**Judging restraints**

BY A R I FA N O O R 2020-11-24

THE hostility has never been this intense and the aggression never this naked, fear many as they view the state of Pakistani politics. But at the same time, it seems the demand or debate for a national dialogue has also never been this loud. From the politicians themselves to the observers to the journalists, many are in favour of defusing the situation. For, in their view, a state of hostilities is not good for the polity.

In the past week itself, among others, a senior politician has suggested that the judiciary could lead the dialogue or initiate it, while a journalist hinted at something similar when he bemoaned the fact that no one could play the role of a mediator as the judiciary had done in the past.

Another suggestion is in favour of including the judiciary in the dialogue along with the media (as yet another stakeholder). Like weddings in Pakistan, political dialogues too tend to favour the inclusion of the entire extended clan.

But the judiciary`s role in either a dialogue or as facilitator of one sounds better on paper than it may be in reality. We have become rather enamoured of the notion of the independence of the judiciary in the post-Musharraf period but this is seen as more myth than reality. The fault line as it was earlier is along the civil-military axis. Some analysts go so far as to say that the judiciary has now replaced the president in the power troika. In the 1990s, politics in Pakistan included the power troika of the government, the president and the military.

However, with the passage of the 18th Amendment which reduced the president`s powers and the stature of the position, the troika is now said to have re-emerged with the judiciary as the third player.

The dismissal of two prime ministers (Yousuf Raza Gilani and Nawaz Sharif)in the tenures of the PPP and the PML-N testifies to this. In addition, both the governments also faced considerable challenges in terms of governance from the judiciarywhether it was the Iftikhar Chaudhry court during the PPP`s five years or Saqib Nisar while the PML-N was in power.

But does this really translate into a troika of three equal power centres (or adversaries)? Or would it be more accurate to say that politics remains dominated by the direct competition between the two main players, while the third player (be it the president earlier or the judiciary) becomes effective only if it sides with one of the other two against the third. Without being part of this alliance,the third playerisineffective.

In the 1990s, for example, the president was able to exercise his power under the law the infamous 58-2(b) only when he enjoyed the support of the military. The powers to sack the government may not have meant much without this backing. It is hard to believe that this power could have been exercised without a green signal from Pindi.

And this is why when Ghulam Ishaq Khan and Nawaz Sharif ended up in a deadlock during the end of his first term, the army chief`s intervention ended it (by sending both home, ensuring the return of the PPP to power).

If we fast-forward to the present, it`s important to remember that the court-ordered departures of the prime ministers in 2012 and in 2017 played out against heightened civil-military tensions. Without this context, would these dismissals have taken place? Other examples, here, may prove instructive the commission formed to look into alleged rigging during the 2013 elections led to a judgement which maintained the status quo it pointed out irregularities in the election process but left it at that.

Was that because no one was interested in disturbing the system at that point? Consider also that when the first petition for the judiciary to look into the Panama leaks was submitted to the court, it was rejected. Then came the PTI`s announcement of a dharna followed by the PML-N crackdown onthe party it seemed as if there was no way out of the crisis as neither of the two antagonists was willing to back down. But, fortunately, the judiciary accepted the PTFs petition on the matter and this allowed the situation to be defused.

Another way of looking at the issue is to identify the occasions on which the judiciary was in direct confrontation with the military post-2008. Except for perhaps a few cases of missing people even there the remarks in courts were far harsher than the judgements that followed it is hard to find examples of any friction that can be compared to the constant friction between the other two arms of the state. Perhaps the last such example was the suo motu taken by chief justice Asif Saeed Khosa just before his retirement. Even here, the judgement threw the ball (or shall one say the hot potato) to parliament and left it at that.

Maybe this is why it is hard to currently find much direct friction, let alone confrontation, between the judiciary and the political government (except for the Qazi Faez Isa case, and one can still debate what the origin of this conflict is). Is it because the larger context is far different from when the PPP or the PML-N were in power? Perhaps one can go sofar as to say thatjostling between the government and the establishment creates room for the judiciary in the political arena. The power lies with the government and the military; the third player enjoys legal power but this can only be exercised in the political arena with the support of one of the two political players.

And for this reason, it is hard to see the judiciary playing a mediator`s role, or even being able to bring the other two to the negotiating table if either of the two is not interested. It`s like expecting the United Nations to pressure an unwilling India and Pakistan to resolve issues. The impetus will have to come from within. The writer is a journalis L