GOVERNMENT JUDICIARY ROW AND FUTURE OF DEMOCRACY IN PAKISTAN

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The painful constitutional crisis being faced by Pakistani nation since last about four months speaks of the base thinking and moral degradation of our political leadership. The waywardness, the thoughtlessness and the self ego with which basic constitutional and institutional matters have been played with, is most disturbing. With the appointment of five Supreme Court judges an impression was created that things have settled down and some accord now prevailed. What, however, happened subsequently more than established that the row continued covertly. Nothing was surprising as the patriotic elements were apprehending something very serious. Worst of all, even the Supreme Court stood divided and this most sacred of the state organs was subjected to assault in an open fascist manner. Someone has to answer, "to it" (what is it)?

The circumstances call for an objective and independent examination of the whole issue. The real causes and factors leading to this dismal situation need be determined. It is not simply the misleading advice of some 'advisers' because it is well known to everybody that the real responsibility lies with those who selected the ADVISERS, exalted them to high positions and acted upon their advice. The attitude of shifting blame to wrong shoulders is not only unrealistic but also self deceiving and devastating.

March 20, 1996 has assumed the importance of a milestone in the political and constitutional history of Pakistan. This day the Supreme Court through its epoch-making verdict tried to stabilize country's constitutional framework on foundations that paved the way for the future of democracy and supremacy of law. It was a full bench unanimous decision of the Supreme Court. It appears that the Supreme Court took this historic step so as to put the bogey of country's constitutional government back on the track after profound thinking and under great mental stress. But it is a pity that the political leadership of the country kicked this decision like a football in their political game. The decisive mechanism that was suggested for improving the situation was almost sabotaged for the sake of personal aggrandizement and self ego. No effort appears to have been made to put the constitutional institutions on stable footing because the decision was not seriously accepted. That was more than evident from the seemingly backdoor efforts of the government to create and widen the rift within the apex court and the government's insistence on political solution rather than legal redressing.

What are the real issues and what is at stake, should be clearly understood. As we see, future of democracy and the rule of law depend much on the successful defusing of the present crisis.

Dictatorship, army or civil, comprises centralization and monopoly of authority, whereas democracy stands on the basis of supremacy of constitution and rule of law. That is why the balance of power and authority between basic political institutions and a coordinated system of

answerability, is inevitable for a civilized and democratic society. This balance in authority is the most effective mode for safety against tyranny, confusion and anarchy.

Therefore it is necessary in a modern state to achieve this end through proper checks and balances by way of the distribution of authority on the one hand and mass political awareness, freedom of criticism and 'Ehtesab' in the country along-with full opportunities for the press and media to play their role, on the other hand, so that every institution could function freely and evenly within their respective spheres and collective norms could be adhered to. Supremacy of one over others will only lead to upsetting the entire system.

The political leadership of our country has only frustrated all its claims for democratic mindedness by trampling the basic rights of common people. It has tried to harness journalism and media and has even tried its every nerve to overpower judiciary as well. Series of actions in this direction include limiting and encircling the powers of judiciary, appointment of favorites in judiciary by ignoring the principles of merit, discarding the unsavory decisions' of the judiciary, rather violating them openly, stultifying them and adopting innovative measures to undo them and non-compliance of the constitutional requirement of segregation of judiciary from administration. This is the background wherein the heinous activities of Benazir Government of Peoples Party viz. wholesale appointment of favored judges in the High Courts and in the Supreme Court, dismissal of trusted and experienced judges, transfer of not only senior judges but the Chief Justices of High Courts also without due consultation and dumping them into Shariat Court, ultimately forced the Supreme Court to announce its verdict to save the judicial system of the country - the verdict of 20th March. Through this decision the devised vivid principles to protect the judicial system according to the Constitution and to save it from the intervention of the political leadership. Now country could go apace towards democracy and the rule of law by adhering to these principles. While the people at large have taken this decision as an historic milestone, the Governments found it as a hindrance for their dictatorial aims. This is the main cause of confrontation between judiciary and government. It is being projected as a risk against the 'supremacy of Parliament' or as 'parliament and judiciary row' just to confuse the issues. Graciously enough for the nation, both the big traditional parties (one which was in power at the time of verdict and the other now holding reins of power) have in their respective periods been busy to undo the verdict by not honoring its requirements.

Now let us see what the verdict said and what principles it tried to settle and stabilize. It is regrettable that a spate of discussions went on in the country but it lacked grip on the implications of this verdict.

1. Pakistan is not a secular state but is an Islamic state which stands on the foundations of Supremacy and Lordship of Allah. Therefore all the matters in this country have to be decided in the light of the teachings of Islam. It is the requirement of the Objective Resolution which forms enforceable part of the

Constitution. According to Article 2(b), Islam is the religion of the state. Article 270 which determines Qur'an and Sunnah as the basis for legislation and for the oath that is taken by the President, the Prime Minister, the Chief Justice, the Ministers, the judges and the members of the Parliament before they assume office, is the foundational article of the constitution under which the state and the authority become Trust to be administered through the representatives of the people and office bearers within the limits as ordained by Islam.

2. Besides being an Islamic state, Pakistan's constitution delineates foundations that concern parliamentary democratic system of the country, its federal form, protection of fundamental rights and absolute freedom of the judiciary.

3. Pakistan's constitutional framework distributes powers to the three institutions with absolute balance. Parliament enjoys powers of legislation, running of the state is the responsibility of administration that consists of Prime Minister, his Cabinet and subordinate bureaucrats, and the judiciary has the authority to monitor the enforcement and implementation of law and to spell out its ramifications and annotations.

4. Judiciary can discharge its assigned duties only when it is wholly independent and segregated from the administration, and its system of appointments, demotions and transfers is based on such transparent principles under which it is possible to get justice, and merit is upheld. It should avail the support of all concerned organs but must be free from the intervention of political elements and self seekers.

5. Anyone whose rights have been trampled or who is adversely affected by the important matters in the country, enjoys the right to knock at the door of law and courts are responsible to see that in case justice is not administered they intervene suo moto or on a petition from any person. It is but obvious that through this decision two main fundamental rights of the common person have been recognized, though complementarily, viz:

a. Even if one is not directly an aggrieved party but if it involves fundamental rights, can knock at the door of law.

b. If in the lower court (may be the high court) a case is lingering on (as was the case of Jehad Trust which had been unnecessarily kept pending for three years and hearing was not fixed), the Supreme Court can be approached provided it involved fundamental rights.

6. Interpretation of the Constitution and the law is the sole prerogative of the judiciary. According to the Constitution of Pakistan, the judiciary is the protector of the Constitution and any legislation that hits the Constitution -- which is based on Islam and the Objectives Resolution -- can be declared void by the higher courts under their authority. In other words the judicial review is the constitutional right and responsibility of the higher courts in Pakistan. And in the light of the later decisions every constitutional amendment that is contrary to the basis of the Constitution, would be against the law and the Constitution.

7. Constitution is an organic whole, one part of it explains the other part and even if there is apparent conflict and incoherence between the provisions of different parts, it shall be interpreted in such a way that it conforms with other parts and is in accordance with the basics of Constitution, or is very close to it.

Besides settling these seven basic principles, the March 20 verdict also settled certain principles and regulations with regard to the appointment of judges and the freedom of judiciary, so that any ambiguity is avoided and the judiciary performs its duties properly. Following six are the most important regulations:

a) Appointment of judges should be on merit and in a transparent way. It is an essential part of freedom and independence of the judiciary.

b) Constitution suggests mode of consultation and lays down an unambiguous system for it that shows that it was not the exclusive authority of the government and none enjoys supremacy in this regard:

i. This consultation is not mere formality, it is rather mandatory;

ii. Consultation shall be between President, Chief Justice, and Governor of the respective province and in the case of High Courts, the Chief Justice of concerned High Court;

iii. The consultation should be meaningful and purposeful leading to consensus so that no room is left for any irregularity, political considerations, influence or individual discretion;

iv. More linkage with a political party in the past is not necessarily a disqualification but there can be no room for appointment for political purpose or as political bribery;

v. The administrative head (say Governor) can render advice about the background and moral character of an individual but the person's legal capability and acumen can be verified by only those who possess legal experience and excellence. Therefore the advice of the Chief Justice High Court and Chief Justice of Pakistan is final in this respect

vi. Final authority to appoint rests with the President but he can neither go against nor without the advice of the Chief Justice to suggest any other name. If the President differs with the advice of the Chief Justice, he has to record reasons for doing so and the Chief Justice enjoys the right to discuss dissenting reasons concerning legal ability and capacity;

vii. For appointment it is necessary that the President and the Chief Justice both agree. On the refusal of Chief Justice, none can be trusted over the courts.

viii. After appointment, promotion shall be on the basis of seniority and the same should hold good in the case of Chief Justice High Court so that senior person finds his proper place;

ix. Judges working as Additional judges must have first right for confirmed appointment unless there is something against them;

x. For appointment as judge it should be necessary that one has been actually practicing for ten years. Simple registration is not enough.

c) Appointment as Acting Chief Justice can be purely temporary - in ordinary circumstances 30 days and in extraordinary circumstances (e.g. death) at the most 90 days. The Acting Chief Justice shall dispose off day to day routine matters but his advice in regard to appointment of judges shall not be effective. This advice should come only from a permanent Chief Justice.

d) Vacancies of judges should be filled up within one month. The question of filling posts that are likely to fall vacant must be considered ahead of time so that appointment is made within 30 days. Additionally the verdict has also settled the principle that there are no way such posts should remain vacant for more than 30 days and at the most 90 days. Thus a time-frame has been decided for action under the Constitution which shall be applicable to all appointments and related matters.

e) Appointment of Supreme Court judges as Acting Chief Justices of High Courts or shifting Supreme Court judges or Chief Justices High Courts to Shariat Court disregarding their wishes is against the Constitution and freedom of judiciary. Similarly there is no justification for transferring judges against their will by way of penalty. This verdict clearly spells out its supremacy as contained in Article 209 and other clauses of this nature.

f) Appointment of ad hoc judges in the vacancies of permanent judges is not correct.

Besides the seven basic principles, these six principles and regulations in regard to appointment and transfers have been settled in the verdict. Thus it is for the first time in the history of Pakistan that judiciary has fortified itself in a way it can function as an independent and powerful institution and the fortification is the sine quo non for the protection of fundamental rights, supremacy of law and attainment of justice. But in our view, all these provisions area necessary yet not sufficient for the purpose. Unfortunately our political leadership is not prepared to accept the essentiality of these things, which is not a good omen for democracy and supremacy of law.

The fortification by the judiciary for the supremacy of law and administration of justice is being presented from a very wrong angle and it is branded as an onslaught on the supremacy of the Parliament, which is only to create confusion. We shall discuss it latter but before proceeding further it is necessary that we should bring out in an objective and honest way the attitude of the two Prime Ministers and their parties so that real illness could be determined.

The verdict of March 20, 1966 was taken by Mohtrama Benazir, the then Prime Minister, as a declaration of war from judiciary against the Parliament and she tried to avoid its implementation till the last moment. That is why the charge sheet prepared by the President to justify dismissal of her government, concentrates mainly on her attitude in this regard and it was recognized by the Supreme Court as a crime on the basis of which her government was rightly dismissed.

The attitude adopted by the present Prime Minister and his aides, through delay in appointment of five judges, amounted to disregarding the advice of the Chief Justice. They expressed their open indignation against the said verdict and about all the settled basic principles that was sheer non-confidence. The firmness with which the Chief Justice behaved, was not merely sticking to his advice but it was a struggle for getting recognition of principles - and this struggle continues. Those in power have come all out against the judiciary, considering least what was at stake. The damages caused will hardly be repaired.

Let us see what has been the stand of Peoples Party and the Muslim League. The attitude of Benazir government formed part of President's charge sheet and court's decision. To refresh peoples' memory, a reference from the Supreme Court decision is reproduced here:

The Prime Minister Benazir Bhutto in her statement in the National Assembly on 28th March, 1996, criticized the court decision and charged it for political intervention. She went to the extent of saying that court was a part of her government. On 29th march she said, 'Supreme Court cannot perform the duty of adding a mini-constitution." She averred, 'if the decision is accepted, the Chief Justice has to go". Giving an interview to the German Radio she said, "Government is firmly on its stand and will not budge an inch".

The present Prime Minister, who was then the leader of Opposition, had branded this stand of Benazir government as treason against the constitution and had paid tributes to the Courts. But

what is his stand now? He and all his aides are challenging the right of the court to interpret the Constitution and depicting it as an attack on the legislative functions and the parliament. They brought out ordinance to reduce the number of judges of the Supreme Court but it had to be withdrawn. Appointment of judges was penned till last hour. When the Chief Justice advised President to take action under Article 190 and when the President and the Chief of Staff refused to support and ratify the unconstitutional attitude of the government, they made appointments as per advice of Chief Justice in 'public interest'. But with what mental reservations! Following portion of his speech needs attention:

"Parliament is the most basic and supreme institution of parliamentary democratic system. It depicts the dignity of the nation. Parliament is the creator of the Constitution and its protector as well. Even if other institutions are intact but parliament does not exist, it is said that democracy has ended, dictatorship has overtaken the country. Parliament is like heart in the body of politics. Other institutions function as its supporters and ensure the supremacy of the Constitution. It is necessary for the integrity and survival of democracy that every institution should function within its limits and should not assume functions of other institutions."

While claiming all this, the Prime Minister forgot that parliaments existed under the autocratic fascist system in Germany and in Italy and in the whole socialist world and under socialist dictatorships, but none recognized it as democratic system!

On analyzing the thinking of both political parties and of their heads, the basic points that come to the fore are:

1. They consider judiciary a part of government and subservient to it.

2. They do not recognize the right of the judiciary to finally interpret the Constitution and the law, because under these powers judiciary can declare any legislation passed by the parliament as void. They take this authority as an attack on the legislative powers of the parliament.

Both of these assumptions are wrong and go against the established principles of Islam and democracy. Unless the political leadership disowns these wrong assumptions, this row shall neither end nor shall the foundations of democracy stabilize.

Freedom and independence of judiciary and its segregated entity, as from the government of the time, is the basic principle of Islam and democracy. It is the responsibility of the judiciary to see that the Constitution and the law are fully respected and wherever there is any infringement and in case those in power or any other group are depriving the people of their rights, it should apprehend them and restore the right to whom it is due. This is possible only when government of the time is answerable to the court in the same way as an ordinary person. Court is the only forum

where justice can be claimed against the government of the time and it treats both the ruler and ruled, equally. It can be only the dictatorship or the fascist system where judiciary is part of the government and subservient to it. It has no place in Islam and democracy. For the understanding of Islam's approach in this regard, two anecdotes are quoted here.

During Khilafat-e-Rashidah, it was the caliphate of Hazrat Ali. The capital had been shifted to Kufa and Qazi Shureh was the Chief Justice. A dispute between Ameer-ul-Mumineen Hazrat Ali and a Jew comes up for hearing. The Ameer-ul-Mumineen had dropped his zira (protective armor) somewhere. The Jew picked it up. When Hazrat Ali came to know of it, he claimed it but the Jew refused to give it back. Ameer-ul-Mumineen knocked the door of law. The Chief Justice called for the statements of both. The Jew said that it was his own and the proof was that it was in his possession. It is the responsibility of the plaintiff to produce the proof and present evidence for it. Qazi Shureh asked the Ameer-ul-Mumineen to produce evidence to prove his claim. Two evidences were produced - Hazrat Hassan and Hazrat Qambar. Qazi Shureh accepted the evidence of Hazrat Qambar and remarked that evidence of Hazrat Hasan was not acceptable. (Some reports say, even Qambar's evidence was turned down, as he was Hazrat Ali's bondsman).

Hazrat Ali surprisingly asked, "You are declining the evidence of Hasan whereas the Holy Prophet (p.b.u.h.) had himself said that both Hasan and Hussain are the leaders of the yough in Paradise". Qazi Shureh replied, "You are true, the Holy Prophet (p.b.u.h.) did say this, but it is also the principle of Islam that evidence of a son in favour of his father is not reliable". Ameer-ul-Momineen's claim was dismissed in the absence of acceptable evidence.

Pondering over this anecdote, three main basic points come to fore:

1. Free and independent entity of judiciary and government segregated from each other;

2. Rule of law - Hazrat Ali does not take his zira back despite his being Ameer-ul-Mumineen and does not make use of any functionary of the administration to obtain it. He takes recourse to the powers of judiciary instead of utilizing the powers of authority and thus he recognizes the supremacy of judiciary in regard to freedom of courts, administration of justice and enforcement of law.

3. The courts administer justice above board and consider the plaintiff and the respondent as equal, call for evidence according to the law and dismiss the claim of the government of the time due to insufficient evidence. It doesn't accept the evidence of Hazrat Hasan; the grand companion (sahabi) because it is not in accordance with the principles of justice. The decision goes against the Ameer-ul-Mumineen. This is Islamic principle of justice. For this reason the outcome was that although the Jew won his case yet he was so impressed with this above board justice

that he declared that the armor belonged to Hazrat Ali. He recited Kalima and embraced Islam.

Yet another anecdote is eye opener. It happened after the Khilafat-e-Rashidah, in the middle of second century Hijra. Muslim rule pervaded three continents. Muslim conqueror and the commander of the Central Asia - Qutaiba bin Muslim - enter Samarkand with grandeur and displayed highest level of morality. There, however, occurred some lapses in observing certain conditions that were considered as mere formality. Some local Buddhist citizens approached Qazi of the troops with a plaint that during the conquest such and such conditions were ignored. Therefore, all the process may be declared void and the army may be ordered to vacate the city. The Qazi heard the complaints of the non-Muslims against the Chief of the Muslim army and ordered that the city be vacated. Thus the city which was conquered by Qutaiba bin Muslim was vacated, without demur, in compliance with the decision of his own Qazi. It was announced throughout the city that if anybody sustained any loss during the whole process he may claim compensation according to Islamic Shariah. **(Ref: Historian Balazuri Futuhul Baldan, Chapter Conquest of Samarkand, Islam ka Qanoon Bainul Mumalik by Mahmood Ahmad Ghazi, p.59-60)**

In regard to the principle of democracy, all people, from well known legal authority Prof Albert V.Dicey to Sir Ivor Jenning, agree to the point that freedom of judiciary is essential for democracy. Judiciary is an institution independent and permanent in itself and supreme in its own sphere. Parliament's function is to legislate and the judiciary's function is to enforce and interpret it. This holds good in the case of British parliamentary system. In the light of American constitution its historical definitions, and in other countries where written constitutions are in force, judiciary's function cover not only enforcement and interpretation of law but it also enjoys the powers to decide under the principle of judicial review whether any law or governmental order is in accordance with the constitution, or violates it. In America, chief justice Marshal settled this principle in a case known as 'Marbury vs Modison' case. It was recognized as an absolute principle of constitutional law despite certain reservations of the justice prone governments of that time. When President Roosevelt tried to take revengeful action against the Supreme Court for its declaring certain laws of his renowned 'new ideal' as void and planned to increase the number of judges so as to appoint some of his liking, the Congress refused to accept it. Thus collective support was attained for the supremacy of constitution, freedom of judiciary and its judicial review.

Leonard Jason Lloyed in his book "The Constitution" (published London, Franco's 1996 pp.42-43) writes about the British parliamentary system:

Though in our constitutional system parliament is the supreme institution for legislation; courts, which are formed by judges, have the power to see that laws are properly implemented. It is courts who decide on the vires of laws and their legitimacy. Since parliament's legislation can neither address every human error and nor can it cover all unlawful deeds, it is, therefore, for

courts to interpret a law or even give direction for necessary legislation where there is either no law or exists an ambiguity about its meaning.

Thus, judges themselves perform the task of legislation. We have 'common law' which is simply based on judges' legislation made on issues not found in Parliamentary Acts. Moreover, the exercise of Judicial Review is an important means with the help of which court keeps government (and even legislation, to an extent) in control. It is the field of judicial review which is now making fast progress in our own country (i.e. Britain). Lord Dip lock has discussed the three basics of judicial review i.e. to decide about a law whether there exists some element of illegality in it, whether there was irrationality in it, or there is procedural impropriety.

We have cited this example from the British parliamentary system only for the reason that our rulers repeatedly talk of parliamentary democracy, otherwise it is a recognized fact that in America and other countries having written constitutions, including India, the institution of judiciary is not only independent and free but it enjoys the powers of judicial review. This judicial review is not limited to laws only, but in different countries those constitutional amendments that are not coherent with the basic structure of the Constitution, lie in its fold. In this regard an important instance is India itself where the Supreme Court in a famous case Kesavananda vs Kerala (AIR SC 1461-1973) which is commonly known as fundamental rights case, settled this principle that parliament is not empowered to make any constitutional amendment that runs counter to the basic structure of the constitution. It is because the parliament is not constitution-making body. It can, however, exercise authority to amend the constitution formed by the constitution-making body. Therefore any amendment that distorts the constitution itself is not an amendment rather it is constitution-making, for which the legislature enjoys no authority. (The way our Prime Minister declared the parliament as 'Creator of Constitution' is the result of ignoring this fact). It was further explained by the Supreme Court in a case Indra Gandhi Vs Raj Narain (AIR 1973 SC 2294) and clearly decreed that it can never be the purpose of constitution-makers that the Prime Minister should be made an oriental despot through a constitutional amendment. Parliament's authority for amending the constitution (Article 368) despite its overt phrase logical expanse confers only limited authority - not absolute authority. In order to counter it, when Indra Gandhi added two amendments (clauses 4 and 5) to Article 368 through constitutional amendments, and thus ended the authority of the courts to declare any constitutional amendment being counter to constitution, the Supreme Court in 1980 in Mai Nirwamal case (AIR 1980 SC 1989) cancelled this amendment (42nd amendment) and through it not only frustrated the claim of the parliament that it enjoyed unlimited authority to amend the constitution but also refused to recognize its right that parliament can restrict the powers of judiciary. This is the position of judiciary in a democratic parliamentary system.

In the light of this discussion about the importance and authority of judiciary in Islam and in democracy, let us analyse Prime Minister's speech wherein every parliament is declared as

'constitution maker' - one that is supreme over all. All other institutions are being asked to act as assistants.

An excerpt from a paper, presented earlier by Mr Khalid Anwar - a close aide of the Prime Minister and now the Law Minister - at a seminar held in the Institute of Policy Studies, Islamabad and which is being published in an under print book "Pakistan Secular or Islamic" ,seems to be pertinent and is reproduced here:

"Judicial power is a fundamental aspect of secular as well as religious constitutions..... It operates to restrain parliament from transgressing their constitutional limits. There is nothing unusual in this exercise of judicial power and, instead of considering it as usurpation of the powers of parliament; it is indeed the exact opposite. It is an attempt to prevent parliament from usurping a power which does not vest in it".

A misconception was being created as if the recent row is between the parliament and the judiciary and that judiciary was aiming at grabbing the powers of the Parliament. The instances we have quoted from the constitutions and political systems of Britain, America and India are enough to prove that in a democratic system real supremacy lies with the Constitution and the Parliament, the judiciary and the government are the creators of the constitution and equally subservient to it. Each of them is independent in its respective sphere but none is supreme over the other. Now to call it a row between the Parliament and the judiciary is merely to confuse the matter. The real problem in our country is that every government wishes to establish its supremacy over the Parliament and the judiciary and to make them totally subservient. This is the issue that poses greatest risk to the future of democracy.

From the historical point of view, we find that in Britain there has been four hundred years long tussle for the supremacy of the parliament but it had no concern with the judiciary. The actual contest was between the king and the parliament. In the Glorious Revolution supremacy of parliament over the government was recognized only academically. Government or management meant the king and his cabinet that remained daggers drawn against the parliament. Practically the supremacy of the parliament was established through a law in 1911. But it is a pity that later on things gradually took a shape whereby the parliament in the British parliamentary system has since practically slipped into the grip of the Prime Minister. Due to the party system accountability of the government before the parliament is no more in its true sense. That is the reason why in Britain itself where there are still innumerable ways to check the government and hold it effectively accountable; for instance through free press, independent judiciary, effective opposition, politics-free bureaucracy and hundreds of constitutional traditions, the intellectual discussion rampant nowadays relate once again to the restoration of parliament's supremacy over the Prime Minister and the government.

T. Benn in his "Argument for Democracy", (London 1981 pp.18-19) presents a concept of constitutional premiership:-

"I have reached the conclusion that the range of powers at present exercised by a British Prime Minister, both in that capacity and as party leader, is now so great as to encroach upon the legitimate right of the electorate, undermine the essential role of parliament and usurp some of the functions of collective cabinet decision making ..... In short the present concentration of powers in the hands of one person has gone too far and amounts to a system of personal rule in the very heart of our parliamentary democracy. The Prime Minister and the party leader must be made more accountable to those over whom he or she exercises powers, so that we can develop a constitutional premiership in Britain. To transfer an absolute premiership into a constitutional premiership would involve making some fundamental changes in its functions comparable to those made over the years when the Crown was transferred from an absolute monarchy into a constitutional monarchy. The arguments for change are based upon experience of the way the present system works in practice.... a Prime Minister has the power to get his or her own way." In another recent publication "British Politics: Constitutional Changes" (Oxford University Press, 1990) Professor D Kavanagh broaches the subject saying particularly about the premiership of Margret Thatcher, that the type of government existing in the United Kingdom can now properly be termed as Prime Ministerial government (p.208). Such being the state of parliamentary democracy in Britain, one can assume what must be happening in Pakistan where parliament is practically ineffectual. All the powers are concentrated in the hands of the Prime Minister. The cabinet is also under his thumb. Decisions are taken outside the cabinet and the Parliament. From distribution of tickets for parliamentary representation to the affairs of the state, from important international treaties to basic postings and appointments (that go down sometimes to the level of police S.H.O. and Municipal Councilor), all powers vest in the Prime Minister. This is not ‘parliamentary democratic system’. It is rater ‘premiership system’, yet the hue and cry is for the supremacy of the Parliament.

Our considered view is that the real problem does not concern parliament and judiciary. The problem concerns government, rather Prime Minister, and the judiciary on the one side and the Prime Minister and the Parliament on the other. In this background the currently suspended 14th Constitutional Amendment was conspicuous. The state of helplessness of the Parliament could be judged from the way the 13th and 14th Amendments were bulldozed through both the Houses. There was no consultation, no discussion at national level and no proceedings in the Houses. In the light of the 12 years experience gained by the writer in the Senate of Pakistan, it can easily be said that the majority of members did not read the full text of the amendments even once. Only under the orders of the Prime Minister, all the members wherever they were in the country or all over the world, were huddled like mindless pets to Islamabad and approval of such important constitutional amendments was secured within hours both from the National Assembly and the

Senate. This is the type of government which is a risk for democracy and which makes the worst example of usurping the powers of the Parliament.

Through the 14th Amendment the grip of the Prime Minister and the party leader over the 'elected representatives' was further tightened. Changing parties for selfish ends and 'lotaism' is no doubt against Islam, morality, nobility, conscience and democracy, but the persons who are vociferous now in this regard, had been the real traders in this field and they thrive in it even now. Despite all this it is a crime that one gets elected on the ticket of one party and then shifts to other for selfish ends. This needs to be curbed. But gagging the elected representatives, depriving them of freedom of expression in the Parliament and ending their membership merely on a chit from the party leader, is the brute authority both in the eyes of democracy and Islam and runs counter to the self respect of human being and against the freedom of conscience of the best of creation. Islam allows everybody to differ from those possessing authority and declares Allah and His Prophet (p.b.u.h.) as the sole standard of righteousness:

No doubt Islam does ordain for obedience to the leader (Ameer) in well known matters binding also consultation (shoora). But it denies the obedience of even the highest in matters of evil. Islamic system comprises consultation (shooraiat) and democracy. Further, discipline is something different from ban on expression, may it be within the party or outside the party. The purpose of 14th Amendment was to keep the elected representatives under the brute authority of one person and then above all the party leader was the final authority. He could directly write to the Election Commissioner for disqualification whereas earlier the procedure according to the Political Parties Law was that the complaint used to be sent to the Speaker National Assembly or to the Chairman Senate who was then to send it to the Election Commissioner. The procedure adopted in the 14th Amendment is wrong; freedom-frustrating and an ugly one, irrespective of its professed purpose that may be very important. The palliative measure taken by the Supreme Court in this regard made an excuse for stultifying the judiciary and branding it as protector of lotaism which is the worst example of political goondaism! This consequently paved the way to the awe-inspiring black November 28 when the apex Court was openly assaulted and the nation and the world at large stood stunned.

The procedure adopted in democratic countries in this regard is something between discipline and freedom. In the British Parliament only the front bench that comprises cabinet or the second cabinet, is subject to certain restrictions in expression of their opinions, although the differences even among ministers become manifest inside and outside the parliament. But there is no restriction on other party members who are called back benchers. They perform the duty of taking even their own government to task. In the British parliament due to the dissatisfaction of back benchers official resolutions were defeated five times during the four years period (1970-74), 14 times in only 1974 and 29 times during 1974-75, but it was not treated as defection. In important matter even party whip - compulsion to vote in favour of party - is withdrawn and freedom is

granted to vote according to one's conscience. Tradition of the British parliament is that after his election, a member is recognized in three positions. One: as representative of his constituency wherein he represents the whole population and not his party alone; two: country's elected representative at national level; and three: party's M.P. A balance is maintained in all these three positions. Only a change from one party to another is considered defection. Expression of opinion and difference with the party leadership and even non-compliance of party whip is not considered as defection. (See "The Changing Constitution" ed. by Jowel and Olivu, particularly Chapter IV. "Modern British Democracy - Ideology and Action" by Anthony H.Buch and Chapter V - Dawn Oliver - "Parliament and Political Parties".

We would like to reiterate that real risk to democracy in Pakistan is from dictatorial and autocratic type of rule that is being promoted here in the name of parliamentary democracy and as a result of which both cabinet and the parliament have become ineffective. A little obstruction has come in the way of the unlimited powers of the rulers from judiciary. Therefore, attempts have been made by every regime to chain down the judiciary and to keep it under thumb and the same fight is still going on.

Real risk to democracy is this mentality and the political culture that tolerates it. The distortion and independence of judiciary and the supremacy and hold of the Parliament over the government. This can be possible only when the entire political system and its pattern is changed, awareness about their rights and responsibilities is created among the masses, the press performs its functions with freedom and with responsibility, and new leadership emerges from amongst the middle classes and the people. Parties should be organized on the basis of principles and programmes and democracy be practiced within the parties as well. Effective system of 'Ehtesab' and accountability needs be introduced. Rule of law and the constitution and equality of all before law is established in the country practically. Free press and independence of judiciary are very important components of this system. Democratic activities cannot prosper without the safety and stability of all the institutions. Unfortunately personnel cult has become so rampant that whoever comes into power is considered to be indefensible. Although none is indispensable in this cosmos, finality rests with Allah. Here it is apt to quote the example of French Prime Minister Clemenceau who had brought conquest to his country during the World War. Cajolers termed him 'indispensable', but he slapped them in the face replying: "the graveyard is full of indispensable persons".

Those who are now attempting to harrow the freedom of judiciary should know that it is very painstaking and nerve breaking task to build up and to protect institutions whereas it is very easy to destroy them. Here we are presenting an excerpt from an article of Mr Khalid Anwar to apprise him and all the members of the Parliament. All we wish is that it opens their minds:-

"It takes decades, if not generations, for the institutions to develop but the task of destruction can be swiftly carried out, coldly and remorselessly in the span of a few h ours. What those who carry

out this sacrilege forget however is that they will not always repose in the chair of temporal power.... It is a cruel irony and a monstrous fraud on the people of this country that the secular rules of the Islamic Republic of Pakistan were snatching away from them the reality of constitutional safeguards. The security of tenure which is the substratum of judicial independence has been eroded and a baneful eye has sought to wither the flowering of the tender bud of judicial rectitude. It is a matter of surprise that those who clamored the loudest for a free and independent judicial branch when they were in the opposition should now launch premeditated assault directed against the citadel of justice. Or perhaps it is not. Those who shout the loudest are not necessarily the sincerest. It is this, the usurpation of judicial independence by executive fiat that should be of the profoundest concern to those who believe in the ideal of a free and just society."

Future of democracy depends on the urge of the nation and channelizing of the ruling pattern of the leadership in right direction. In this connection following matters are most important:-

First absolute and unflinching conviction in Islam and avoiding ostentatiousness, hypercritic dealings and contradictions. One may like it or not, it is not only academic but an historical fact that masses of the country want Islam and no other system or pattern other than Islam can be enforced successfully among the Muslims. That is why from practical point of view, Islam and democracy are inseparable. If democracy means rule of law and leading the system of life according to peoples' wishes and intentions, then democracy can be enforced through Islam alone. Enforcement of Islam and pursuit of democracy are two facets of one activity. That is why the tussle between Islam and secularism in Muslim countries resulted in dictatorship and fascist systems and in no country the un-Islamic and purely secular laws could be enforced through tyrannical authority of dictatorship and not through democratic support. Among thinkers of the West, Prof Dr Wilfred Smith has acknowledged this fact in very clear terms that Islamization can be implemented through democratic process and only the Islamic system is in cohesion with popular will and consummation of their ambitions. (See "Pakistan as an Islamic State"). Another teacher of philosophy, history and sociology, Professor Dr Filmer Northrop, in one of his articles that was presented at a colloquium on Islamic Culture in 1958 and printed this year by Preston University, says while reviewing Turkey and the Western countries, "I believe this is one of the reasons why such laws (i.e. secular laws) are initially enforced by a dictator; therefore these cannot become part of law-book as a result of mass movement because the masses stick to the old traditions".

Therefore it is necessary that the tussle between Islam and secularism is buried with absolute conviction. Whosoever believes in democracy and wants it to flourish whether he belongs to this country or some other country, must know that it is the requirement of democracy that Islam may not be made controversial and that effective attempts be made din legal, social, educational, economic, cultural and all other fields to enforce it. Our Constitution which is the basis of oath taken by all functionaries, calls for it and this is also the call of the Supreme Court's decision of

March 20. Those who consider the Islamic system as the requirement of their Faith (deen), are treading the right path but those who have some reservations about Islam and Islamic system, yet they are true to democracy and want to see the future of democracy to be secure and bright, are duty bound to support Islam to honor the peoples' will instead of blocking its way. Otherwise this tussle shall continue and the constitutional stability would not be attainable.

Second, a change is needed in the attitude of the rulers and other effective political powers. Both the Constitution and the law are very important, but constitutionalism and respect for constitution and law is something different. Undoubtedly, the rectification of the Constitution and law is called for where necessary, but most importantly there is need for implementing the constitution and the law, settling matters according to the Constitution and moulding the practical attitudes in consonance with it. Dictatorship, fascism and tyranny also take start from this point when they consider themselves above the Constitution and law or attempts are made to make the Constitution and law to abide by their will or to corroborate with them. Therefore, unless attitudes change and ruling pattern as well as decision-making styles alter, sovereignty of Constitution and law shall remain a dream. For bringing this change, besides education, public opinion and social pressures, effective role can be played by the press, the political parties and the workers and the judiciary. That is exactly what is needed.

Thirdly, the pressing force of masses is the most effective element for which large scale mass contact, creating among people awareness of their rights and a feeling of their responsibilities is called for. Ultimately to mobilize them in a way that it may become impossible for anybody to ignore peoples' determination, ambitions, wishes and needs.

In this background, we consider the recent struggle of the judiciary a good omen for the future of the democracy. Judicial activism is the need of the hour and essentially the reaction of ignoring the Constitution and the law by the political leadership. The way Justice Kiyani played a positive role during the Ayub Khan's Martial Law in boosting the wave of revival of democracy; similarly the Supreme Court and its present head become instrumental in directing the country towards constitutionalism and respect for law, since 20th March, 1996. A study of history reveals that our experience is not a solitary one.

1. In every walk of life consultation enjoys central role, similarly in the judiciary an effective convention of consultation needs be established. If fortification of judiciary is needed to save it from the intervention of political elements, then these principles should be respected and adhered to within the fortification as well, as they have been declared by Islam essential for the attainment of justice, fairplay, happiness and prosperity. This purpose can be achieved through healthy constitutional conventions. Lacking enough emphasis on this tradition brought the unfortunate of division and rift within the judiciary itself that could and must have been avoided.

2. The dignity and respect for judiciary depends on its just verdicts and its firmness and stability to stand by the right. But it is also very necessary that the high tradition of respect, for each other, cooperation and mutual trust among the judges of higher courts that has been our history, including the recent past, should be maintained and strengthened. It is not an ordinary matter and never be overlooked, because if the judiciary stands divided, there could be no rule of law. Calling each other as 'brother judge' is not mere formality but it depicts deep concern and the future of the institution. The difference of opinion that has been created or if it existed in the higher courts is not a healthy state of affairs. It is necessary for all to respect difference of opinion, conscience and the law. But there are norms both for giving shape to the issues and for their expression. Honoring of these norms goes to create beauty and balance in all matters.

3. 'Ehtesab' is equally necessary in the judiciary so that it could put the nation to Ehtesab candidly and carries it out in the most transparent manner. Judiciary is the institution which the nation is prepared to accept even today as above board and blotless, despite the deteriorations whatsoever. It is their longing and their desire. It is essential for the survival of democracy as well. Therefore, judiciary should also take care of it within their own system.

4. Real success of the judiciary depends on protection of Constitution and law but more so in protecting the common man in his day to day life from oppression and providing him due justice. It is a fact that thousands of cases have been pending in the courts of different levels since very long periods. Thousands are rotting in jails because their cases have not been decided. Instances have come to the fore in which by the time decision was announced the accused had been in jails for much more period for crimes whose maximum term of punishment was few fixed years. Delay in justice is as much injustice as violation of justice. Our judiciary should ponder over this problem at every level. Our advocate should also not make money-making as the only purpose of life. They should help and cooperate in getting speedy, less costly and full justice. If a tree is recognized by its fruit then the success of our constitutional institutions depends on the extent they fulfill the real needs of the people through their fruit.