

Short March to Despotism

By
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For those not too bothered about legal nit picking but more concerned about political and institutional developments, the road to judicial despotism has truly begun. The possible ramifications of this despotism at a time when there is a nominal consensus in resisting salafi-inspired jihad on the one hand and democratic consolidation on the other, are truly ominous.

A section of lawyers – notably led by the indomitable Asma Jahangir – as well as a growing section of the political class and civil society has started voicing concern on judicial over-reach. Everywhere and in all situations there is a thin line between judicial activism and judicial despotism. Has the higher judiciary in Pakistan crossed that line? It appears so, based on the following.

The July 31 decision of the Supreme Court started the ball rolling on this slippery slope. Through the stroke of a pen the judgment threw out 104 judges from the superior judiciary in order to undo the Musharraf PCO of Nov 3 that had illegally dismissed 60 odd judges. All judgments pronounced by the dismissed judges were considered valid, except for one (the Iqbal Tikka case) while all administrative decisions of Justice Dogar were validated but the Musharraf appointed Chief was deemed to never have been the Chief justice. This quirky logic (which I am sure lawyer friends will endlessly carp on) of picking and endorsing what is convenient and discard what is not, was extended to the executive domain. While Musharraf's numerous decisions during the existence of the Nov 2007 PCO were declared legal – most prominent being dissolution of the parliament, appointment of a caretaker cabinet and holding the general elections in February 2008– the Ordinances he issued were to be re-endorsed by Parliament and the Islamabad high court that was established during the period was to be abolished.

As it turns out there were two ends that the judgment was to serve. One was to get a 'loyal' judiciary to replace the 100 odd judges dismissed through the stroke of a pen. Many of us heard leading lights of the lawyers' movement triumphantly strutting about in social gatherings informing others of the names of judges that will be appointed on 'their' recommendation. Obviously these were considered just desserts of the two year long 'principled' struggle.

The second purpose that the July 31 judgment served was in the words of Asma Jahangir to 'jeer' the PPP government on the NRO. When no other Ordinance as such was controversial and existing petitions on the unconstitutionality of the NRO were already pending before the court, it was known that even if the government managed to get the NRO approved by the National Assembly, it will be struck down by the court. As it happened, this decision set up a long series of embarrassing episodes for a duly elected government mired in confronting a myriad of problems that the outgoing Musharraf dictatorship had saddled it with.

The second signpost to judicial despotism was the NRO judgment itself. First of all, the petition was picked immediately after the period to get the Ordinance passed had expired. Meanwhile other petitions on corruption – most notable of which is Air Marshal (retd) Asghar Khan's – have been pending for more than a decade and have not been picked up. The obvious political implications of picking the former and not the latter petition are self evident. Second, while the prayer of the litigants was to declare the NRO null and void ('ab initio' in legal speak) and the Government itself did not contest its validity, it was used as an occasion to revile the President and a handful of other government functionaries to the exclusion of the other 8000 odd beneficiaries who were given amnesty through the law for far more serious alleged crimes. Third, the discredited NAB – a petition against which is already pending in the Court for its discriminatory character – which was the handmaiden of the same dictator who arbitrarily dismissed Chief Justice Chaudhry to browbeat politicians into submission and let off corrupt businessmen through 'plea bargains,' was asked to start proceedings against government ministers.

The most important element however was to ask NAB to start proceedings against the President in the Swiss courts. To one who is admittedly not trained in legalese but can confidently claim to understand the English language, Article 248 (2) clearly states that no criminal proceedings against the President can be initiated by a Pakistani court. Is this order then, not a violation of the Constitution? Or is it the case, as it appears, the whims and fancies of the Supreme Court judges are now the law and the constitution of the land?

This notion of interpreting the Constitution whimsically and to pursue narrow prejudices was taken to new heights in the controversy regarding the appointment of judges. While the government can be rightly accused of being ham handed in the manner in which it finally approached the issue and regardless of the individuals involved (although it is instructive the manner in which the interests of the Superior judiciary and the Punjab government converge on retaining Chief Justice Sharif in the Lahore High Court) to arrogate the right to appoint all judges according to the sole discretion of the Supreme Court Chief justice violates the basic precept of parliamentary democracy where inter-institutional checks are built in to the system. Now, after the passage of the 18th amendment, we are told that the process of appointment through a judicial commission is against the basic structure of the constitution. Again a self serving definition of what constitutes the basic structure may be in the offing.

Judges and lawyers (along with their supporters in the media and political parties) claim this judicial over reach is an outcome of the popular 'mandate' that the judiciary has acquired through its two year struggle. It is 'people's power' that legitimates judicial transgressions is the standard refrain one comes across *ad nauseum*. This argument is institutionally untenable. It is important to remember that courts are not *jirgas*; they are formal institutions that derive their very existence from the constitution. Thus recourse to informal forms of public support – through crowds in a march or support by the media – is neither here nor there simply because the judiciary is not formally accountable to the public, only parliament is.

Having said this, it is true that a large chunk of the lawyers, represented by their professional associations, do back the judiciary and perhaps also endorse its despotism. The belief that they have won an important victory over other political forces (as if they were ever competing with them) has empowered them to take the law in their hands on numerous occasions. But this is scarcely popular endorsement for this form of despotism, at best it is indicative of the outlook that one interest group holds. Trade union behaviour in one sphere of activity is no substitute for formal procedures of representation.

Much more important are the implications of this particular form of despotism. Regardless of all the hype, at the end of the day the judiciary is nothing more than an unelected arm of the state, along with the army and the civil bureaucracy - known in Pakistani parlance as the 'establishment.' Noted historian Ayesha Jalal and other academic observers of South Asia have pointed out that the domination of non-elected arms of the state has been an important impediment to democratic governance in Pakistan. Apart from its anti-democratic credentials, the Pakistani establishment is also Punjab centric and its security policy continues to be characterized by a pro-jihad, anti India posture.

At a time when Pakistan is in the midst of a potentially path changing democratic transition the reassertion of establishment politics led by the judicial arm is particularly troubling. As the elected government at the centre and in Khyber Pakhtunkhwa is defiantly taking on deobandi-salafi jihadis (at huge personal cost also) and parliamentary balance for the first time in the country's history favours the smaller provinces, the judiciary is cheer leading the establishment's efforts for another blow to democracy and federalism in the country. If judicial restraint is not adhered to very soon, this will go down as the grandest of all betrayals of those earnest supporters of the lawyer's movement who took it to be a secular, democratic and truly federal enterprise.