

JUDICIARY'S INDEPENDENCE: LINE OF
ACTION FOR THE NATIONAL ASSEMBLY

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By Professor Khurshid Ahmad

The newly elected National Assembly of Pakistan faces a number of challenges, but the most important and crucial of them all is the revival of the pre-November 03, 2007 judiciary and reinstatement of its illegally sacked judges. No civilized society can survive with honor without a free judiciary. With the independence and prestige of the judiciary go the independence and prestige of a nation. This explains why it is imperative to annul all unlawful and extra-constitutional actions, which commenced from March 09 and culminated with the declaration of Emergency on November 03, 2007. The National Assembly is already committed to resolve the issue pertaining to the restoration of the judiciary within the timeframe of 30 days, in accordance with the demands of law, Constitution and the national conscience. More than a week has since passed and the matter needs now to occupy the top most position among the list of priorities before our new legislature and the executive.

There are at least three aspects of the issue, which merit serious consideration in order to avoid recurrence of such mishaps in future. Firstly, we notice that one man has been taking drastic actions in utter violation of the Constitution, the law of the land and the Islamic values and civilized norms of the society. The Chief Justice of Pakistan was summarily dismissed, followed by as many as 63 judges of the higher judiciary. These highly respectable figures, and in certain cases even their family members, were subjected to illegal confinement and the most inhuman treatment. This was followed by appointment in their place of the judges of the ruler's choice with a view to obtain decisions of his liking. The entire episode was nothing short of the judiciary's murder, something that has happened never before in our chequered history. Secondly, a single person enjoyed the liberty to willfully suspend the Constitution, introduce amendments suited to his designs and mould the system of governance the way he wished. Thirdly, the PCO-induced judiciary colluded with him to grant him extra-constitutional powers through willful amendments, which even the Supreme Court was not authorized to make and which needed two-third majority of the Parliament for passage.

These three extra-constitutional and hence illegal measures were taken by the regime and the post-03 November judiciary became equally involved in the ruler's crime by according them legal sanction. There are instances even earlier of the judiciary's abuse and we may cite in this context the sad example of Governor General Ghulam Muhammad and his accomplice Justice Munir. The rulers' favorites in the Parliament have also been involved earlier in transgressing their limits and the bounds of decency and fairplay by violating the spirit of the Constitution and sanctifying these transgressions in the form of Sections 270, 270-A and 270-AA. It was, however, for the first time that the country had fortunately a Chief Justice, who could resist such unlawful measures. Justice Iftikhar Muhammad Chaudhry and his 63 other senior fellow judges stood like a rock before all pressures and intimidations of the government. Their brave and principled stand encouraged the

country's entire lawyers' community, followed by the civil society and the political force, to rally round the Chief Justice of Pakistan in this heroic struggle for the sake of judiciary, the rule of law and supremacy of the Constitution. In the eyes of Pervez Musharraf and his cronies this was obviously the greatest crime of the Chief Justice and his fellow judges. Unprecedented in the country's history and a matter of shame for any civilized society, the government of the day went to brutalize and terrorize the honorable judges of the superior judiciary. It was in this backdrop that general elections of 18 February 2008 were held and the people of Pakistan sealed the fate of Pervez Musharraf and his favorites once for all.

The newly elected National Assembly of Pakistan should, therefore, bear this fact in mind that it owes its existence chiefly due to the overwhelmingly anti-Musharraf and pro-judiciary vote, as rightly symbolized in the person of the Chief Justice of Pakistan and his 63 fellow judges unlawfully sacked by the Musharraf regime. Now, the National Assembly and the new government are duty-bound to remove, once for all, those factors, which were responsible for the country's downward slide in the realm of judiciary. Following measures are recommended in this regard.

- 1.** The National Assembly should move a well-drafted resolution declaring the steps taken on November 03, 2007, as unconstitutional, unlawful, unethical and malafide. Being ultra-vires, these steps should be declared null and void from the day these were introduced. A resolution to this effect should automatically lead to the following:
 - (a)** The Chief Justice and all the sacked judges would stand reinstated in same capacities as enjoyed by them in the morning of November 03, 2007. The verdict of the seven judges of the Supreme Court, declaring November 03 measure as extra-constitutional and hence unlawful, would thus automatically come into effect and those who had violated the superior judiciary's decision would face the music.
 - (b)** All steps taken by the regime following declaration of Emergency on November 03, 2007, including every constitutional amendment and administrative measure, would cease to be lawful and operational, provided the Parliament feels like retaining some of those in supreme national interest.
- 2.** The proposed resolution may have the following four parts:
 - (i)** Annulment of the steps taken on November 03, 2007 and declaring them unlawful and without any legal sanction.
 - (ii)** Restoration of the pre-November status quo.

- (iii)** A clear-cut declaration reaffirming that neither the President, nor the Chief of Army Staff, or the Supreme Court has the authority to amend the Constitution. Any amendment in the Constitution will have to be invariably done only as specified under Articles 238 and 239 of the Constitution of the Islamic Republic of Pakistan. Hence, the Supreme Court judges who took oath under PCO were not authorized to give legal sanction to any of the actions taken following the declaration of Emergency.
- (iv)** In order to streamline the anomalies and for the sake of the continuation of the system, some new legal measures may be adopted on the lines proposed below:
- a.** The serving judges would revert to their erstwhile positions following the reinstatement of the sacked judges. The newly appointed judges would be liable to scrutiny under Article 209 of the Constitution. In case they are relieved of their duties, necessary action may be taken in the light of the Supreme Court's rules of business and on the precedence of the superior judiciary's decisions in Al-Jihad Trust case.
 - b.** Within three months following the passage of the resolution by the National Assembly, all actions taken under the Emergency Rule, introduced on November 03, would become null and void except for those which a Parliamentary Committee may decide within these three months to retain. If no such decision is taken, all previous actions would stand nullified, with the exception of those which have already been enforced. They may, thus, be condoned as 'lesser evil'.
 - c.** The resolution should also clearly state that any validation of the government measures by the superior judiciary, and their ratification by the Parliament under the 'law of necessity' was a wrong practice, which has been done away with forever. It may also be useful for the Parliamentary Committee, specially instituted for the purpose, to determine how far the validations provided in the past under Articles 270, 270-A and 270-AA were legally correct. The Committee should review all such laws, orders and measures of the past and decide which one of these needed to be revalidated and which one to be cancelled.
 - d.** Once the resolution is adopted, immediate action should be taken in its light and the judges restored through an executive order so as to make the

defunct constitutional process of justice and fairplay operational once again. The resolution should be made part of the Constitution as its Article 270-AAA. This would shut, once for all, the doors of validations granted through Article 270 and, also close forever the most undesirable chapter of the law of necessity.

- e. It may also be pertinent to add, through an amendment in Article 6 of the Constitution, that any step to suspend the Constitution of the Islamic Republic of Pakistan, or hold it in abeyance was a crime and tantamount to subverting the Constitution and similarly any action taken to justify such extra-constitutional steps was equally a crime.
- f. If felt necessary, an amendment may also be introduced in Articles 238/239 as an explanation to the effect that no measures other than those specified in these Articles would be admissible and no authority has the power to introduce any amendment in the Constitution, which if done, would be treated as extra-constitutional and *ultra vires*.

The measures proposed here fulfill the requirements of the Murree Declaration. Reinstatement of judges is definitely a legal requirement, but more important is to provide foolproof safeguards to the Constitution as well as the institution of judiciary by restoring the judiciary's independence and annulment of the unconstitutional steps of November 03, 2007. It has to be vindicated as a matter of principle that dismissal of judges through any expedient measure is illegal and any such action will have to have the sanction of Article of 209 of the Constitution. The resolution should also place on record the commendation of the great sacrifices made by the Chief Justice of Pakistan and his 63 fellow judges for the cause of the independence of judiciary and the supremacy of the Constitution. While lauding their principled stand and steadfastness in the face of the brute state terror and pressure tactics, their exemplary stand may also be compared with the sadly expedient and self-serving approach of the judges who cooperated with the dictator and agreed to take oath under PCO. Measures for the judiciary's accountability also need to be reviewed, along with steps for mutual cooperation and better understanding between the two vital pillars of the state: the executive and the judiciary. In the light of an impassioned review, fresh rules and regulations may be framed to make the judiciary truly independent and a repository of the people's confidence, with the executive facilitating it in deliverance of justice unhindered by any source of power.

As for the oft-repeated question that how the Parliament can annul government measures of November 03, one may simply ask: Why an executive order, which in itself was illegal and exists now only *de facto* and not *de jure* in the eyes of the Constitution, cannot be declared null and void through another executive order? Legal experts of the free world have declared those measures *ultra vires* and in violation of the Constitution and the established democratic norms. The US

government may have its own axe to grind, but the US experts of law and constitution have declared those steps unlawful. The US Congress in its resolution of 17 March, 2008 disapproved the judges' dismissal and expressed the need for their reinstatement. The New York Bar Association, which has a membership of 22,000 barmen, has also condemned those measures. Back at home, all leading jurists and legal experts have declared them unlawful and unconstitutional. The seven-member bench of the Supreme Court, in its judgment of November 03, dismissed the Emergency measures as wrong and malafide. The same judgment holds good even today. No action, subsequently taken by the judges who took oath under the PCO, has, therefore, any legal validity. The former Chief Justices of Pakistan, Justice Ajmal Mian, Justice Sajjad Ali Shah and Justice Saeduzzam Siddiqui have all clearly and repeatedly stated that the dismissal of judges under the Emergency order was unconstitutional and they could be restored to their pre-November 03 positions simply through a resolution of the National Assembly. More than three dozen judges of the Supreme and High Courts are of the same view. Under such circumstances, there is no nee at all for any legal hair-splitting on this account.

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