

Separation of powers

Dr. Sania Nishtar

The potential standoff between government and judiciary has finally been averted. Process-related concerns notwithstanding, the saga's culmination appears to be a product of sound technical advice, heed to provisions of the constitution and a process of consultation. These attributes of governance will surely pay dividends whenever they are mainstreamed in decision-making in matters of state.

There is a lesson to be learnt here. But as always, reflections are becoming centered on conspiracy theories, power struggles, personal rivalries and institutional divides—in other words, power politics. By contrast some systemic considerations related to the implications of the averted standoff for state governance and its determinants have not featured prominently in discussions. This comment aims to underscore the importance of these factors.

The matter was centered on prerogatives of institutions, which brings to the fore the question of 'separation of powers'. The purpose of separation of powers is to foster institutional checks and balances, as it is only through these that safeguards can be built against potential abuse of power. Failure to institutionalise these simply creates opportunities for tyranny—whether it is in the shape of traditional dictatorship—military rule—or absolutism in the guise of democratic rule.

There are many examples over the course of the last 63 years where the authority of decision-making has been in the hands of one person in Pakistan, both during military and civilian reigns. In these situations, power has been deliberately and/or inadvertently abused and the legitimacy and sustainability of power grabbed by the executive could not be hindered, as a result of lack of separation of powers. This trend continued to prevail because powers have traditionally been 'fused' and the checks and balances, which could act as safeguards against abuse of power could not be asserted and in many cases, stood blurred.

We need to understand why this has been the case in the past, why this pattern appears to be changing now and where the impediments to change stand. Understanding the concept of separation of powers in Pakistan's context is important in this regard.

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In Pakistan as in any other constitutional democracy the powers of the government are meant to be divided so that the legislature makes laws, the executive authority carries them out and the judiciary operates independently in any constitutional democracy, a system of checks and balances is inherently implicit, and that is why powers are meant to be separated.

The judiciary is meant to exercise checks on the parliament. The power of judges to review public laws and declare them in violation of the ruler's constitution serves as a fundamental check on any potential abuse of power by the government. The constitution has a supreme status, which means that any law that violates the constitution or conducts that conflict with it can be challenged and struck down by courts. This prerogative of the judiciary has not been widely exercised in the past. However, with increasing trend towards judicial activism, the judiciary has increasingly made use of this privilege. So in its ruling on the legal validity of the National Accountability Ordinance (NAO) and 'striking it void ab initio for being ultra vires of the constitution, the judiciary exercised a fundamental check. Striking down the recent notifications as being in violation of the constitution is also a check on the executive's authority and must be perceived in the same spirit.

The judiciary can also exercise similar checks on the executive. However, some of the recent 'checks'—e.g. the suo moto actions with regard to setting sugar prices—are controversial, as there are many economic considerations determining price increases. Shortcomings in governance, though a proximate cause, are not a violation of the constitution, per se.

This aspect notwithstanding, the recent trend towards independence of the judiciary is a positive trend and one that holds promise of impact with regard to institutionalising checks and balances, provided 'independence' does not transcend into 'judicial imperialism', as an expert has recently emphasized. Additionally, in order to fully realise its impact in a sustainable manner, two things must be ensured. One, de-politicising the superior judiciary and two, elimination of graft at all levels through reform of the judicial system.

The other system of checks and balances relates to the check of the legislature on the executive. There are two complicating factors in this regard—one generic to Pakistan and the other inherent to parliamentary forms of government, in general. Each of these creates a separate imperative for systemically ingraining checks and balances in Pakistan's context.

Firstly, the power of the executive has been vested either in the president, or the prime minister at different times in Pakistan. The 1973 Constitution and the 13th and 14th Amendments greatly empowered the prime minister whereas the 8th and 17th Amendments shifted power to the president's office. Striking the right balance has therefore been a major bone of contention. Having a presidential chief executive in a parliamentary system creates a level of complexity and undermines the ability of the legislature to exercise checks on the executive. The solution to this lies in fashioning structural provisions of the constitution to separate powers.

Secondly, the other complicating factor with regard to separation of powers is inherent to the differences between presidential and parliamentary forms of government, which are the two ways in which executive authority is organised in constitutional democracies. Separation of powers, also known as trias politica, a model for governance in democratic states, is a feature inherent to the presidential system whereas 'fusion of powers' is characteristic of parliamentary systems. In the latter, the executive which consists of the prime minister and the cabinet are drawn from the legislature. Given this fusion, the role of an independent judiciary becomes all the more important in a parliamentary system.

The solutions to the lack of parliamentary oversight on the functioning of the government are not confined to amending the constitution. Overall systems of accountability need to be revamped to ensure that: institutional instruments and arrangements are in place to enable direct and indirect political, administrative and financial accountability—both ways, involving the legislators and the executive. In doing so decision makers must scope beyond the current narrow ambit of accountability, as is being envisioned in the Accountability Bill. In order to ingrain appropriate checks and balances, many relevant institutions and instruments need to be restructured to address administrative dysfunction, mismanagement and political manipulation—all of which are pervasive in the system.

In sum therefore, two key instruments need to be reshaped in order to institutionalise a system of checks and balances between the three pillars of the state; one, the Constitution and two, a holistic accountability framework. The potential within these norms—if appropriately cascaded into implementation—to shape the destiny of this country must not be underestimated.

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