**Final and infallible**

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A renowned jurist and eminent judge Jackson 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. This observation has assumed the significance of a legal maxim and is universally accepted. What it means is that by virtue of being the ultimate forum of justice, the apex court becomes infallible and its decisions become binding, irrespective of the fact whether they are good or bad.
In the domain of jurisprudence, it is also an internationally settled principle that judges are not legislators but adjudicators, interpreting the text of the constitution and law laid out by the legislators and stating what the text means. They cannot even change a coma in the text of the constitution. It is also agreed that the judges, while delivering their verdicts must exercise utmost restraint, which envisages refusal to exercise judicial review in deference to the process of ordinary politics as it supports the process of democratic self-governance as one of the main political ideals in a democratic dispensation.
The history of Pakistan is replete with judicial decisions that were given in breach of the settled constitutional principles, by inventing judicial dogmas like the doctrine of necessity and validating conspiratorial removals of chief executives which have had a profound and debilitating impact on the development and consolidation of democracy in Pakistan, besides promoting fissiparous tendencies in the society. But they were all accepted and implemented irrespective of their consequences.
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. Justice A R Cornelius was the sole dissenting judge. The Supreme Court also validated the Martial Law by Ayub Khan, relying on the doctrine of necessity. Military dictators down the line also benefitted from the doctrine of necessity. The hanging of Zulfiqar Ali Bhutto ordered by the Supreme Court headed by Justice Anwar ul Haq is widely regarded as judicial murder. In dismissing Yousaf Raza Gilani for not writing a letter, the court failed to exercise the internationally recognised principle of judicial restraint.
Now we have yet another controversial opinion rendered by the Supreme Court with a 3-2 majority on questions pertaining to Article 63-A asked by the President under Article 186, in which the SC has an advisory jurisdiction. The Article reads, “(1) If, at any time, the President considers that it is desirable to obtain the opinion of the Supreme Court on any question of law which he considers of public importance, he may refer the question to the Supreme Court for consideration. (2) The Supreme Court shall consider a question so referred and report its opinion on the question to the President.” As is evident under this Article, the court gives only its opinion and not the decision on the relevant clause of the constitution pertaining to the questions asked. However, the Article is silent in regards to whether the opinion given by the SC is binding and enforceable like the verdicts given by it under its original and appellate jurisdiction or not. Maybe this question will come up when an intra-court appeal is lodged against this opinion to be adjudicated by a larger bench of the apex court, which has become a necessity in view of the fact that out of the five judges, two have expressed their dissent. They have maintained “Article 63-A is a complete code in itself which provides a comprehensive procedure regarding defection of a member of the parliament and consequences thereof. Any further interpretation of it, in our view, would amount to re-writing the constitution and will also affect other provisions of the constitution, which have not even been asked by the President. Therefore, it is not our mandate and we see no force in the questions asked through this Presidential Reference.”
I would tend to go with the opinion expressed by two dissenting judges which apart from being strictly in conformity with the spirit of the Article also appeals to common sense. The motion for a vote of no confidence is presented usually by the opposition with the help of members from the treasury benches and independents and if it is done by members of the ruling party to get rid of an errant Prime Minister, they usually enlist the support of the opposition. With the current opinion of the apex court that possibility has been foreclosed for all times to come. It also circumvents the procedure laid down in the Article for determining defection of a member of the parliament. I am afraid the judiciary has opened a Pandora’s Box of legal battles for a long time to come.