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**Supreme Court at a crossroads**

“Some of our greatest national problems will be relieved if only we realize the momentousness of what has transpired in this country since 2007.” – Justice Jawwad S Khawaja

The Supreme Court of Pakistan has been at critical crossroads at various stages of its history. In 1958, 1977 and 1999, when it legitimized martial law and laid the foundation for judicial un-constitutionalism. In 1997, when judges of the Supreme Court were divided and when it was attacked by a political mob.

Like in the past, the present Supreme Court is also at a critical crossroads as unprecedented judicial events are happening: the fourth senior-most judge of the Supreme Court is appearing personally before his own court as a petitioner counsel along with his wife; the personal conversations and internal letters between judges are being disclosed and critiqued in judicial orders; the chief justice of Pakistan and fellow judges are under unprecedented personal and judicial attack by a fellow serving senior judge; and the discretionary power of the chief justice to constitute benches is being questioned through judicial orders.

What are the reasons behind this current conflict at the Supreme Court: is it a clash of personalities or personal egos? Or is it a battle between good and bad judges, judges who are strict constitutionalists and judges who are pro-executive? Such explanations suffer from analytical naiveté as they fail to locate this judicial conflict in a structural and historical context. Or, as Marx rightly observed, “men make their own history but not of their own free will; not under circumstances they themselves have chosen”.

Structural and constitutional paradox: The foundational basis of this conflict is the structural and constitutional paradox of dependence and independence in which the Pakistani Supreme Court is constituted and functions. On the one hand, the Supreme Court is part of the Pakistani state and exists in a relationship of dependence on the executive and legislature. As Alexander Hamilton in the Federalist Papers No 78 described this dependency relationship by observing that the Supreme Court has “no influence over either the sword or the purse…neither Force nor Will but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments”. In other words, the Supreme Court has no independent means to generate its own finances for its institutional survival nor has any independent executive means to implement its own judgments and its sole power is the ideological and constitutional legitimacy of its judgments.

Moreover, it is also necessary for a functional constitutional state that the Supreme Court should work in relative harmony, instead of constant conflict, with the executive and legislature. It is precisely because of this dependent relationship that you have judges avoiding conflict with the executive and legislature giving rise to the phenomena of pro-executive and pro-legislative judges. On the other hand, the constitution also imposes a contradictory duty on the Supreme Court which is to hold the executive and legislature constitutionally and legally accountable by striking down their unconstitutional and illegal actions.

In addition, the Supreme Court also has a constitutional obligation to enforce fundamental rights which also leads to conflict with the executive and legislature as the state is the biggest violator of citizens fundamental rights. It is precisely because of this independent relationship that you have judges in conflict with the executive and legislature giving rise to the phenomena of activist judges, who either pass anti-government or anti-establishment judgments.

Historical rupture: The history of the Pakistani Supreme Court is a battle to balance this structural and constitutional paradox of a dependent and independent relationship within the Pakistani state. The judicial-lawyer’s movement (2007-2009) provided a historical breakthrough to try to resolve or deal with this paradox. The deposed judges of the Superior courts were not restored because of the willingness of the executive and legislature but because of public mobilization.

The consequences of this public mobilization were crystal clear: judicial power based only on constitutional and moral legitimacy cannot withstand the brute power of a dictator or political power of a sitting government. The only basis of an independent judiciary is the threat of public mobilization which meant that the judicial power had to be based on public legitimacy. In other words, judicial independence based on public support countered the judiciary’s dependence on the ‘sword and purse’ provided by the executive and legislature. But the additional paradox of the lawyer’s movement was that it gave rise to different types of judicial approaches, through which judges interpreted and used this new found power in different ways.

First, the status quo approach, where judges did not feel obliged to bring about judicial and social reform but merely used this new found power to secure their judicial tenures. Second, the reformist approach, where judges understood that in order to sustain public legitimacy, judicial and social reform was necessary but at the same time avoided unnecessary and constant conflict with state organs. Third, the radical approach, where judges thought that in order to sustain public legitimacy, radical judicial and social reform should be implemented regardless of its consequences.

It is this historical context that has given rise to the current conflict within the Supreme Court. The Supreme Court judges are divided because they disagree about which legal approach to adopt – whether of status quo, reformism or radicalism – in order to deal with the structural and constitutional paradox of dependence and independence in which the Supreme Court functions. In other words, this is not primarily a personality or moral conflict but an ideological conflict about the role of the Supreme Court in a period of rising public expectations about judicial and social reforms.

Is this conflict dangerous? Conflict is the engine of judicial reform whereas constant judicial harmony is a sign of judicial decay. But danger arises when judges lose respect for each other, doubt each other’s intentions and are unable to function as an institution. It is then that conflict converts itself into breakdown, and long-lasting institutional damage is around the corner.

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