

**THE ROLE OF JUDICIARY IN THE PROMOTION
OF A CULTURE OF TOLERANCE.**

Pakistan is today passing through a period of acute crisis. A culture of intolerance seems to have taken the whole country into its strong grip. Sectarian feelings have added a new dimension to this deplorable situation. Islam which has unified the Muslims for more than thirteen centuries has been rendered by sectarianism into a factor of division on sectarian lines. Different religious denominations have not only given different interpretations of Islam but have also started insisting on their respective interpretation as the only valid and legitimate interpretation of the faith to the exclusion of all other views.

The difficulties have been further accentuated by the current injustices being done to the Muslims around the globe. Western powers have adopted double standards, one for dealing with the Muslims and the other for dealing with the non-Muslims. Every such policy further re-assures the Muslim masses that the present world order has been conceived, developed and adopted only to curb and control Muslims and to ensure that their ideals and aspirations are frustrated. A common Muslim fails to understand why the up-holders of human rights refuse to appreciate the miseries and plights of the people of Palestine. It is difficult for a Muslim to justify prompt action on behalf of western powers to get the non-Muslim population of Eastern Timore right of self-determination and to quickly secede from Indonesia while a similar right has never been acknowledged by the world powers for the peoples of Kashmir, Mindanau, Chechnia and Daghestan. A common Pakistani has the feeling of being miserably insulted when he notices that India has been acknowledged as a nuclear power while Pakistan is not.

These injustices create a feeling of deprivation, indignity and frustration. Frustration always gives rise to hatred against those who are perceived to be the cause and source of frustration. It is unfortunate that the dimensions of these frustrations are continuing to increase with the passage of time, mostly because of the exiting situation in and outside the country. The present frustration is giving rise to the belief that not only the present world order is insensitive to the grievances of the Muslim peoples but even

the system in Pakistan is rapidly failing to address the miseries of the common man. This perception is also giving rise to the conviction that every person should himself come forward to seek, secure and protect his own rights, instead of relying on the system which is constantly eroding in the eyes of the common man. It seems that not only our societies, but human society as a whole are moving to the situation of *Omnus Belli Contra Omnis*.

The rising intolerance which has acquired serious dimensions has resulted in a complicated situation, where a number of causes are at play. Unfortunately, the negative causes and forces seem to have been operating in harmony and unison. The system has taken such a turn that it not only ignores but supports and patronizes negative forces in society. The positive forces have failed to prosper or at least have been rendered incapable under the prevalent system. For example, the system has not been able to effectively control corruption, land mafia and such other social and economic evils which are constantly adding to the complication of this situation.

Unless the present deplorable situation is analyzed and examined impartially and objectively we will never be able to come out of this impasse. Unfortunately, many men and women living in Pakistan have lost confidence in many of the institutions of the state. On the contrary, there is feeling that the institutions of the state are directly responsible for the emergence of the present impasse. For example, many citizens of Pakistan perceive police to be the main protector of criminals in the country. They feel that the system and the culture prevalent in the lower judiciary are responsible for the delay in delivering justice in time. The majority of the tax payers are convinced that the tax collecting agencies of the government are directly responsible for leakage and pilferage of the tax payers' money. The majority of the traders are found complaining against the corruption, malpractices and maladministration of the concerned government agencies. Hardly any voter would be convinced that the representatives elected and voted by him into the elected bodies would fulfill their tall promises.

The only state organ which still enjoys some confidence of the people is our superior judiciary, particularly the Supreme Court of Pakistan. Although some decisions in cases of political nature in the past have compromised the dignity of the Supreme Court, yet the common man feels that the only ray of hope comes from the court rooms of the superior judiciary in Pakistan. If the superior judiciary responds to the expectations

and aspirations of the people of Pakistan, it is hoped that the present culture of intolerance, frustration and despondency will, one day, be replaced with a culture of tolerance, sense of achievement, pride and competence.

The most important problem being faced by the people of Pakistan is the prevailing lawlessness and insecurity. The security and protection of the lives and properties once enjoyed by the people of Pakistan is now history. In all major cities, there are dozen of incidents of theft, robbery, abduction, rape and murder almost every day. All leading newspapers are full of stories and reports of such heinous crimes taking place in different parts of the country. In such situations, common man in Pakistan is always reluctant to rely for his rights on law enforcing agencies and to resort to judiciary. He only feels that law enforcing agencies would simply add to his miseries and difficulties. Despite all claims of improving police culture and despite spending of billion of rupees, the prevalent *thana* culture is the same. The situation in villages and far-off areas is much more worse than we notice in major cities. This sense of insecurity is bound to create a culture of intolerance and to give rise to a sense of despondency in which no person is prepared to rely on the state apparatus or to have confidence in the law enforcing agencies. In such a state of mind, every person would only be concerned with his right, safeguard his own interest and would be ready to do anything to defend his own interests. Such a state of mind would always give further rise to exploitation and frustration. This state of mind is an easy raw material for the prevailing culture of intolerance.

The miseries of the down-trodden get more deepened and worsened when a person feels insulted and deprived by the lower judiciary. It is commonly acknowledged that the majority of the criminal cases are not reported to the police. It is also commonly acknowledged that the majority of the cases reported to the police are not registered. It is also commonly acknowledged that the majority of the cases registered by the police are not properly processed. Even those cases, which are processed by the police are so weak and faulty in preparation that they fail to get any serious consideration in courts. This situation encourages people to settle their accounts on their own. People are not ready to come for evidence in the courts. The state has failed to provide proper security to the witnesses. The security agencies are not at all concerned with the security of the people. They have, perhaps, forgotten altogether and they are not primarily responsible

for protecting the so-called VIPs; instead, their primary responsibility is to ensure safety and security of the common people of Pakistan.

Even those cases which find their way to the courts linger on in such a way that their decisions lose relevancy and meaning. In order to get justice under the judicial system of Pakistan one has to have a long life of Prophet Noah, as much financial resources as of pro-verbial advisor of Pharaoh, namely, Qarun and such a perseverance as that of Prophet Ayub (Job). Since those things are not within the reach of a common man in Pakistan, most of the people hasten to take law in their own hands and settle their disputes, the way they like.

Our political system has added new dimensions to this pitiable situation. The feudal system given to us by our colonial masters is not only persisting but is getting stronger and stronger. The feudal lords of yesterday have also become undisputed political masters. The land owners of the past have also become strong and influential industrialists of today. When these classes were created by the British, their relationship with the rulers was what of the master and the client. Their Master successfully and effectively controlled them and kept them within bounds. With the exit of the master in 1947, the erstwhile client has found inroads in the corridors of power. Now, the feudal lords have their family members in the civil and military bureaucracy not only to provide support and protection to them but also to join hands in many cases to promote common family interests.

During the British days, there might have been some utility and sense in granting some authority to the loyalist feudal lords, particularly in maintaining law and order, security and protection to the people and solidarity to the system. Even this debatable utility has lost its meaning after the creation of Pakistan. During the British days, the powerful and influential feudal lords were controlled by the British who were at the helm of affairs. All the effective offices were in the hands of the British who did not owe anything to the locals as far as their authority and power was concerned. In this situation, even the petty officers of the British bureaucracy were able to control even the most powerful of the feudal lords. The situation underwent a substantial change after the creation of Pakistan. The feudal lords as a class have taken over all the political and other lucrative offices. They organized themselves into various political parties and joined almost every government which came to power in Pakistan after mid 1950s. Thus,

they assigned to them political power and legitimacy. The awe of the erstwhile British Raj was no more. All governments coming to power either owed their existence to one or another group of feudal lords or sought their political support for their survival and continuation in office. Even the most dreadful and wreckless regimes of military rulers had to eventually fall back on the support of the feudal lords. The most powerful military ruler of this country, namely, General Muhammad Ayub Khan, found it convenient to develop a league of interest with the landed aristocracy. Rather, he tried to find his way into the league of the privileged aristocracy through marriages as well as through acquisition of landed property and agricultural lands. General Ayub Khan could have dispensed with this colonial legacy as was done by the Indian leadership soon after Independence.

The increasing unbridled power and influence of the ruling elite which consists of feudal lords, the top civil and military bureaucracy and the new industrialist class has further widened the gulf between the masses and the privileged classes. This class-based society and stratification of the people of Pakistan is visible in every walk of life. Residential areas in all major cities and towns have been designed on the basis of class and income group of the respective owners and prospective dwellers. The educational institutions have emerged in such a way that the difference between various classes and resulting gulf has further been deepened and widened.

All these factors have resulted in eroding the power and prestige of law and the weakening of the law enforcing agencies and institutions. The majority of the people of Pakistan, living in villages and small towns are under the influence, if not totally under the yoke, of the local members of the neo ruling elite. In the perception of the common man, the law has lost its meaning and purpose as far as the interest of the common man is concerned. To him, law is a tool in the hands of the powerful to protect latter's interest and to perpetuate his power and increase his prestige. Virtually, the local administration, the elected representatives, the local feudals, the neo-elites have organized themselves into a privileged class with little or no interest in the empowerment of the common man. The so-called civil society is, to a large extent, nothing but also an extension of the merging neo elite. In most of the cases, the NGOs have either been established by the members of this privileged class or have their blessings. Hardly any NGO has ever taken any interest in solving the problems and removing the difficulties of those millions who are suffering under the yoke of land lords, feudals and local chiefs for around three

centuries. The NGOs are mostly interested only in raising funds and donations from overseas. They have hardly taken any real interest in improving the lot of the common man. They only promote the interests of outsiders. It is strange that those who have been raising their voices against the Hudood Laws to save the so-called interest of a few thousand women alleged to have been suffering from the misuse of Hudood Laws have never raised any voice against millions of those who had been constantly denied even the most fundamental rights guaranteed under the Constitution of Pakistan. Hardly any NGO raised any voice against the private jails established by almost every major feudal lord. Hardly any NGO raised any voice against bonded labour imposed on men and women in the villages and smaller towns in the country. Their sole concern appears to be to put Islam and Pakistan into this dispute.

This has deprived the masses of even the possibility of falling back on the help and assistance of civil society and the NGOs. In many other countries, the weaknesses and failures on the part of the government agencies are compensated by the work of civil society, which fills such voids with voluntarily activities.

Even in situations where law and the law enforcing agencies, such as subordinate judiciary, take any initiative to address the miseries of the people, their initiatives bear little fruits because of the complication and degeneration of the system. The investigation agencies might have been effective in the past. However, these have become totally ineffective today. The complicated and cumbersome procedure given to us by the British has added to the difficulties of the people. Our codes of civil and criminal procedures are mostly misused to prolong litigation, only to serve the interest of the powerful and influential. Voices have been raised in the past to dispense with these complicated and cumbersome laws. But these voices have so far failed to attract favourable response both from the bar and the bench. In some cases, such concerns became a cause of conflict between the bench and the bar on the one hand and the advocates of the change on the other. The bar seems to be so deeply enamoured and emotionally attached to what it calls the beauty, the scientific nature and the systematic structure of these procedural codes that it refuses to listen to suggestions for any revision in them. It is difficult to say whether this enchantment is really because of the beauty of these laws or because those laws have provided an opportunity to some of them to play with their provisions to prolong and complicate litigation.

The demon of corruption has added further dimensions to the maladies of the system. Until very recently, the superior courts were, to a large extent, free from this curse. Now, it is difficult to say that higher pedestals of justice are now as free from corruption as they used to be in the past. Recent actions taken by this apex Court against some of its top officials speaks about the deplorable situation. Among other things, corruption causes at least long delays in the disposal of justice. In order to remedy this situation, drastic steps will have to be taken to deal with these maladies and to reinstate the confidence of the common man in the entire judicial system. If no practical and immediate steps are taken, the situation may further degenerate and may even erode whatever remains of the prestige of law and judiciary.

The judicial activism shown by the superior judiciary during the recent years is a great omen. The initiative taken by the worthy Chief Justice and some of his honourable colleagues represent a ray of hope in the darkness of injustices, corruption and oppression. However, I would seek the indulgence of the honourable members of the superior judiciary to submit that the situation is so complicated, the maladies are so deep rooted, the corruption is so much rampant and the maladministration has so grossly penetrated our national lives that it cannot be removed solely by judicial activism on the part of the superior judiciary. It is the responsibility of all of us particularly the intelligencia, the lawyers community, the Ulema and sincere, honest and patriotic elements in civil society. All these elements should come forward to complement the work initiated by the superior judiciary. However, since the judiciary is the most powerful of these elements, it is mainly its responsibility to marshal its resources to address the difficulties and problems enumerated above.

The culture of intolerance is not a disease in itself. It is a symptom which indicates that the entire body social, body politic and body religious of our society is suffering from an acute cancer. It cannot be addressed with a casual interest or a casual initiative. A cancer has to be treated in the most serious way and has to be given top priority. It cannot be cured as a casual and ordinary sickness. In my humble view, the entire judiciary should complement the action initiated by the Chief Justice of Pakistan. Fortunately, our Constitution provides effective mechanism for the judiciary to initiate meaningful and positive change in the state of affairs. I can enumerate, only by way of illustration, some of the measures which appear necessary to ensure that the confidence

of the common man is restored in the judicial system of Pakistan, to minimize the misuse of local authority and to restrain corruption as far as possible.

Local and subordinate judiciary should be provided with full support and facilities needed for imparting justice to each and every party. Most of the judges in the subordinate judiciary are men of competence and character. However, the areas in which they have to operate and the atmosphere in which they find themselves are not helpful in the performance of their responsibilities with objectivity and impartiality. Civil society does not come to their support. Superior judiciary is so much overwhelmed with its own load of work that it seems extremely difficult to extend its support and patronage constantly to subordinate judiciary. The political leadership has unfortunately developed a culture of dealing with things with purely political and partism considerations. The local administration including the law enforcing agencies are always under the influence and pressure of the local representatives of the ruling elites and the influential feudal lords. In such a situation, the poor judge finds himself helpless and exposed to pressure and even threats. Neither the system comes to his rescue nor the so-called civil society is concerned with the supremacy of law and the protection of the rights of the weak and the deprived.

It is not easy to provide justice to a poor and helpless citizen against the influential and powerful persons who also has political support of the powers that be. In this situation, courage and readiness to sacrifice is essential. If men of judiciary are not ready to show courage, to make sacrifices and to face the consequences they cannot deliver. The superior judiciary is expected to serve as a role model for the lower judiciary. It should also encourage the bar to constantly and continuously defend the cause of justice, equality and rule of law. As long as bar is motivated only by political considerations, it cannot objectively promote the cause of the rule of law.

The greater the authority, the greater the responsibility. The higher the prestige, the higher the expectations. The stronger the power, the stronger the need to control itself. The subordinate judiciary may be constitutionally controlled by the high courts. But there is absolutely no authority over and above the Supreme Court to control the authority of its judges, except the Constitution and the consciousness of the judges themselves. If the judges of the Supreme Court effectively control themselves they can effectively control the entire legal system. In order to control oneself, one should impose

a vigorous discipline on one's ownself voluntarily without any external check. This internal voluntary check has been adopted by many Muslim jurists and scholars in the past. According to a well-known *hadith*, "inner most feelings of accountability to Allah is the primary source of all wisdom". It shows that wisdom remains powerful, alive and effective as long as it emanates from this awareness. If this awareness is gone there is every possibility that objectivity is polluted by personal interest, class interest or other similar prejudices.

Effective and meaningful judicial review of administrative actions require absolute impartiality on the part of superior judiciary. Fortunately, our superior judiciary has to its credit examples of bold decisions and impartial judgments on a number of issues. However, the situation requires further improvement, particularly, in the context of subordinate judiciary.

Quick disposal of cases and the provision of justice at the door steps of citizens has been the cherished ideal of the people of Pakistan. A number of exercises have been initiated in the past, but without much progress. A comprehensive report prepared by late Mr. Justice Hamood-ur-Rahman presented a host of viable proposals and suggested a number of practical steps to realize this long awaited objective. Although some of its recommendations were adopted later on, but without much success. The target of providing quick justice to the people seems to be as far away as it was in late 1960s when the Law Reform Commission was set up under Mr. Justice Hamood-ur-Rahman. If any one reason is to be identified to have caused the rising culture of intolerance it is the delay in the disposal of justice. When a person is convinced that justice is beyond sight he tries to have recourse to unorthodox means to get his grievances answered, putting in motion a series of chain reactions. Every such event strengthens the existing culture and convinces people of the utility and the effectiveness of unorthodox means.

It is encouraging to note that the superior judiciary in general, and the Supreme Court of Pakistan in particular, has underscored the significance of quick disposal of cases and early dispensation of justice. Unnecessary adjournment of cases causes unnecessary delay. The Supreme Court may, in its wisdom lay down rules and procedure, to dispose of the civil cases within a period not acceding 6-12 months depending on the nature and volume of the case. Likewise, criminal case, particularly at

the level of the trial court should not take more than 3-4 months for a decision. A criminal case, specially the case of heinous crimes should not take more than 6 months before it is finally decided on appeal. In the past criminal cases under this very Code of Criminal Procedure, which now cause delays were disposed off in days and weeks.

Delay in the disposal of cases involving sectarian violence has in some cases encouraged offenders to take the law in their own hands. A major cause of these delays has been the multiplicity of appeals which the concerned parties have a tendency to exploit. Almost every lawyer advises his client to opt for the option of Special Leave to Appeal in the Supreme Court. In many cases, where Special Leave to Appeal is applied there is hardly any justification under the Constitution to move the apex court of the country. It is only wastage of the time of the Court at the cost of other important cases of appeals pending before it. In most cases, where the appeal was permitted to be filed under the Special leave, this was eventually the decision of the high courts and the Federal Shariat Court which was upheld. Frequency of such appeals also affects the popular perception about finality of the decisions of the High Court. It would, therefore, be in the fitness of things if the learned apex Court decides in its wisdom to substantially curtail unnecessary venue of appeals and revisions in order to put an end to the prolongation of litigations.

Another important aspect which requires consideration by the honourable Supreme Court is the question of discouraging unnecessary and frivolous litigations. Unfortunately, there is no law in Pakistan to effectively control this tendency. Until the Parliament considers this important aspect, the learned Supreme Court may lay down rules and procedures to punish those who waste the precious time of the judiciary and exploit judicial authority to their own selfish motives. This should have been done much earlier particularly in Hudood case where any body could file any complaint against any person under any of the Hudood Laws without being accountable to any forum for his action.

As a cumulative effect of these factors, every section of our society has been affected by some kind of frustration, selfishness and despondency. Strangely and unfortunately, those who seem to be more selfish and despondent are those who are more influential in society. Selfishness and despondency has grossly contributed to intolerance. Apart from sectarian groups, the other intolerant groups include those who

feel encouraged to be involved in the politics of regionalism and ethnic divide. Despite the fact that many political elements who would have been non-entities without regional and ethnic politics, they are not content with what they have achieved in terms of political recognition and electoral positions. Instead of sincerely serving their genuine cause, they remain busy in promoting the ethnic divide, hatred and the resulting intolerance. In some cases, the sectarian intolerance has collaborated with regional and ethnic intolerance and vice-a-versa. The feudal lords and the westernized elite have been either passive spectators of these developments during the past two decades or had been trying to use these tendencies to serve their respective political and class interests. There is no hope that the westernized elite will come forward to fulfill its obligations by solving the problems created by up-holders of regional and ethnic politics. Likewise, the feudal class does not seem to be interested in curbing the rising tendency of intolerance promoted by these three groups, namely, sectarian extremists, ethnic hardliners and the politicians advancing regional prejudices.

The only hope in this regard has been the judicial activism of the Supreme Court of Pakistan. It has taken notice of such issues which have never attracted the interest or even the attention of the rulers. The Supreme Court can play an effective role in curbing the rising tendency of intolerance and the resultant divide and difficulties in the country. This can easily be done by addressing those genuine and legitimate issues and real difficulties faced by various sections of our society and which have been exploited by some elements for their ulterior motives.

Undoubtedly, there have been failings on the part of the successive governments in fulfilling the Constitutional obligations of the state. The failure of the state in fulfilling these obligations always provides room for religious, political and social opportunists to exploit the situation and the resultant gap to serve their own ulterior motives. If those whose failure, incompetence or indifference give rise to some real or perceived grievances are taken to task and are forced to perform their duties, the opportunity to exploit and instigate the innocent people is minimized.

There is not doubt that some of the Constitutional obligations are not easy to fulfill with one stroke of pen and during a short span of time. But this should not be allowed to be taken as a justification or pretext to keep such obligations ignored and shelved for an indefinite period of time.

For example, a major reason of the violation of human rights in Pakistan, a major cause for public frustration and the resultant intolerance, is the ignorance and illiteracy of the overwhelming majority of people of Pakistan. They are ignorant of their own rights and privileges granted to them by the Constitution and the law of land. Apart from the serious and horrible proportion of illiteracy in the country, another major cause of this ignorance is continuation of English as the official language. Our founding father had repeatedly declared and promised that Urdu, the *lingua franca* of this area, would be the state language of Pakistan. The successive Constitution in Pakistan have been making provisions in this respect. The present Constitution of 1973 had promised that Urdu would replace English within a period of 15 years. This period has come to an end in 1988. But the successive governments even after 1973 have miserably failed, if not, criminally violated, this national, historic and Constitutional obligation. Even in areas, where Urdu can easily be adopted as a medium of communication, English continues to occupy the field, simply because the ruling westernized elite does not want to part with something which is a source of distinction and superiority for it over the millions and million of common folk. I may clarify that the fulfillment of this Constitutional obligation does not at all mean that English should not been taught as a subject and should not be used as a vehicle for higher learning and research.

There are several other provisions in the Constitution which have constantly been ignored by successive regimes in our country. This act of negligence on the part of rulers has resulted in eroding the sanctity of the Constitution. It seems that our ruling elite is concerned only with those provisions of the Constitution which are directly relevant to their own positions and privileges. Those provisions of the Constitution which deal with our national obligations and commitments seems to be no body's concern; simply because they do not deal with the positions and privileges of any section of the ruling elite.

The recent decision of the Supreme Court of Pakistan in the privatization of the Steel Mills Corporation of Pakistan and its direction to constitute and activate the Council of Common Interests has given confidence to million of citizens in the smaller provinces about the safeguard of their interests. This confidence will proportionally reduce the opportunity for the exploiters of the interests of smaller provinces. The Supreme Court has, thus, made it known to the public that it is not only the protector of the word and letter of the Constitution, but it is also the guardian and protector of the spirit and

purpose of the Constitution. The purpose of the Constitution cannot be protected unless it is ensured that all obligations and commitment made in the Constitution are effectively fulfilled within the timeframe laid down by the Constitution or within such a reasonable time as the Court may, in its wisdom, determine. The culture of intolerance, hatred and frustration can only be eliminated with the realization of justice in its true sense. The shortest and the easiest way to ensure justice to the people is through effectively implementing the Constitution. The Supreme Court has shown that it has full appreciation of the import of getting the Constitutional obligation of various organs of the state fulfilled.