

A prescription for controlled democracy

By Shameem Akhtar

Dawn
29/8/02
THE Chief Executive-cum-President-cum-COAS has invoked the May 12, 2002, judgment of the Supreme Court to amend the 1973 Constitution by promulgating a Legal Framework Order. The LFO gives the CE a virtual carte blanche to rewrite the Basic Law of the land which in a democratic polity is the prerogative of the popularly elected legislature.

From a reading of Article 3 (2) of the LFO it appears as if the amendments contained in it are not complete since the CE has empowered himself to make further amendments if necessary or pass orders "for removing any difficulty as he may deem fit". Whether or not the truncated 1973 document needs to be further mutilated will rest entirely on the discretion of the Chief Executive.

The parliament emerging from the October elections will obviously have no say in it. General Musharraf made this clear when he categorically stated at his lengthy press conference on August 21: "I am hereby making it a part of the Constitution through the powers given to me by the Supreme Court. I do not need assembly's approval". In other words his fiat is final and irreversible.

If the future legislature is not to have any power to approve or disapprove of the changes that have now been made in the Basic Law and instead, the Chief Executive is to exercise the function of the legislature, then General Musharraf is doubtless the supreme law giver. One wonders whether that could have been the intention of the Supreme Court in giving him limited authority to amend the Constitution.

The apex court verdict has given rise to controversy among the jurists, most of them contending that the judiciary's role being the interpretation of the law and the constitution, it cannot usurp the functions of the parliament. At the same time, it is also believed by jurists that judges not only interpret the law; they also make law in the process of putting a construction on it.

If the executive of any country were to insist on making amendments to the constitution, he would be branded an autocrat, not a democrat. That way Gen

Zia did better than General Musharraf as he got all his amendments, including the infamous Eighth Amendment, validated by an elected — albeit a hostage — parliament. On the other hand, Gen Musharraf would not allow the future parliament to approve or reject the amendments made by him. Nor would he permit the parliament to elect him as president according to the constitution.

Already Gen Musharraf has announced that he would continue as president and Chief of the Army Staff for the next five years and to make sure, a provision to this effect has been incorporated in the Constitution. At least in this respect he would be following in the footsteps of Gen Ziaul Haq who combined in his person the presidency and the office of the army chief. Who can

The National Security Council, as envisaged in the LFO, will be a supra cabinet which will not be answerable to the parliament. On the contrary, it may bypass the cabinet and even call for the dissolution of the parliament. At best, the LFO is a prescription for controlled democracy; at worst, a recipe for dictatorship.

deny the fact that power flows from the barrel of the gun rather than from the will of the people?

True, in democracies, presidential or parliamentary, the president or the king/queen is the supreme commander of the nation's armed forces but not the service chief of any of these. Even Ayub Khan was content with the honorific of field marshal as he relinquished the office of the commander-in-chief in favour of Gen. Musa. But Ayub's national assembly was elected by a restricted electoral college of eighty thousand Basic Democrats.

Like all despots Ayub treated the national assembly as a mere rubber stamp. The citizens' rights were not justiciable, so the courts could not strike down the black laws that were repugnant

Democracy
to the basic norms and values of civil society. There was a vociferous public demand for their repeal and for the restoration of universal suffrage and a directly elected parliament. At least Ayub's saving grace was better governance which his Bonapartist successors cannot boast of.

The Ayub regime was impervious to public criticism. So is Musharraf's. In vain did Ayub and Zia seek to perpetuate their authoritarian system. Ayub questioned the wisdom of an elective system of government, while Zia termed elections as un-Islamic, denouncing democracy as a western system that did not suit the genius of the Muslim people. But Ayub's Basic Democracy was dismantled by the martial law decree of Gen Yahya Khan, while Zia's Eighth Amendment was annulled by an overwhelming majority of the parliament.

It is ironic that both Yahya Khan and Nawaz Sharif invalidated the laws of their mentors. Musharraf says he would not allow anyone to scrap the amendments he has made in the Constitution. Article (3) of the LFO reads: "The validity of any provision made, or orders passed, under clauses (1) and (2) shall not be called in question in any court on any ground whatsoever".

It is indeed a serious matter that the apex court should be deprived of its inherent right to adjudge the validity or otherwise of the laws and ordinances passed by the executive. If the parliament cannot endorse or reject changes made in the Constitution and the courts cannot pronounce on their validity, it is autocracy, not democracy. In parliamentary democracy elected parliament is sovereign and the executive is accountable to it. It is the parliament that elects and ousts governments by a majority vote. The president is only a titular head and acts according to the advice and consent of the prime minister and his cabinet.

The National Security Council, as envisaged in Article 152A of the LFO, will be a supra cabinet which will not be answerable to the parliament. On the contrary, it may bypass the cabinet and even call for the dissolution of the parliament. The fear is that rather than ensuring checks and balances in the exercise of power at the apex level, it would be an appendage to the president. At best, the LFO is a prescription for controlled democracy; at worst, a recipe for dictatorship.