be united to strengthen the civilian institutions

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