Pakistan Lawyers' Movement: A Losing Cause?

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The Pakistan Lawyers' Movement: A Lost Cause?

JURIST Guest Columnist Shubhankar Dam of the Singapore Management University School of Law says that in pursuit of their goals of judicial restoration and political change Pakistan's lawyers may at this stage be well-advised to reconsider the wisdom of boycotting both the courts and forthcoming elections...

"In three words I can sum up everything I’ve learnt about life,” Robert Frost once said: “It goes on.” After nearly ten months of unfailing persistence, lawyers in Pakistan are finally beginning to wonder: Should they go on?

On 13 January, the Pakistan Bar Council (PBC) voted to end the continuous boycott of judges who swore oath’s under the country’s Provisional Constitution Order and to instead substitute “a complete boycott of the superior judiciary every Thursday and a one-hour token strike on a daily basis.” Predictably, the decision created a furor: for many, it was a sell-out.

Both the Lawyers National Action Committee (LNAC) and the Supreme Court Bar Association (SCBA) quickly denounced the decision as "contradictory" and “against the spirit of the lawyers’ sacrifices.” The provincial bar councils, the high court bar associations and the district bar associations echoed similar sentiments: they insisted on pursuing the strategy of continuous boycott.

The PBC, some argued, did not have authority to amend the methods of the movement. The LNAC was responsible for all decisions post-March 9 and the same, they said, should decide on the issue of amending the scope of the boycott. Secondly, appearing before these courts, some of the high court bar associations argued, would amount to giving legality to the unconstitutional acts of the regime.

And finally, many lawyers reiterated their resolve to continue a complete boycott notwithstanding the financial hardships. A majority of the mostly young lawyers of the Islamabad District Bar Association, for example, rejected the PBC decision insisting on their willingness to “face financial constraints” and "sacrifice everything for the rule of law.”

The PCB, on its part, argued that the decision was motivated by the hardships of the litigants: it was "a concession in public interest in view of the misery of persons falsely accused of criminal cases and hardship of litigants seeking determination of their genuine
claims.” The concession, however, wasn’t “a recognition of the validity and constitutionality of the PCO judges,” the PBC said.

Not surprisingly, the PCB found few takers for its explanation. And with mounting pressure to revert to its original plan of complete boycott, the PCB met on February 2 to decide the future course of action. But it chose not to revoke its earlier decision.

With the PBC now openly in disagreement with the LNAC and the SCBA about the future course of action, it may be worthwhile to pause for a moment and ask: what, after all, are the objectives of the lawyers’ movement? What are they seeking to achieve? What purpose does a complete (or token) boycott serve? More importantly, is there a disconnect between their purported goals and the strategies they have employed thus far?

In the last three months, some or all of these have been articulated as the objectives of the current agitation: (a) restoration of the pre-PCO judiciary (b) removal of (retd.) General Musharraf from the office of the President (c) and the release of lawyers and judges who have been kept under "detention" including Aitzaz Ahsan, Munir Malik, Shakeel Ahmad, Ali Ahmad Kurd and Justice (retd.) Tariq Mahmood. Additionally, they have also called upon the political parties to boycott the impending general elections.

Beyond these specific claims, lawyers have often demanded the following: establishment of an “independent judiciary” and respect for rule of law, the restoration of the 1973 constitution in its “real form” and the cessation of all forms of coercion against lawyers and members of the civil society.

In the light of these narrow and broad objectives, consider the effectiveness of a boycott strategy. Consider, for example, objectives (b) and (c) mentioned above. What reason does one have to believe that General Musharraf can be removed from office by boycotting the superior judiciary? Or what reason does one have to believe that a boycott of the superior judiciary will lead to the release of detained lawyers and judges?

Or consider the effectiveness of the boycott strategy with reference to the broader objectives. Can the boycott of the superior judiciary, by itself, lead to the establishment of an “independent judiciary”? Or can it lead to the establishment of a “rule of law” society? Or can it, by itself, lead to the restoration of the 1973 Constitution in its “real form”?

The agitation may be effective in making a moral statement against the illegalities of the Musharraf administration. But the effectiveness of the boycott strategy in producing tangible changes must be seriously questioned.
Lawyers in Pakistan are trying to effect significant political and legal changes both by their presence in and absence from the courts. Their endeavors are strikingly reminiscent of what came to be known in the US as “cause lawyering” in the early 1950s. “Cause lawyering” typically involves a strategic use of the litigation process to pursue specific goals.

For example, throughout the 1950s, black organizations used the litigation process to challenge specific laws (and policies) that were unfairly discriminatory. Organizations “shopped around” for appropriate persons to act as petitioners while lawyers located judges likely to be sympathetic to anti-discrimination arguments.

And bit by bit, a body of equality jurisprudence began to develop, culminating in the historic Brown v Board of Education in which the US Supreme Court declared the policy of racially segregated schools unconstitutional. “Cause lawyering” became a phenomenal success and since then has been a pervasive feature of the US legal system.

There is, however, a basic difference between the practice in the US and what is now being attempted in Pakistan. In the US “cause lawyering” was employed to bring about changes in specific areas of law: equality jurisprudence, abortion rights, gay rights and so on. In contrast, most of the objectives of the current agitation relate to fundamental legal and political changes in Pakistan.

A strategy closely tied to the litigation process can rarely deliver fundamental changes. “Independence of the judiciary” or the restoration of the 1973 Constitution in its “real form” cannot be brought about by a dialogic process merely involving lawyers and judges. These are objectives that can be achieved only through broader political power.

This may explain why Justice Khalilur Rehman Khan, the former SC judge who did not succumb to the 2000 Provisional Constitution Order, recently “asked lawyers not to press for the boycott of the elections.” “Lawyers must beat General Musharraf at his own game,” he said “by persuading the masses to vote only for those candidates who had pledged restoration of the pre-PCO judiciary.”

Justice Khan encouraged lawyers to persuade the masses to vote for specific candidates. Maybe lawyers need to present themselves as candidates. Boycott, it would then appear, is a misguided strategy: they need to participate actively, whether in the courts or in the elections.

In their 1995 “Plan for the Historic Initiation of the People’s War,” the Maoists in Nepal declared: “everything is an illusion except state power.” As Pakistan's lawyers work towards their February 9 convention, they would be well-advised to consider the validity of the
“Maoist truth.”

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