

Judicial Activism vs Democratic Consolidation in Pakistan

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In a ruling hailed as historic by his supporters, the restored chief justice of Pakistan struck down as unconstitutional some of the actions taken by former President Pervez Musharraf. A reading of the verdict and of the politics leading up to it suggests that the judges are on a collision course with the elected government, and that retrospective judicial vigilance may hinder rather than aid democratic consolidation. More importantly, it is not clear how the judges and their supporters plan to use the power they are busy acquiring with respect to the key challenges facing state and society.

On 31 July 2009, a Supreme Court bench headed by the chief justice of Pakistan, Iftikhar Mohammad Chaudhry, declared unconstitutional a number of measures following on from former President Pervez Musharraf's declaration of emergency on 3 November 2007. The constitutional petitions before the Supreme Court related to the legality of judicial appointments during the 16-month period when Chaudhry had been removed from his position as chief justice.

The 14-member bench of the apex court gave a ruling declaring these judicial appointments to be illegal. At a stroke 110 judges of the Supreme Court and the four high courts lost their jobs. Another implication was the referral to parliament of all legislation enacted during the emergency (from 3 November to 15 December 2007). This included constitutional protection extended during that period to the National Reconciliation Ordinance (NRO), which had paved the way for the elections held in February 2008.

Extraordinary Judgment, Ordinary Purpose

In effect, a few judges of the Supreme Court gave themselves veto power over the composition of the higher judiciary as a whole. The judges whose careers were cut short included not only the so-called "PCO judges" – or judges who had taken oath under Musharraf's second Provisional Constitutional Order of November 2007 – but also all other judges appointed to the higher courts before the restoration of Chaudhry following the "long march" four months ago. These judges, including the then Chief Justice Abdul Hameed Dogar, were declared not to have been judges at all!

What was left out from under this radical judicial gavel was instructive. Routine administrative business conducted by the

non-judges – notably the presidential oath taken by Asif Ali Zardari before Dogar – was exempt from review. Also, importantly, the entire process of general elections – which had started during the emergency with the announcement of the schedule, and judicial reviews of candidate qualifications and election results – was condoned on the ground that popular sovereignty trumps everything. Everything, that is, except things about which the court thought otherwise – such as the retention of Dogar as chief justice by a duly elected government until his age of retirement.

More importantly, while it was clearly stated that Musharraf's November 2007 emergency was illegal and unconstitutional, something that was hardly news, the court refused to press Musharraf or his military and civil co-conspirators for accountability. Rather, in a ruling on a different petition a few days before, it deflected the question of Musharraf's accountability towards parliament. Aitzaz Ahsan, Chaudhry's former counsel and a leader of the lawyers' movement, held a meeting with the army chief General Ashfaq Pervez Kayani days before the judgment. It is not known what was discussed at this meeting, though speculation was rife that assurances might have been exchanged between the chief justice's confidant and the top soldier.

On the surface there was something for everyone. The Pakistan Peoples Party (PPP) government put on a brave face and called the verdict in line with its own position. The judges had passed on the opportunity of directly confronting the government by invalidating the general elections or even the NRO. Chaudhry's supporters claimed a moral victory in declaring the military rule illegitimate, and tightened their grip on the higher judiciary. The military got away scot-free, even if Musharraf took personal flak in terms of public humiliation, but nothing more serious than that. The losers were the 110 judges some of whom were condemned for taking oath under the reviled PCO, and others for simply having been appointed under the tenure of a PCO chief justice. The irony of Chaudhry himself having taken oath

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under Musharraf's first PCO in 2000 was not missed by some.

In fact, the political nature of the ruling could not be concealed behind hair-splitting legal arguments condoning some actions taken during and after the November 2007 emergency and nullifying others. The Supreme Court seemed interested in expanding its own powers in the name of safeguarding the constitution, while sidestepping the accountability of the main culprits of constitutional mutilation. It also signalled that it was not initiating an all-out war with the elected government, only preparing for it.

Regurgitation Neither Cleanses Nor Deters

The common explanation offered by enthusiasts of judicial activism against the closing acts of Musharraf's illegitimate regime was that a firm ruling would deter future coup-makers. This is flawed reading of the history of military takeovers. The judicial denunciation of General Yahya Khan in 1972 did not prevent General Zia ul-Haq from pouncing in 1977. The coup-makers' main concerns were to carry the army, assuage foreign powers, and prevent popular resistance. Judicial legitimisation was further down the list of concerns. One possible impact of the current judicial activism is that future coup-makers might feel the need to involve judges and lawyers among conspirators early on – this too would not be an entirely novel idea.

History's enduring lessons are at dangerous variance with the lawyers' leaders' spin. Democracy will be safeguarded through unity within political society, the delegitimisation of militant Islamic nationalism in "core" regions such as north-central Punjab, and the accommodation of "peripheral" regions and ethnic groups into the mainstream. On these and other substantive questions the lawyers' movement and the activist judges came a cropper.

The retrospective focus on Musharraf's November 2007 emergency misses the big picture around the slow, painfully negotiated, and still tentative transition to an elected civilian government. It is strange to condone the results of the February 2008 elections on post hoc political grounds, while pretending that the process of

restoring democracy, once it had been derailed, could be anything but political. Musharraf agreed to retire from his army position only after receiving United States-backed assurances that he will be protected once he handed over the reins. His military and civil accomplices probably agreed to the script also on the strength of such assurances. The installation of Dogar as chief justice was part of the choreography that was necessary to effect a peaceful handover of government through relatively free and fair elections.

Democracy was not won back by revolutionary insurrection but through a combination of negotiation and non-violent confrontation. Only the naive would expect this transition to have been a clean break. Until he was cornered by elected politicians last August, six months after the elections and nine months after the emergency, Musharraf retained the *de jure* power to call the whole thing off. And it is not as though regurgitating the events of November 2007 has produced a clean break either, given the political considerations that appear to have conditioned the present verdict.

Power for What?

The constitutionalist pretensions of activist judges and their lawyer supporters are belied by their open political ambitions. We have witnessed remarkable acrobatics – as in the Supreme Court's *suo motu* questioning of the government's power to alter taxes and subsidies. These acts of judicial activism have not been randomly distributed. There is a pattern: media-fuelled populism, encroachment upon the authority of the parliament and executive, helping political allies, and keeping mum where core interests of the military might be involved. From a broadly-supported popular struggle against the Musharraf regime, the lawyers' movement has morphed into a self-serving power grab.

There is nothing inherently right or wrong about a group organising successful collective action for increasing its power. But Pakistani state and society face substantive challenges which require a minimal level of internal coherence and a sense of purpose. Successful navigation of challenges ahead will be a surer guarantee of a democratic future than the symbolic

humbling of past dictators and supplicant judges who have been dumped by their own power centres.

The biggest of these challenges is seeing off jihadi militancy – domestically and with respect to India and Afghanistan. The trial and conviction of the Mumbai accused will pose the toughest test yet of the resolve of the political leadership, judicial system and of course the military. Almost as important are the challenges of managing ethnic and interprovincial conflicts. Balochistan is the most conspicuous, but not the only one. Necessary economic reforms too will need a deft touch.

Rewards will come slowly, and perhaps never at all for those who will pay the political price for persevering with unpopular but desperately-needed measures. But there are few alternatives to pushing ahead with reforms in foreign policy, interprovincial resource distribution, and economic management, and keeping diverse political constituencies on board. There are strong interest groups who will look for quick exits from hard decisions – not least many in the military for whom dismantling the infrastructure of jihadi militancy and normalisation of relations with India and Afghanistan would be anathema.

The judiciary's penchant for populism coupled with its thirst for power does not bode well for tackling difficult political questions that require tough decisions and painstaking negotiation. As they attempt to further expand their domain of authority, the judges and their lawyer supporters will also have to take responsibility for their actions, and the alibis they might provide to other forces for stalling crucial reforms.

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