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Pakistan's dialogic turn

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Pakistan's Dialogic Turn (Express Tribune, October 22, 2010)

Ultimate, yes. But exclusive, no. That, in some sense, is the gist of the Supreme Court's interim verdict on the 18th Amendment case. While courts are the ultimate interpreters of the constitution, they are not exclusively so; parliament has a role as well. And it is in this participatory spirit that a unanimous Court sent back Article 175-A for the parliament's reconsideration.

The verdict is interesting; it speaks both through speech and silence. Despite refusing to "express its opinion on the merits," the Court has ineluctably laid the foundation for a basic structure argument. Judicial independence, it claims, is one of the "core values" in the Constitution; especially because enforcement of fundamental rights and the rule of law are closely linked to it.

The concept is reinforced, the Court says, by references in the Preamble, the right to fair trial and the judiciary's insulation from political processes. In short, judicial independence is special; it isn't just another concept. These assertions are incompatible with a parliament's unlimited power to amend the Constitution. The fate of the 18th Amendment — formally — remains undecided. But make no mistake. "Basic structure" is already law in Pakistan.

Why, then, did the Court return Article 175-A? Three reasons compete for attention. First, counsel's request: Shahid Hamid admitted that "it would be in fitness of things if the matter is referred to Parliament for re-consideration." On its own, this is not particularly compelling. Judges have no obligation to accede to such requests.

Second, precedents: “Making reference to the Parliament for reconsideration is in accord with law and practice,” the Court said. This is hardly convincing. That it may have been done in the past is rarely a good reason for repeating it. Which takes us to the third reason; one that brings together the philosophical and the political.

At a philosophical level, the Court seems to lend credence to a (relatively weak form of) shared interpretative space. It is the idea that constitutional interpretation is a dialogue: both courts and parliament are participants, not adversaries, in the process. In asserting that the parliament’s sovereignty and judicial independence are complementary — not competing — values, it makes an interesting case for a dialogic possibility. This interpretative view is decidedly novel in Pakistan.

But not so in other jurisdictions. The British Human Rights Act, 1998, for example, authorises courts to make a “declaration of incompatibility” if it concludes that any legislation is incompatible with a fundamental right. In such situations, the matter is left to parliament. It may take remedial measures or expose itself to charges of violating fundamental rights.

Will the Court pursue dialogic with some degree of robustness? On that count, the decision falls short. It leaves little room for parliament. Having laid out arguments assailing Article 175-A, the Court proposes specific alternatives. In particular, it is highly keen on the idea of judicial primacy in appointment matters. Uncomfortable with the veto powers of the parliamentary committee, the Court proposes its own veto: “When a recommendation…made by the Judicial Commission is not agreed by the Committee…, [it] shall refer the matter back to the Commission for reconsideration.” If the Commission “reiterates the recommendation, it shall be final.” In demanding specific provisions, the Court defeats the possibility of a (meaningful) dialogue.

Interestingly, the effect of non-compliance is left unexplained; it merely asks parliament to "re-examine the matter." What if the parliament has other ideas? Can alternative arrangements guarantee judicial independence? Or is parliament bound by the observations of the Court?

As a method of constitutional interpretation, the dialogic approach is a departure from previous practices in Pakistan, but one suited for the times. In speaking the language of "complementary institutions," the Court almost takes up the prime minister's recent offer to the judges to "work hand in hand" in resolving the nation's pressing issues. How long this will last, if at all, is another matter.

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