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## **Reforms or restructuring?**

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For stable and progressive society, we need sincere, noble and capable leadership. We need rule of law and protection of key institutions and their freedom. These institutions out-live human beings who are mortal. When institutions are stable, the system continues functioning despite change of leadership. Where institutions are unstable and everything depends on mortal human beings, the system becomes infirm and like a sand crumbles with change of persons.

Stability and progress demand respect for institutions. It is an unforgettable lesson of history. For this very reason the holy Prophet (PBUH) prescribed the vital course for the permanence and stability of the Muslim Ummah of compulsorily following him and his Khulafa-e-Rashideen. And it was the continuance and succession of institutions in compliance with those instructions that enabled the Muslim Ummah to face all the challenges of history.

The crisis Pakistan is faced with today stems from the negligence and disregard of the stability of institutions. The truth is that the political leadership of this unfortunate nation is bent on destabilizing and weakening all the basic institutions. The objective of the people at the helm of affairs is concentration of power. This is, of course, a straight path to destruction. The dire need of the time is to restore to institutions the value they deserve. Moreover, the distribution of powers should be so balanced as is essential for the successful functioning of any political system and for saving the nation from dictatorship and fascism.

The nation is faced with a dictatorship-like situation, in contrast to the illusions of political imagery. It is time we struggled at every level for the protection of the Constitution and the democratic institutions so that they are saved from dictatorial designs and fascist man oeuvres, and a healthy balance could be struck between the different institutions of state so that they could lend strength to each other. It is sad to note that after having a full grip on the presidency and the Judiciary, the head of the government is now planning to bring forward a package for amending, rather metamorphosing, the Constitution. He is not content with the concentration of powers that he already has by virtue of the 13th and 14th Amendments. It is felt that on the pretext of the revival of 1973 Constitution, plans are afoot to bring about changes that would entirely alter the parliamentary system into an absolute prime ministerial system. Mr Nawaz Sharif's speech in Pakpattan should serve as an eye-opener. There he said that his plans do not fit in with the present system.

Also, according to reports, while addressing the federal cabinet some days ago, he said that the heavy mandate given by the nation to the present government called for radical changes in the present system and procedures of the government. For this, all the ambiguities and contortions in law and the Constitution shall be removed through amendments.

What these constitutional amendments aim at? According to some reports, powers of the president are being further slashed, advice of the chief justice in the appointment of judges shall no more be necessary, and the authority to appoint chief election commissioner, the auditor general and the head of the Public Service Commission shall rest with the prime minister. Basic changes to the Constitution, including Articles 75, 90, 168, 213, 260, are on the anvil and it is all being done in the name of the supremacy of the Parliament. Commencing on this state of affairs, the Voice of America has said that as a result of these amendments Nawaz Sharif shall emerge as a dictator.

It is, indeed, clear that the direction in which the present government is heading and propensities is fraught with grave risks and the need is that timely notice is taken of these trends and that they should be effectively resisted.

It is tragic that amending the Constitution has become a game of power. No doubt, the door should remain open for improvement through amendments, but amendments or changes should necessarily be within the limits of and subject to the objectives of the Constitution and the nation's historical aspirations.

Moreover, there is a difference between normal legislation and constitution making. The responsibility of constitution making is assigned to a body that is elected specifically for that purpose. All parliaments come into being under a constitution: its members, the executive and judiciary all pledge to work for its protection and enforcement. They do have limited authority to amend the constitution but they do not enjoy the right to abrogate or bring about wholesale changes in it. That is why the following two principles are considered most important in the constitutional law:

First, constitutional amendments are not passed by simple majority but specific conditions are laid down for this purpose e.g., two- third majority of the parliament, or, in the federal system, approval of full parliament together with support from a large number of provincial legislatures (as in the US, India and some other countries), or referendum, etc., in support of the amendments intended. Thus, a constitution acquires permanence while chances of change are also there.

Second and this is rather more important and delicate a difference has been maintained between an amendment to the constitution and changes in basic structure and strategic systems. Amendment means partial change, a rectification of any error or omission. It is an attempt to fulfil the natural evolutionary requirements by adding or deleting something in consonance with the basic structure of the constitution and the strategic system. No change, incompatible with its character and spirit, can be treated as legitimate amendment. It is a very basic issue and its understanding is essential. In this regard, it will be useful to have a look at the constitutional history of India and Pakistan.

In India the issue surfaced in 1973. Article 8 of the Indian constitution is about amendment to the constitution according to which a two-thirds majority of both Lok Sabha and Rajya Sabha is required for an amendment to the constitution and in some matters the support of at least half of provincial legislatures is also needed. In a case involving fundamental rights known as Kesavananda vs. Kerala (AIR 1973, SC 1461), the Supreme Court of India set the principle that the parliament enjoys no right to bring a change in the fundamental rights or in the basic structure of the constitution, because it pertains to the objectives of the state and the legality of its very existence. Therefore, any such amendment affecting them shall be considered void. In Indira Gandhi vs. Raj Narain (AIR 1973 SC 2299), the Supreme

Court again confirmed this principle and observed that Article 368 does not confer any right to the parliament for such an amendment but limits this right to partial changes only.

No parliament enjoys the right to carry out any basic or radical change in the constitutional scheme because it is not a constitution making body, rather it is an institution brought into being under the constitution; it can neither abrogate the constitution nor can it change its basic structure. However, it

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enjoys the right to carry out a partial change in consonance with this structure. In order to render this decision ineffective Indian Prime Minister Indira Gandhi carried out the 40th amendment to the constitution through which Clauses 4 and 5 were added to Article 368.

"Clause 4: No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article (whether before or after the commencement of Section 55 of the Constitution (Forty-second Amendment) Act, 1976 shall be called in question in any court on any ground."

"Clause 5: For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article."

This constitutional amendment was reviewed by the Indian Supreme Court in 1980 in *Minerva Mills* case (AIR 1980 SC 1789) and it decided that parliament had no right to carry out this amendment to Article 368 (i.e. addition of clauses 4 and 5). Therefore, the Act was declared unlawful and void. This decision of the Supreme Court that the parliament cannot make any change in the basic structure of the constitution is standing and extant.

What is worth consideration is that after this decision neither the Supreme Court was assaulted nor the chief justice and other judges dismissed. It was even not considered an encroachment on the rights of parliament. People submitted to this constitutional principle and worked for the supremacy of law and stability of the constitutional system.

In *Aasma Jeelani* case, the Supreme Court, then headed by Chief Justice Hamoodur Rehman, pronounced an epoch-making decision which dispelled the confusion then prevailing in the country. It had reversed the earlier decision given by Chief Justice Muneer. A golden principle was thus set that rule of law is only possible by respecting the Constitution; its abrogation would amount to treason. Justice Hamoodur Rehman wrote:

"Upon this analysis, I am, with the utmost respect for the learned Chief Justice, unable to resist the conclusion that he erred in interpreting Kelson's theory and applying the same to the facts and circumstances of the case before him. The principle enunciated by him is, in my humble opinion, wholly unsustainable, and I am duty bound to say that it cannot be treated as good law.

Chief Justice Hamoodur Rehman maintained that the Objectives Resolution is the incontrovertible basic structure of the Pakistan Constitution. This resolution was passed by the Constituent Assembly which

was elected for the purpose of framing a constitution when Pakistan was established. Ruling out any deviation, he wrote:

"In any event, if a grundnorm is necessary for us, I do not have to look to the Western legal theorists to discover one. Our own grand norm is enshrined in our own doctrine that the legal sovereignty over the entire universe belongs to Almighty Allah alone, and the authority exercisable by the people within the limits prescribed by Him is a sacred trust. This is an unmissable and unalterable norm which we clearly accepted in the Objectives Resolution passed by the Constituent Assembly of Pakistan on the 7th of March, 1949." Justice Yaqoob Ali confirmed the decision of the Chief Justice, but in his separate judgment he not only confirmed and fully supported the basic importance of the Objectives Resolution but also declared that the actions of General Ayub Khan and General Yahya Khan in abrogating the Constitution were unlawful and constituted acts of treason. Dictators were, therefore, warned that such future encroachments shall never be deemed valid or condonable. Justice Yaqoob Ali remarked:

"May be that on account of his holding the coercive apparatus of the state, people and the courts are silenced temporarily, but let it be laid down firmly that the order which the usurper usurps will remain illegal and courts will not recognize its rules and act upon them as de jure. As soon as the first opportunity arises, when the coercive apparatus falls from the hands of the usurper, he should be tried for high treason and suitably punished. This alone will serve as a deterrent to the would be adventurers."

Unfortunately, the channels of deviations and departures of this kind could not be eliminated because the adventurists evaded the grip of law. But as a result of positive judicial activism, a distinction between the lawful and the unlawful, and between good and evil was established. General Ziaul Haq, instead of abrogating the Constitution, held it in abeyance and the courts also held it as a constitutional deviation. When the Provisional Constitutional Order was promulgated, the then Chief Justice and a number of judges declined to take oath. Resultantly, the martial law system was cracked and democracy had to be restored in 1985.

In Nusrat Bhutto case also the chief justice determined the Objectives Resolution as the basic law of the country and later the High Courts also acknowledged this principled stand. Gradually, all courts confirmed this principle, which ultimately formed part of the Constitution in the shape of a full bench judgment of the Supreme Court in the Achakzai case. This judgment should be studied thoroughly by the politicians, advocates and members of the parliament to settle constitutional matters. The judgment says:

"One thing is beyond dispute that in all the three Constitutions, Objectives Resolution is common and the same, which has been incorporated as preamble in all the three Constitutions, including the Constitution of 1973... Revival of the Constitution of 1973 puts to rest any doubts which might have arisen after the promulgation of PCO. It also appears that the intention of CMLA was to restore the Constitution with amendments to strike a balance between the powers of the President and the Prime Minister and also to blend the Constitution with Islamic provisions in respect of which already the foundation was laid in the Objectives Resolution... We are therefore of considered view that Eighth Amendment including Article 58(2)(b), has come to stay in the Constitution as a permanent feature. It is open to the Parliament to make amendment to the Constitution of any provision of the Eighth Amendment as contemplated under Article 239, as long as basic characteristics of federalism, parliamentary democracy and Islamic provisions as envisaged in the Objectives Resolution/Preamble to

the Constitution of 1973 which now stands as substantive part of the Constitution in the shape of Article 2A, are not touched.

This judgment of the Supreme Court settles in clear terms the basic structure of the Constitution and that amendment could only be effected staying within these limits. Therefore, all the religious and political forces in the country should remain cautious about it. They should try for a consensus at the national level on a package of constitutional amendments which is in consonance with the Objectives Resolutions - the basic structure of the Constitution - i.e. Islam, parliamentary democracy, federalism, protection of human rights, freedom of the judiciary, balance of powers and stabilizing the supremacy of law, and should unstinted resist any amendment that paves the way for centralization of powers and for the dictatorship of any individual, or group or institution, in any form.