**Rule of Judges**

[Malik Muhammad Ashraf](https://dailytimes.com.pk/writer/malik-muhammad-ashraf/)

April 6, 2023

When any future historian will delve into removing the haze of tragedies that Pakistan had to endure and the perennial political instability, it will be hard for him to not mention the pliable and unscrupulous judges among the tormentors of this god-gifted state.

They invented dogmas like the doctrine of necessity to validate military coups; authorized military dictators to make changes in the constitution, which the judiciary itself was competent to carry out; re-wrote constitution; ordered the removal of chief executives in breach of the judicial principle of restraint and indulged in unfettered use of suo-motu powers establishing the Rule of Judges in the country. All those decisions and verdicts were, however, accepted and implemented irrespective of their consequences because there was no other choice. An eminent judge of the US Supreme Court said that the apex court is not final because it is infallible but it is infallible because it is final. The result is that even after more than seventy-five years of our independence, we are still groping in the dark to find our destination.

Perhaps, it would be pertinent to take stock of some of those verdicts. The first such case was when the Constituent Assembly was dissolved by Governor General Ghulam Mohammad in 1954. Maulvi Tamizuddin challenged the dismissal in the High Court which overturned the order of the Governor General. However, the Federal Court (Supreme Court) under Justice Muhammad Muneer upheld the dissolution by inventing the doctrine of necessity.

The judiciary, under CJ Iftikhar Muhammad Chaudhry, acted more as a popular court than a court of law.

Martial Law by Ayub Khan was validated through the invented doctrine of necessity. The military dictators down the line also benefited from this judicial invention. The hanging of Zulfiqar Ali Bhutto ordered by the Supreme Court headed by Justice Anwar ul Haq is another black chapter in the history of Pakistani jurisprudence and is widely regarded as judicial murder.

The judiciary, under CJ Iftikhar Muhammad Chaudhry, acted more as a popular court than a court of law. Constitutional experts, both within and outside the country, were of the view that the apex court while declaring verdicts in the NRO case and appointment case of the then Chairman NAB, transgressed its constitutional powers. He and Justice Saqib Nisar tried to even overlord the parliament besides violating the tri0chotomy of power enshrined in the constitution. Through excessive use of suo-motu power, they poked their nose in everything under the sky. Yousaf Raza Gilani was removed; setting aside the principle of restraint.

The SC challenged the eighteenth amendment clause regarding the appointment of judges and almost forced the parliament to bring another amendment to accommodate its viewpoint, thus not only violating Article 239(5-6) of the constitution which says no amendment in the constitution can be challenged in any court of law and there is no limitation whatsoever on the power of the Majlis-e-Shoora to amend any provision of the constitution. It was a blatant attempt to overlord the parliament.

Nawaz Sharif was removed from power through a very controversial decision when the SC itself assumed the role of a trial court instead of its original appellate jurisdiction and disqualified him on the basis of a plea which was not even part of the petition seeking his disqualification. There is a predominant view–as also corroborated by later events–that his removal was a result of a conspiracy. Since then, the country is wading through political instability badly affecting its economic profile. Yousaf Raza Gilani was removed in breach of the jurisprudential principle of restraint.

Last year, while rendering its opinion on the reference made by President Alvi in regards to Article 63-A, the SC added to the text of the Article notwithstanding the fact that two judges held that Article 63-A was complete code in itself and any further interpretation of it would amount to re-writing the constitution.

The SC with a 3-2 majority, however, ruled, “The vote of any member of a parliamentary party in a House that is cast contrary to any direction issued by the latter in terms of paragraph (b) of clause (1) of Article 63-A cannot be counted and must be disregarded and this is so regardless of whether the party head after such vote proceeds to take or refrains from taking action that would result in a declaration of defection.” The judges noted that a member would be treated as having defected even if the head of the party does not initiate action against him and actually re-wrote clause 63-A, which they were not competent to do.

The opinion rendered by SC on Article 63-A fomented political crisis in Punjab and KPK including the unjustified dissolution of their assemblies. It has opened a new Pandora Box of legal battles for a long time to come fraught with destabilizing impact.

Now, the verdict announced by the three-member bench of SC, which initially comprised nine judges and was squeezed to only three members in regards to the election date in Punjab and KPK and the change of date by ECP in the announced schedule of elections, is yet another addition to the litany of miscarriage of justice and reinforcement of the concept of Rule of Judges.

The bench, in its verdict, was wrong in saying that the ECP did not have the power to change the date of elections and by doing so it had violated the constitution. The ECP is a constitutional and independent body charged with the duty to hold free and fair elections in the country in line with the constitutional provisions and Election Act 2017. Section 58 of the Election Act empowers the ECP to change the schedule if it deems necessary to do so by recording the reasons. Article 254 of the constitution provides cover for any such eventuality. Then how come the three-member bench declared ECP’s notification against the constitution? The decision has also been given in spite of the fact that four judges had rejected the validity of the suo-moto notice and a three-member bench headed by Qazi Faiz Isa had also ordered suspension of all suo-motu cases with 2-1 majority till the formulation of rules in that regard. The case has also brought out the divisions in the apex court which is not a good augury for it.

The ruling PDM has rejected the ostensibly flawed and unfair verdict and seems poised to take steps to circumvent the debilitating impact of the verdict. Doing so will surely have serious political and legal implications and the brewing turmoil might derail the entire system.

*The writer is a former diplomat and freelance columnist.*