SUPREMACY OF THE CONSTITUTION AND THE PARLIAMENT

TERJUMAN-UL-QURAN

April 2008

PROF. KHURSHID AHMAD

SUPREMACY OF THE CONSTITUTION AND THE PARLIAMENT

By Professor Khurshid Ahmad

The challenges facing the nation and its new leadership today can be summed up as follows:

(i) restoration of Pakistan's Constitution in its original shape;
(ii) supremacy of the Parliament;
(iii) equitable distribution of power among different state institutions; and
(iv) Improving the working of the Parliament to enable it effectively perform its constitutional role.

As for the first challenge, the Constitution needs to be immediately restored to its pre-12 October, 1999 position. In spite of minor differences, we too have endorsed the stand taken in this context in the Charter of Democracy and London Declaration. Some major constitutional amendments are, however, required to be introduced not just to restore the pre-12 October, 1999 position, but also fulfill the requirements of the Constitution's Islamic, parliamentary, federal and welfare role. For this purpose, suitable amendments are needed to be introduced in the Parliament after necessary deliberations and effective consultations. Some such amendments are proposed below.

1) In order to restore the supremacy of the Parliament, the first and basic requirement is to do away with the special powers of the President, which has created imbalance between the institutions of Presidency and the Parliament and due to which the Parliamentary system of government has been turned into the Presidential one. Furthermore, the executive is also needed to be made answerable to the Parliament, which is the actual forum of decision-making. Following amendments are immediately needed in this context:

(a) The Parliament should be free to discuss all foreign and domestic issues in the light of the guiding principles of the state which must form the basis of policy-making. The debate should result in policy-directives for the executive and reports of their implementation should come up to the Parliament for discussion. This ought to be a constitutional obligation, binding both for the executive as well as the Parliament.

(b) The budget-making process must be changed altogether. Four months prior to the budget, the Parliament should debate the guidelines and in the light of these all budget proposals be prepared. These proposals should be placed before the concerned Committees of the two Houses within a month, which in turn should forward their recommendations to the Ministry of Finance for incorporating them in budget proposals. The actual budget should be

submitted before the Parliament three months before the end of a fiscal year. The Senate should have a minimum of three weeks and the National Assembly eight weeks to finalize the budget. The Parliament would, thus, have two months for the approval of national budget. The proposals regarding defence sector should also be submitted to the Parliament as part of the overall budget proposals.

(c) Among the factors responsible for rendering the Parliament ineffective is the practice of legislation by way of ordinances. The countries that claim to be democracies generally have no room for such exercise and where there is a provision of temporary legislation; there too severe restrictions have been imposed on the enactment of laws by repeated recourse to ordinances. The emergency requirements for legislation also need to be clearly defined and brought under the jurisdiction of legal accountability. Unfortunately, our Parliament and the government have traditionally enjoyed a very poor record in this context. The previous Assembly could bring up just 50 laws for a semblance of debate during the last five years of its existence, while 73 laws were introduced during the same period through ordinances. In order words, the executive enforced those laws without any Parliamentary debate and consultations. This simply means that legislation through ordinances was 150 percent more than the normal process of law-making. In neighboring India too, ordinances are used for legislation but their volume is much less. During the last five years, the Indian Lok Sabha passed 248 laws after proper debate and discussions, while the number of those enacted through Presidential Ordinances were only 34, which comes to just 14 percent of laws passed by their Parliament. Another sad aspect of episode in our case is that some of the most important Bills did come up for discussion in the National Assembly and the Senate during the period, but the stage never came for any proper debate on those Bills. The new Parliament can forestall the predominance of Presidential Ordinances by laying down the condition that no ordinance can be issued 15 days before the National Assembly session and till after 15 days of its prorogation. In case of some extraordinary development requiring issue of an ordinance during the intervening period between two Assembly sessions, specific reasons must be spelled out for such emergency legislation. It is further necessary to clarify that a particular ordinance cannot be issued again and again after repeated reframing, as this is actually tantamount to bypassing of the Parliament by the executive. It is necessary to also clarify that during one calendar year not more than five ordinances should be issued. Such steps would facilitate

serious working of the Parliament and in making the processes of law and policy-making smoother.

(d) There are two other factors which have been throwing spanner in the way of the Parliament's efficient functioning. One of these is the processing and approval of international agreements over and above the Parliament. This is a practice that has been going on since the British days and is contrary to democratic norms. It is imperative to use the proper forum for formulation and ratification of agreements. Then, apart from the appointments made through Public Service Commission, which is the right forum for the job, all diplomatic and administrative posts are now filled exclusively by the executive. I think, there must be a role in this for at least the Parliamentary Committees of the Senate, or the joint Committee of the two Houses. We can follow the US model in this respect in the interest of the Parliament's supremacy.

(e) The matter concerning the working days of the two House of the Parliament is also of great important. According to the 1973 Constitution, 160 working days were earmarked for the National Assembly, which have now been reduced to 130 days. Ironically, through an interpretation it was subsequently decided that in case of two holidays falling within a week, those too would be deemed as working days. Consequently, the Assembly and the Senate now meet only for three days a week, which are counted as seven days. Then, the daily schedule of work is also limited to an average of 2½ hrs only. As against this, the Parliament remains in session round the year elsewhere in the world, except for 2-3 days of its annual leave. Its working is spread over 6-7 hrs. In this context, it is also recommended that the members of the National Assembly and the Senate be provided necessary facilities and material for study, research and help in their job as legislators. The proceedings of the Parliamentary Committees should be open; the people ought to have access to the sessions of the Parliament; Ministers' participation should be made mandatory. The Prime Minister should ensure his presence in the Parliament at least once a week. Half an hour should, in fact, be reserved for him to reply to questions.

The measures proposed above are expected to tremendously improve the working of the Parliament and help in establishing its supremacy.

2) Together with the measures for the supremacy of the Parliament, certain amendments are also needed to be made, as early as possible, in the light of last

35 years' experience in order to preserve and protect the Islamic and Federal character of our Constitution. An all-party Parliamentary Committee, composed of the members drawn from both the Houses, should be formed to deliberate on the proposed amendments and prepare recommendations for the Parliament. The members inducted in this Committee must be well-versed in law and demands of contemporary history. The issues requiring thread-bare discussions in the proposed Committee may be summed up as follows:

- The first of these is the issue of provincial autonomy. Major political parties of the country do not object to the doing away with the concurrent list and transferring those matters to the provinces. We are also of the same view, but do not take it as sufficient. Part-B of the Federal List also needs to be reviewed to facilitate better say of the provinces in many things requiring their attention. Similarly, there is a need to reconstitute and re-invigorate institutions like the National Economic Council, Council of Common Interests and National Wage Board Award. The Federal government has traditionally had an upper hand in these institutions, which has often been unjustly used to the detriment of the provinces' interests. This needs now to be done away with in order to ensure participation of the provinces in decision-making and implementation of those decisions on the basis of justice and equanimity.

- The second issue in the context of the Parliament's supremacy is the matter concerning effective separation of the executive and the judiciary and provision of necessary resources to a truly independent judiciary, followed by a proper mechanism of its accountability. The judiciary at the lower level suffers too much by shortcomings inherited from the past. The superior courts do need an effective and transparent system of accountability, but the need to reform the flaws at the grass root level is all the more pressing. Without losing sight of the ultimate goal of judiciary's independence, efforts should also be accelerated to eliminate unwarranted delays in unhindered provision of justice to every citizen of the country and restoration of his confidence into our judicial process. The role of our lawyers' community in this context is also of crucial importance. As things stand today, justice is beyond the reach of the common man and there appears no remedy for inordinate delays at various levels. The situation, therefore, demands a total overhaul of the system and its replacement by a thoroughly rejuvenated judicial system.

- The third equally pressing issue is that of the Federal Shariah Court, which has now been reduced to an institution of secondary level. The transfers of the superior courts' judges to FSC are generally taken as punishment. They do not enjoy the same service conditions and safeguards as enjoyed by their Supreme and High Courts' colleagues. Furthermore, the FSC decisions have been made ineffective through willful provision of the right to appeal.

- There is yet another issue of immediate concern, which relates to an equally important constitutional body, the Islamic Ideology Council. According to the dictates of the 1973 Constitution, the laws of the land were required to be brought completely in consonance with the Quran and the Sunnah and this process was to be completed within seven years, following the promulgation of the Constitution. The Islamic Ideology Council has, meanwhile, prepared dozens of reports and identified hundreds of laws which need to be modified and for which necessary amendments were also prepared. Unfortunately, however, the Parliament did not bother during the last 35 years to look into those reports and proposed amendments. The Senate did discuss a couple of those reports but the debate remained inconclusive. The time has now come to stop this cruel joke with the nation and allow no further violation of the Constitution in this context. The consensus government, which enjoys overwhelming support of the legislature, should immediately take steps for necessary legislation to implement the Council reports and amend the laws accordingly.

The fifth issue that merits the Parliament's attention concerns the role of the civil service. On the one hand, the civil service needs constitutional guarantees and on the other is the necessity of making it truly neutral administrative machinery. The civil service has long been abused and instead of safeguarding its interest as an impartial administrative organ of the state, all successive regimes have unfortunately used it as their beasts of burden.