A pyrrhic victory?

BY BAK H TAWA R BI L A L SOOFI | 1/26/2020

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| T HE manner in which the two main opposition parties have helped pass amendments to the Army Act, the Air Force Act and the Pakistan Navy Act has exposed the sincerity of their cause and has left their supporters disappointed. Those who are celebrating, however, must do so with caution because now the judicial branch has a possible veto over the process of such extensions.  Each time parliament legislates on any topic and `occupies the field`, two powers that vest in a constitutional court are triggered.  The first is the court`s power to review the constitutionality of the law itself at which stage the court reviews parliament`s action.  It may ask if parliament had the competence to legislate on that topic? Whether the proper procedure was followed? And whether the law itself is not ultra vires the Constitution? But if there is no law, then there is nothing for the court to review.  The second is the court`s power to review the legality of executive or government action. Article 4 of our Constitution enshrines the principle that the executive can only do what the law permits it to do.  This means that all executive action must be sanctioned by law. At this point, the court can ask whether the action taken by the government is in accordance with the power conferred on it by parliament or whether the decision is in transgression of the law? But if there is no law allowing the government to make a particular decision, then that decision must a fortiori be illegal.  This is why the Supreme Court`s decision is important. It is clear, as the court itself admits, that there was no law allowing for the extension or reappointment for the army chief. The extension must by logical implication have also been held to be illegal. But the Supreme Court condoned the illegality and gave the army chief an extension for six months subject to legislation by parliament. Whether the Supreme Court did the right thing is a separate question.  What is more important, however, is that in allowing the extension and directing parliament to legislate on the matter, the Supreme Court has preserved for itself a rolein the extension offuture chiefs.  On the first step, the court retains the power to examine the constitutionality of the amending acts. Senior lawyer, Salman Akram Raja, has already indicated that the recent amendments may in fact be ultra vires Article 243 of the Constitution because the amending statutes do not make the advice of the prime minister binding on the president. If these amendments are challenged and found to be unconstitutional,then all actions taken thereunder including the extension of Gen Bajwa will also be illegal and unconstitutional.  On the second step, the court has the power to review the actual decision of granting an extension. So even if the statute is intra vires the Constitution, a particular appointment may still, in some future case, be declared illegal for being in contravention of the law. To guard against this possibility, an ouster clause has beeninsertedin sections 8(B)(2) and 8(E)(2) which provides that neither the `appointment, reappointment or extension` nor the `exercise of such discretion` shall be called into question in any court of law.  The ouster clause however has limited efficacy. Firstly, it does not prevent the court from examining the legality of the law because the ouster applies if at all to actions take under the law and not to the law itself.  Secondly, courts have historically been skeptical of provisions that seek to oust their jurisdiction. In the `Military Courts` judgment, for instance, the Supreme Court held that it could even sit in review of constitutional amendments though Article 239(5)of the Constitution expressly provides that `[nlo amendment of the Constitution shall be called in question in any court on any ground whatsoever`.  In a constitutional sys-tem where the judiciary is the final arbiter of what the law is, the ouster clause is only just as good as the court thinks it to be.  So, in effect, the extension or reappointment of any service chief in the future can be challenged in a writ petition and judicially reviewed if the judicial officer before whom the petition is brought so desires.  Does this mean that we will see future chiefs being dragged into courts and asked to explain why their extension or reappointment is in the national interest or why they are more qualified by someone else in the line? Who knows? Given our history and the judiciary`s pragmatic concern for its self-preservation, it is unlikely that the judiciary will ever go this far. That doesn`t mean, however, that it will never happen. After all, questions of justifiability are always open to different interpretations. The writer is a lawyer b.soofi@gmail.com Twitter: bbsoofi  [[TOP]](https://epaper.dawn.com/DetailImage.php?StoryImage=26_01_2020_009_002#top) |  |