In Defence of the Supreme Court: A Conservative View

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EXCLUSIVE: In defence of SC: a conservative view — Shubhankar Dam

The restoration of the CJP has provided the Pakistani Supreme Court with a new lease of life — a new opportunity to grow into a credible institution. But there are good reasons to tread cautiously. In this hide-and-seek thriller, one hasty move and the hard earned gains may wash away.

Much has been said — mostly critical — about the Supreme Court of Pakistan’s refusal to consider the merits of the Dual Office case. For those in Pakistan who looked up to the Court as a saviour of democracy (civilian rule), the disappointment was obvious. But is there anything to be said in favour of the Supreme Court. India’s somewhat parallel experience under Prime Minister Indira Gandhi suggests so.

The years 1972-75 were tumultuous in Indian politics. Soaring prices, a fall in the supply of essential commodities, unemployment and rampant corruption had led to popular discontent. Wide spread demonstrations, often violent, had turned civic life into a sea of lawlessness. The protests reached a crescendo in two states — Gujarat and Bihar — in 1974, with students organising and leading agitations. Indira Gandhi, then-prime minister, was fast losing political control: the Opposition was determined to secure her resignation.

It was in such circumstances that the Allahabad High Court retrospectively invalidated the election of Mrs Gandhi and debarred her from holding the post of prime minister. She was accused of violating the Indian law by first, using an officer of her government to make campaign arrangements, and secondly, by using other state officers to put up speaker’s stands in her constituency and supply electricity to her amplifying equipment.

Interestingly, in its decision, the High Court acquitted her of the serious charges and unseated her on comparatively frivolous grounds, once described by a leading daily as “firing the Prime Minister for a traffic ticket”. Threatened by the High Court’s decision and uncertain about her political future, Mrs Gandhi, using civic chaos and lawlessness as a pretext, imposed Emergency. The rest, as they say, is history.

Does the Indian experience have any relevance for the current controversy in Pakistan? Yes. The Indian experience suggests that “judicial courage” is not an unmixed blessing. The Allahabad High Court may have been legally correct but was not adequately pragmatic. A bold decision works only if the expected consequences follow. That General Musharraf agreed to abide by the decision of the Supreme Judicial Council in reinstating the Chief Justice of Pakistan, Justice Iftikhar Chaudhry, was no guarantee that he would behave similarly if disbarred from contesting.

The possibility (or rather the threat) of Emergency was far too real: like Indira Gandhi in India, General Musharraf may have taken Pakistan through another spell of darkness. Continued civil unrest in the streets of Pakistan and frequent terrorist strikes may have provided General Musharraf with the perfect foil to justify his Emergency.

Javed Jabbar recently lamented: “The majority of 6 judges out of 9 appear to have focused on the letter of the law, whereas wisdom demanded that the focus be on the spirit of the 1973 Constitution and on the essence of its principles.”

The decision, I would suggest, was neither about law nor principles but about realism. Disbarring was simply not an option and in that sense rejecting the matter on procedural grounds was far better than having to find substantive reasons for allowing General Musharraf to contest.

Taking this further, I would argue that for this reason, Dr Ayesha Siddiqa may be wrong in her recent argument that the GHQ “would always term this act of kindness as the superior court’s lack of strength and courage”. To the contrary, by avoiding the controversy on procedural
pretext, the Court has retained the constitutional (and moral) space to insist on a future date that a person cannot be a General and the President simultaneously.

If the judiciary (ironically a deeply undemocratic body) is to become the vehicle for reviving and sustaining democracy in Pakistan, it can happen only incrementally. The newfound stature is too fragile, too insecure for persistent and polemic use. Like the human body, a robust institution worthy of respect, cannot grow overnight. It can only do so incrementally, a step at a time.

Unlike hard blows, the decisions of the Court must act on the nation and its power-holders like an addictive drug: slowly and silently but nonetheless surely. This is what Professor Upendra Baxi, in the Indian context, described as the “creeping jurisprudence” of the Supreme Court of India.

The restoration of the CJP has provided the Pakistani Supreme Court with a new lease of life — a new opportunity to grow into a credible institution. But there are good reasons to tread cautiously. In this hide-and-seek thriller, one hasty move and the hard earned gains may wash away.

High-profile cases such as the Dual Office pose serious challenges to any incremental conception of judicial authority. Much is at stake and the accompanying national and international attention often puts disproportionate burden on the judges. Suspending small time policemen for their lawlessness in the streets of Islamabad may make for a better beginning than invalidating the election of a Presidential hopeful.

In refusing the lawyers’ bait to invalidate the Presidential return of General Musharraf, the Supreme Court may have acted conservatively. For once, the conservative course of action may also have been the courageous one.

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