**Culture of un-constitutionalism**

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`Until you rnake the unconscious conscious, it will direct your life and you will call it fate.` -Carl Jung THERE is no ambiguity about the foundations of the 1973 Constitution: the Constitution is the supreme law and it can neither be suspended not even for a minute nor abrogated. Civilian democracy is the only form of constitutional governance; citizens` fundamental rights have enforcement priority and any de facto domination or interference by themilitaryestablishmentinourciviliandemocratic government is unconstitutional.

If such issues are constitutionally unambiguous then why is there an implied acceptance by the judiciary of the de facto domination or interference by the establishment in our civilian democracy (interference within political parties and in elections, onesided accountability etc)? Also why is there judicial tolerance for repeated, grave violations of citizens` fundamental rights by state officials (missing persons, severe restrictions on freedom of speech, press and media etc)? Is such judicial tolerance due to the fact that the judiciary is dependent on the state for its financial functioning and even dependent on it for the enforcement of its judgements? Or is it because of the brutal historical fact that power flows from the barrel of a gun and the Constitution is no match for the coercive power of the state? Both these reasons, ie the judiciary`s dependence on the state and the threat of state coercion are important factors that explain judicial silence. However, such state dependence and coercion is critically reinforced by a culture of un-constitutionalism within the judicial mindset which is caused by the confusion and encouragement principally created by the acceptance of unconstitutional judicial or legal villains as constitutional heroes or respectable constitutional actors.

Unconscious un-constitutionalism: An examination of Pakistan`s judicial history shows a remarkable celebration and acceptance of such former judges and leading lawyers who legitimised and supported martial laws. Let me explain with a few examples.

Firstly, former chief justice of Pakistan Irshad Hasan Khan reached the heights of unconstitutional shame by actively colluding with dictator Musharraf toremove half the Supreme Court judges and other high court judges (2000), legitimising Musharraf`s 1999 coup and supervising both a rigged Musharraf referendum and a rigged 2002 election. Instead of f acing judicial and legalisolation, former CJP Irshad has become something of a celebrated Pakistani author with the present chief justice of Pakistan, Gulzar Ahmed, writing an extremely laudatory preface to his autobiography Irshad Nama and, moreover, some leading Pakistani constitutional lawyers have also contributed short articles lavishing praise on former CJP Irshad. The preface of the present chief justice is especially surprising, as he even praises the quality of the Zafar Ali Shah judgement, the very verdictwhichlegitimised Musharraf`smartiallaw.

Secondly, one of the reasons given by former CJP Asif Saeed Khosa in the report dated Oct 11, 2018 for recommending the removal of former justice of the Islamabad High Court, Shaukat Aziz Siddiqui, is his allegedlyinsulting comments about former chief justices of Pakistan, namely CJP Muhammad Munir and CJP Irshad Hasan Khan. Though former CJP Khosa is right in criticising Shaukat Siddiqui for his intemperate language, he goes on to surprisingly observe `Justice Siddiqui has failed to refer to any material in support of his allegations levelled against the said former Chief Justices of Pakistan ... failure on part of Justice Siddiqui to exercise restraint and extend due deference to his seniors`.

But is there any historical doubt about the incontrovertible material against former CJP Munir and CJP Irshad of their legitimisation of and support for martiallawandwhyisthere aneedtoshow deference to the unconstitutional legacies of former chief justices? Thirdly former CJP Cornelius, who was both a brilliant legal mind and a humble man but he also legitimised Ayub`s martial law in the Dosso case (1958), was one of the longest serving chief justices of Pakistan under martial law and became a law minister to former dictator Yahya Khan during the East Pakistan tragedy. But despite this close nexus between CJP Cornelius and various military dictators, his judicial tenure is still remembered as the golden period in judicial history. Therefore, do these examples show an unconscious culture of un-consti-tutionalism and if so, what are its implications? Ambiguity and encouragement: Judicial culture is principally constructed by chief justices of Pakistan and other judges primarily by defining the heroes and villains of their judicial history and by deciding whether such unconstitutionallegacies of judges and lawyers are accepted or shunned. The surprising judicial deference shown to former CJPs Munir, Cornelius and Irshad is also reflected in the fact that leading constitutional lawyers such as A.K. Brohi, Manzoor Qadir and others have all legitimised and supported martial law by acting as its attorney generals and constitutional advisers.

This culture of un-constitutionalism has two consequential characteristics. Firstly, if there is constitutional confusion regarding the judicial legacies of former chief justices of Pakistan legitimising martial law then it will logically lead to an ambiguous judicial attitude towards the de facto domination or interference of the military establishment in constitutional governance.

Secondly, if constitutional deference is shown towards the judicial legacies of former chief justices of Pakistan who legitimised martial law then it will also lead to a judicial culture in which `everything is acceptable`, with no red lines regarding unconstitutionality, resultantly encouraging de facto unconstitutional adventures. This confusion or encouragement oper ates at an unconscious level because few people will doubt CJP Gulzar`s and former CJP Asif Khosa`s struggle against Musharraf`s 2007 martial law.

In other words, this un-constitutionalism is perpetuated precisely because the judicial and legal actors involved are unaware of unconscious reproduction of this culture by them which causes confusion and simultaneously encourages the ever-present militarisation of our constitutional governance.

In one sense, cultural confusion about un-constitutionalism is more dangerous than the state`s incentives and threats resulting in judicial silence. A judiciary which internalises un-constitutionalism will reproduce the latter seamlessly because, by implication, it accepts without knowing the unconstitutionality of its own actions.  The writer is a lawyer.