**The hearts of men**

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Many years ago, there was an iconic radio show called ‘The Shadow’ in which the title character would be introduced with the tagline, “Who knows what evil lurks in the hearts of men? The Shadow knows!”

I was reminded of the Shadow by the recent proceedings of the Supreme Court regarding the constitutionality of the NAB law amendments in which the honourable chief justice of Pakistan posed the query as to whether parliament can make “self-serving legislation”.

The short answer to the above question is yes. Parliament can indeed make laws which personally benefit parliamentarians.

Take a simple example: what if parliament passes legislation reducing income tax rates tomorrow? Will the law be invalid because every single parliamentarian benefits from that tax reduction? Clearly not. Instead, the law can only be challenged on the grounds noted in the constitution. For example, if the impugned legislation grants tax relief only to parliamentarians, it can be challenged as discriminatory. But the mere fact that parliamentarians also benefit from a law is no basis for declaring it unconstitutional.

The broader jurisprudential principle here is that no malice can be attributed to parliament. Because once you start examining the motives behind an individual’s yes-no vote, you are operating on pure speculation (unless, of course, you are the Shadow and know what evil lurks in the hearts of men.)

In fact, the whole point of parliament is to take individual self-interested perspectives and, where a majority exists, enact that common consensus in the form of a statute. It is the majority principle that protects the people of Pakistan from “self-serving” legislation, not the moral character of its parliamentarians.

To take a different example, President Biden announced a $2.2 trillion ‘Build Back Better Act’ in January 2021. That proposal died because of opposition from two Democratic senators, namely Senators Manchin and Sinema. Subsequently, a less ambitious version of the same proposal managed to find favour with Senator Manchin after which all eyes turned to Senator Sinema of Arizona. It is a matter of record that Senator Sinema then insisted on several changes in the draft act which operated to the benefit of the very wealthy (including presumably backers of Senator Sinema). The rest of the Democrats then swallowed their objections to Senator Sinema’s proposals and the renamed ‘Inflation Reduction Act’ was triumphantly signed by President Biden on August 11, 2022.

Does the Inflation Reduction Act serve the narrow personal interests of Senators Manchin and Sinema? Absolutely yes. Does that make it unconstitutional? Absolutely not.

To summarize, legislation always serves the interests of one party or another. Yes, some legislation is so noble that nobody can object. But for the most part, “laws, like sausages, cease to inspire respect in proportion as we know how they are made.”

You may say this case is different. In this instance, the ‘krupt Noonies’ are changing the law so as to benefit themselves. Look at how many individual leaders of the PML-N will benefit from the amendments to the NAB Ordinance. Shame, shame, shame.

Before I respond to this allegation, it is worth taking a step back and situating the issue, both in the overall context of Pakistan’s troubled history since 1947 and more specifically, in the history of the NAB Ordinance itself.

In terms of the broader issue, the heavy-handed use of accountability laws has been a feature of Pakistani politics ever since the Public and Representative Office Disqualification Act, 1949 (PRODA) was enthusiastically used by Liaquat Ali Khan to prosecute troublesome politicians like Ayub Khuhro, Nawab Iftikhar Hussain Mamdot and Hussain Shaheed Suhrawardy.

In 1959, General Ayub updated PRODA and replaced it with the Elected Bodies Disqualification Order (EBDO). Like its predecessor statute, EBDO too was a blunt instrument used to hammer uncooperative politicians and civil servants into submission.

The next major legislative upgrade to the accountability regime came in 1996 when President Farooq Leghari introduced the Ehtesab (Accountability) Ordinance which was subsequently converted into the Ehtesab Act by the government of Mian Nawaz Sharif in 1997. Then, when General Musharraf took over through the October 12, 1999 coup, one of his first steps was to enact the NAB Ordinance.

There is no dispute that the NAB Ordinance is a draconian law. The fact that the chairman of NAB can, on his own and without the blessing of any judge or court, direct any individual to be arrested and held for 90 days is an abomination. More importantly, the basis for the Supreme Court’s approval of the NAB Ordinance in the 2001 Asfandyar Wali case was very much that hard times called for hard measures. Remember also this was the same Supreme Court which had earlier legitimized General Musharraf’s coup on the basis that governance had collapsed and that corruption had become endemic.

My point here is that the bogey of civilian corruption has always been a useful stick for the establishment to belabour elected representatives. And the NAB law is just one more manifestation of the same impulse. Imran Khan himself now concedes that NAB cases were manipulated by these powers that befor political advantage during his tenure as prime minister.

In this 20-plus year saga of the NAB Ordinance, one would have expected the judiciary to have gradually softened the rigors of a horrific law, at least after the departure of General Musharraf. However, the opposite has happened. Let me give two examples.

The first example pertains to the scope of the NAB Ordinance. Section 9 of the NAB Ordinance provides that a “holder of public office, or any other person” commits corruption if he, for example, takes money to do any official act. Under the rule of ejusdem generis, general language which follows a list of particular instances is to be read only as to the types of things identified by the specific words. Hence, the phrase “any other person” in the NAB Ordinance should have been read as extending the scope of the law only to other public representatives. Instead, in the 2013 case of Abdul Aziz Memon, the Supreme Court read “any other person” literally as meaning “any other person” including private individuals with no connection to the government.

The second example is even more perplexing. As originally promulgated in November 1999, the NAB Ordinance provided that no court could grant bail. Under existing precedent, however, the powers of the superior courts to grant bail could only be taken away through express language. Sure enough, some clever lawyer explained this fact to the powers that be and the relevant language was amended to say, “no court, including the High Courts” could grant bail.

The judicial inability to grant bail was a big deal because it meant that people picked up by NAB would stay in jail not just for the already unconscionable 90 days stipulated in the NAB Ordinance but for years at a time.

In 2001, the words “including the High Courts” were removed. The consequence of this change should have been that the high courts were now free to grant bail under the normal provisions of the Criminal Procedure Code. But instead, the Supreme Court held that the removal of the express words “including the High Courts” made no difference. Yes, there remained the outside option of getting bail through a writ petition. But that bar was high to begin with and then raised higher by the courts. In the 2019 case of Tallat Ishaq, the Supreme Court led by Justice Khosa held that the mere fact that somebody had languished in jail without trial for several years was not a good reason for releasing them on bail. Instead, the delay had to be “shocking, unconscionable or inordinate and not otherwise.” And even then, if “some significant or noticeable part of the delay” was attributable to the accused, bail was not to be granted.

The odd thing is that all this time while the Supreme Court was busy construing the NAB Ordinance in the harshest possible way, it kept on insisting that it had no option but to do so because it was bound by the letter of the law. By one count, there are numerous 23 separate cases in which various benches of the high courts and the Supreme Court have pointed out flaws in the NAB Ordinance or even gone further to suggest that they be removed by parliament.

Which brings us back to where we started from. Parliament has now actually acted on all that judicial encouragement and amended the NAB Ordinance. But the court is wondering whether parliament can enact “self-serving” laws.

The actual text of the new law amending the NAB ordinance was mostly prepared by the PTI during its tenure. Why are these amendments not being hailed as a model of bipartisanship then? What will it take to fix a law which every single major party now agrees has been consistently abused for extraneous reasons?

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