The Supreme Court and the Hamiltonian Dilemma

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EXCLUSIVE: SC and the Hamiltonian dilemma —Shubhankar Dam

In a blatant violation of the short order declaring Sharif’s “inalienable right to return,” the Musharraf administration forced him to return to London. The facts are well-known: the media, in Pakistan and beyond, widely covered the political drama.

By a short order on August 22, a constitution bench of the Supreme Court of Pakistan declared the inalienable right of former Prime Minister Nawaz Sharif and his younger brother Shahbaz Sharif to enter and remain in Pakistan. In a recently delivered judgment, the Court has recorded its detailed reasons for its earlier order.

The judgment liberally uses the language of constitutional rights and rule of law while limiting the exercise of executive authority without legal basis. The text of the judgment revolves around three main themes: maintainability of the petition under Article 184(3), the meaning of “public importance” and the scope of the right to “remain in ... enter and move freely throughout Pakistan” under Article 15.

Raja Ibrahim Satti, counsel for the Federation of Pakistan, argued that the SC was not an appropriate forum since effective remedy could be provided by the High Court under Article 199. Javed Iqbal J., writing for the Court, rejected the argument. Articles 184(3) and 199, he said, provide for distinct remedies. None of the procedural limitations applicable to a petition under Article 199 were relevant for the purposes of Article 184(3).

The text suggests that the SC, under Article 184(3), was claiming unlimited powers: it could adjudicate on disputed questions of facts, condone delays and latches and even do away with rules concerning locus standi.

Iqbal J. fell back on the dictum from Benazir Bhutto to provide a normative foundation for this “unlimited role.” "The inquiry into law and life,” he repeated “cannot ... be confined to the narrow limits of the rule of law in the context of constitutionalism which makes greater demand on judicial functions.” Interestingly, the language about judicial participation in “life and law” is strikingly reminiscent of the approach the Indian Supreme Court adopted in the early 80s.

AG Malik Qayyum contested the maintainability of the petition on the ground of “public importance”: the grievances canvassed did not affect the public at large and the petition, therefore, could not be accepted under Article 184(3). Relying on the dictum in Zaheer Abbasi, Iqbal J. refused to equate “public importance” with "public at large". Article 184(3), he said, provides "abundant scope for the enforcement of the fundamental rights of an individual or a group or class of persons in the event of their infraction”.

In other words, even the violation of the fundamental rights of a particular individual, under some circumstances, may be considered a matter of public importance. The Sharif brothers were popular politicians and had held important public offices. Keeping in mind the pending general elections, the Court arrived at the “inescapable conclusion that the petitions were maintainable”.

But this merely raised another question: why had the SC dismissed Shahbaz Sharif’s petition in 2004? The Court’s rationalisation on the point is hard to follow. “It is to be kept in view that the earlier petition on behalf of Shahbaz Sharif,” Iqbal J. said “was dismissed being non-maintainable as it was filed in his individual capacity ... and the element of public
importance ... was missing". So why accept the petition now? For the Court, the position has apparently changed altogether: the petitions had been jointly filed by the Sharifs and PMLN and had thus acquired a "public" character.

The differences between the reasons for accepting the present petitions and rejecting the petition in 2003 are hard to reconcile. It may well be that the differences in the treatment of the two petitions lie not in law but elsewhere.

Finally, the Court needed to address the scope of the freedom of movement under Article 15. Broadly, Article 15 guarantees three rights to citizens — (a) the right to remain in Pakistan (b) the right to enter and move freely throughout Pakistan and (c) the right to reside and settle in any part of Pakistan. The language of the provision, the Court concluded, was "free from any ambiguity and no scholarly interpretation" was needed. But that can hardly be the case: the very assertion that a provision is "free from ambiguity" is in itself an interpretation, scholarly or otherwise.

Relying on Shahbaz Sharif, the Court drew the following conclusion: "The right to enter in the country cannot be denied but a citizen can be restrained from going out of the country." The text of Article 15 makes the "right to enter and move freely throughout Pakistan" specifically subject to reasonable restriction imposed by law in public interest. And, therefore, it is difficult to understand why the right to enter cannot be denied.

But the soundness of the reasoning notwithstanding, the real test of the judgment is yet to come. "The upshot of the above discussion," the Court emphatically said "is that no restriction can be imposed on the right of the petitioners to enter into Pakistan ...".

Ironically, in a blatant violation of the short order declaring Sharif’s "inalienable right to return," the Musharraf administration forced him to return to London. The facts are well-known: the media, in Pakistan and beyond, widely covered the political drama.

But the violation is, at once, a challenge and an opportunity. On one hand, it challenges the Court’s faith in the very text it authored. Did the judges really believe in what they wrote? Can they really act on their words? On the other hand, it is an opportunity: it gives the Court an occasion to morally indict the administration and reclaim its lost constitutional space.

Alexander Hamilton, writing in 1788, explained the judiciary’s limitations thus: "The judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them." “The Executive,” he added, "holds the sword of the community [and] the legislature ... prescribes the rules by which the duties and rights of every citizen are to be regulated."

"The judiciary, on the contrary," he ruled "has no influence over either the sword or the purse; [it has] neither FORCE nor WILL, but merely judgment." And, therefore, Hamilton concluded: "The judiciary is beyond comparison the weakest of the three departments of power; it can never attack with success either of the other two ...".

In less than a week, the SC will reassemble to hear the contempt case against the administration for violating the order recognising Sharif’s the right to return. Can it prove Hamilton wrong?

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