[**Battle of the intellect**](https://www.dawn.com/news/1678209/battle-of-the-intellect)

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*“There is great chaos under heaven; the situation is excellent.” — Mao Zedong*

WE are told that there is a spectre haunting the Pakistani Supreme Court, which is the danger of a divided court. For such acrimonious divisions, reference is made to the recently released detailed reasons of the minority judgements of Justice Umar Ata Bandial and Justice Munib Akhtar dismissing the review petitions in the Justice Qazi Faez Isa cases (QFI cases). But are such judicial differences really dangerous?

**Reasoning and conclusions:** A central paradox in the examination of Pakistan’s judicial history is between judges who have produced brilliant judgements but who legitimised and compromised with military dictators (eg chief justices of Pakistan Munir and Cornelius) and judges whose verdicts were intellectually deficient in judicial reasoning but who nevertheless showed tremendous courage in enforcing constitutional provisions and human rights against military dictators (eg chief justice of Pakistan Iftikhar Chaudhry, chief justice of the Peshawar High Court Waqar Seth).

In other words, it raises the eternal judicial question of whether correct judicial conclusions justify weak judicial reasoning. So, after 2007, while the Supreme Court emerged as one of the most powerful courts in the world in checking constitutional and human rights violations, the overall quality of judicial reasoning dramatically declined.

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**Intellectual renaissance:** Judicial courage without judicial intellect can be directionless and arbitrary while judicial intellect without judicial courage can be empty and ineffective. Differing institutional visions, power struggles and personality differences underpin the differing judgements of Justice Bandial, Justice Baqar, Justice Mansoor, Justice Yahya and Justice Munib in the QFI cases but the difference of opinion between these judges is also on a jurisprudential plan producing different intellectual approaches to the law. All these differing judgements signify judicial quality of an international standard, pointing towards an intellectual renaissance at the Supreme Court.

Moreover, as long as judges continue to maintain a working relationship, judicial disagreements are the laboratory of intellectual growth, as we have learnt from the conflict among the four great judges of the US supreme court (ie Felix Frankfurter, Robert Jackson, Hugo Black and William O. Douglas), interestingly called the ‘scorpions in a bottle’ by a judicial historian.

**Justice Munib’s challenge:** The classic example of this intellectual judicial renaissance is the separate minority judgement of Justice Munib Akhtar in the QFI cases. The main difference between the majority (six judges) and minority judgements (four judges) was on the following: whether directing the FBR to adjudicate on the UK properties of Mrs Sarina Isa and her children was legal and whether such an FBR report could be considered by the Supreme Judicial Council (SJC). The majority judges said ‘no’ and the minority judges said ‘yes’.

But what did the majority judges ‘really decide’ as opposed to what we ‘think they decided’, as Justice Munib explains. This is a formidable critique which while accepting his minority status, aims to nullify the legal benefits of the majority judgement in favour of Justice Isa and his family. It raises two fundamental objections.

Firstly, there are two conclusions, or two short orders, of the majority judges, one signed by five majority judges and one signed by Justice Yahya. Both have common elements but are also different. Thus, the majority concluding short order could only be the common part of the two majority short orders. According to Justice Munib, what is uncommon about these two short orders is that unlike the short order of five judges, Justice Yahya’s separate short order allegedly allows “any relevant forum or authority including the SJC” to consider material contained or obtained from any orders or reports.

In essence, the FBR report, and the material supporting it, is not completely legally dead and can be used in future SJC proceedings against Justice Isa. But this is a misreading of Justice Yahya’s short order and separate reasoning for the following reasons: Justice Yahya has also signed the majority detailed judgement without stating or indicating that he disagreed with the short order of the five-majority judgement on the point inferred by Justice Munib. Surely, Justice Yahya would have expressly and categorically stated such a major difference with the majority judges.

Moreover, Justice Yahya has categorically declared that all subsequent FBR proceedings or FBR reports to be “of no legal effect and/ or consequences” and an overall reading of Justice Yahya’s reasoning justifies the conclusion that the FBR report, and its underlying material, is legally dead. A linguistic absence in the short order or reference to a “report received from the tax official” (which is not the same as the illegal FBR report) in para 13 of Justice Yahya’s reasoning cannot support Justice Munib’s interpretation.

Secondly, Justice Munib objects to the signing of the detailed reasoning by justice Manzoor Malik after his retirement on the ground that only serving judges can sign judgements. Resultantly, he argues that the majority of six judges is reduced to a plurality of five, and as a consequence, the majority detailed reasons are no longer a majority and not a binding future legal precedent. When confronted by two precedent binding Supreme Court judgements in the CJP Iftikhar Chaudhry case (2010) and Al-Jehad Trust case (1996) which hold that even after retirement, judges can sign and author detailed reasons in cases concluded before their retirement, Justice Munib distinguishes these two judgements by paradoxically concluding that not only are both of them distinguishable as the facts were different but also that both were wrong to hold that retired judges can sign or write judgements. But surely, if these judgements are distinguishable why hold them to be wrong?

Moreover, legality and judicial propriety demands that in the presence of a 13-member judgement in the CJP Iftikhar Chaudhry case (2010), such a debatable reading of judicial precedents should have been left to a future larger bench rather than to a minority judgement. In short, despite genuine doubts, judicial precedents had to be followed.

But the main point lies elsewhere. The intellectual challenge posed by Justice Munib should be welcomed and confronted intellectually rather than being ignored by an ad hominem attack on him.

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*Published in Dawn, March 4th, 2022*