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مثمولات


The Role of Judiciary and the Objectives Resolution(III)
By Sardar Sher Elam

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incarnate of the nation. It is expected of it that it may not even seem to be arbitrary, capricious or inconsistent.

This is a situation which can hardly be described as satisfactory, because it is fraught with confusion, perplexity, and quizzical ungainliness. The fact is that we find here unmistakable symptoms of something deeper. I would venture to say that the root of the problem lies in the lurking and at times diplomatically unexpressed fears, doubts, misgivings, and mental reservations regarding relevance of Islam to the modern context. There is a feeling, it appears that if Islamic Shariah is applied not partially and selectively but as a whole it might lead to disruptive if not disastrous consequences. It is, therefore, true to say unless these doubts and fears are convincingly dispelled and assuaged the situation that presently prevails will continue to persist. In this respect I am somewhat handicapped because constraints imposed by the topic under discussion do not allow adequate analysis of Islamic law, which is a vast subject. However, fortunately it so happens, that here even brief cursory and thus inevitably superficial description of the fundamentals of Islamic law can serve the purpose to a great extent. Such a description can establish that in view of the unusual in-built adaptability of the Islamic law, all above-mentioned fears and doubts are quite misconceived and unfounded. In fact it would become clear that the entire blame can be laid at the door of inadequate understanding and insufficient familiarity of the Islamic law and principles.

the enforceability of Article 2-A would not make any difference. For instance all the political and financial questions which according to the court are difficult to be handled by the court are already within their jurisdiction without Article 2-A, e.g. Political Parties Act, laws relating to election matters, laws relating to all financial and fiscal matters (after expiry of exemption period fixed by the constitution) belongs to sub-constitutional field, and very much open to challenge on the basis of repugnancy to Islam or even repugnancy to fundamental rights. To take one example, perhaps the most intricate and brain teasing questions of the type mentioned above relates to banking interest and interest on loan in general. It is already being scrutinized by the courts without involving any application of Article 2-A. The jurisdiction available to courts under Article 203 D is extremely wide. On the strength of it as we have found in Qazalbash Waqf case, a long row of constitutional articles including Article 253 can be rendered nugatory and this task was accomplished not by Federal Shariat Court but by the Supreme Court itself.

It is interesting to note that on an earlier occasion the Supreme Court had already expressed an opinion on these concepts which is diametrically and dramatically different from the one in Hakim Khan's case. In ${ }^{39}$ B.Z. Kaikaus case, the Supreme Court expounded the following view: "Principles of Islam are neither hidden nor complicated nor involved nor impracticable. Islamic law is capable of being enforced, practiced, applied and adopted at all times and places, only if understood and interpreted in its true spirit keeping in view environment and circumstances of situation at a relevant time". It is easy to see that the view in Hakim Khan's case regarding these concepts represents a change of 180 degrees from the view in Kaikaus case but it has not been supported therein by any reasoning or analysis whatsoever. Supreme Court is the reason and conscience
expressed his considered opinion that outwards form and function of an Islamic State need not necessarily correspond to any "Historical precedent". According to him all that is required is that an Islamic State in its constitution and practice must embody certain clear cut unambiguous ordinances of Islam. But he says "those ordinances are very few and are very precisely formulated and they are invariably of such a nature as to allow the widest possible latitude to the needs of any particular time and social conditions."

The second cause of anxiety for the Supreme Court is that the enforceability of Article 2-A would require application of concepts that are rather vague, general, flexible, concepts which are capable of different interpretation at different times, which would make the constitution unstable and uncertain. At another occasion the court has described these concepts as nebulous, undefined, controversial concepts of the Islamic Fiqah. The court has gone on to opine that the ascertainment of principles of Islamic Law on political and financial questions requires detailed study and thorough research and meaningful debate before acquiring concrete shape so as to be adopted as a test of repugnancy of the constitutional provision. It cannot be summarily done. Such an exercise can more properly be undertaken under the control and supervision of the or legislature expert bodies like the Islamic Advisory Council and Islamic Research Institute.

It is difficult to see how all this is relevant and applicable to the enforceability of Article 2-A. As we have explained already above, most of the main features of the Pakistan's constitution have been authoritatively settled by the Objectives Resolution itself. As regards the rest, we have also explained above the constitutional theory and practice of Islam. Islam allows unusual degree of flexibility and there can be hardly any problem due to this factor, what remains after this, is already subject to the scrutiny of the courts under Article 203 D read with Article 203 B(c) and as such
consistent "Ijma" of both Ulema and Islamic Umma of Pakistan, it is hard to understand how and when any occasion would arise for changing any provision of the present constitution due to Article 2-A which is itself based on objectives resolution. A sword can be used against other swords and objects but it cannot be used against itself. Furthermore it needs to be remembered that there is an unusual degree of flexibility in the constitution principles of Islam which enables them to be adjusted according to the dictates of different times and circumstances. This is amply borne out by the fact that in the case of first four Caliphs, who are designated rightly guided Caliphs of Islamic history, four different methods were used for choosing them. Islam has taken on the whole an extremely pragmatic view of the ruler's functions and the structure of the State. It is significant that the Prophet (S.A.W.) who spoke of so many things - down to smallest detail of everyday life, had little to say on government as such and showed no interest in political theorising. As far as the Holy Quran is concerned, only a small proportion of it deals with legal matters, commands and prohibitions. There is next to nothing which can be relevant to constitutional questions involved here. Thus we find that in Islamic system of law, there is deliberate and well-planned fluidity regarding these matters. We can see here another evidence of Divine wisdom and far sight. As such wide scope has been left for change and adaptations to requirements of different times till eternity. This being the case there is hardly and justification for entertaining any kind of fear or doubt relating to repugnancy of present constitutional arrangement in Pakistan with principles and Injunctions of Islam.

That there is hardly any cause for concern on this account has been eloquently and trenchantly explained by Mr. Justice Dr. Nasim Hasan Shah himself in his Article entitled " ${ }^{38}$ Concept of an Islamic State". Therein he has

Clause 6 and 9 together safe-guard the legitimate interests and freedom to practice religion and develop their culture to minorities, and backward and depressed classes.

Clause 7 prescribed federal form of Government alongwith provincial autonomy. This extremely modern idea of a complex form of State has been solemnly adopted with all the details and complications which it necessarily entails.

Clause 8 guarantees, a wide spectrum of fundamental rights that are a hall mark and a pride of any advanced modern liberal democracy.

Clause 10 ensures full implementation of independence of judiciary. We have already noted that according to objectives resolution authority is to be exercised through assemblies of elected people. It is implied therein that these assemblies will produce the executive head of the State alongwith his cabinet and also that it will conduct the business of law making for the nation. This fact coupled with independent judiciary indicates although in an embryonic form the idea of trichotomy of powers or at least the fact that the idea of trichotomy of powers can easily be accommodated in this frame work.

Clause 12 enjoins the making of full contribution towards international peace and progress and happiness of humanity. Thus the State of Pakistan is required to play its due role amongst the comity of nations in the conditions prevailing in the modern international milieu.

Within the structure of ideas and institutions prescribed by above provisions, clause 4 makes it absolutely certain that the State of Pakistan will be fully democratic republic even in the modern sense. Of course, there are some characteristic peculiarities of the Islamic system but they are bound to be there in the case of every nation and culture. These peculiarities are dictated by the ideology of each nation. However, in view of the features discussed above which are a part and parcel of the objectives resolution and
non-sequitur. In my humble view the whole matter turns on one question. The question is if the legislative body can limit its own legislative powers by means of a constitution of its own creation, and confer the power on judiciary to see that these limits are observed; why cannot it impose on itself the no limits prescribed by Allah the divine and actual sovereign, and confer the power on judiciary to see that these limits are also observed?. In fact, this is what the legislature has purported to do through insertion of Article 2-A in the constitution.

## OBJECTIVES RESOLUTION AND CHALLENGE TO CONSTITUTION:

In Hakim Khan's case the Supreme Court has reinforced its main argument with certain ancillary and supporting arguments. One of these arguments is that if the Article $2-\mathrm{A}$ is given effect to almost all constitutional provisions would become challengeable and thus the entire constitution may have to be re-written. Article 2-A would open the flood gates that the fear expressed by the Supreme ,Court has no foundation in fact or reality. For this purpose a minute examination of objectives resolution as incorporated in the Annex of Article 2-A would have to be undertaken. In pursuance of this, a clause by clause analysis is given as follows.

Clause 2 indicates that the state of Pakistan will be run according to a written constitution which is to be framed by constituent assembly. Thus we can see that the modern dea of a constituent assembly implies the principle of lawnaking through representative institutions within limits rescribed by Allah. Constitutionalism implies that affairs of he state will be controlled by pre-defined chosen principles and orderly procedures.

- Clause 3 refers to chosen representatives of the people, Thich implies the idea of assemblies in the modern sense

sovereignty within its own sphere and according to the Supreme Court the reference the Holy Quran to the obedience of ulul-amar is equally applicable to the members of judiciary ${ }^{37}$.

We must not forget that according to objectives resolution authority resolution authority and not sovereignty is delegated and that too to the State of Pakistan only. People through its chosen representatives who form the legislative bodies are only intermediaries means or stages through which authority is channelized and finally vested in the State. The assemblies come into existence through elections; the other two organs come into being through constitutional law of the country. But this is only a matter of modalities and technicalities through which various institutions necessary for conducting the affairs of the nation are brought into being. Three types of institution are now regarded essential for all nations, each of which takes care separately and exclusively of law making, running the administration and adjudication. Therefore all three of them together constitute the State. Anyone of these three organs cannot therefore, be exclusively termed as "State". here it is important to realise that State in this Islamic conception is nothing but an agency for enforcing Quranic principle and injunctions and that Judiciary as an integral part and organ of State has vital function to perform in this connection. In this conception, therefore, it is altogether unrealistic to consider Judiciary as something separate and distinct from "State".

However, even if we accept the position that the legislative body is the exclusive repository of the divint sovereignty as claimed in the argument above still the conclusion sought to be drawn from it does not follow. It is :
P.L.D. 1992 S.C. 595 at 619 in para marked F. See also at $P .169$ in para marke " G " where after quoting a passage from Maulana Amin Absan Islahi
 drawn that "this shows that the judiciary too can exercise the delegated divin
judiciary. The matter can be sorted out through legislative review rather than judicial review.

Here every thing depends on what we mean by the term "State". The question is what does the term "State" mean? Furthermore does it mean parliament only? The only definition of State is found in Article 7 of the Constitution: But Article 7 was introduced keeping in view the enforcement of fundamental rights and principles of policy. The Article 7 itself specifically indicates that the definition of State therein includes Federal Government and the authority competent to make laws to levy taxes which implies legislative bodies of every description. Judiciary is not included in this definition. This is obviously because only the executive and the legislative body can possibly make transgressions of a fundamental right and principle of policies. The fundamental rights were being guaranteed against these two institutions of the State. Judiciary's role is different from these two organs, because its job is to ensure and enforce the fundamental rights. It is significant that Article 7 itself contains a general rider clause to the effect the unless the context otherwise requires". In other words there is no fixed and exhaustive definition of the State in the constitution and the constitution itself requires that the term "State" will take meanings according to the context and circumstances of each case. In other definition of the State zontained in Article 7 of the Constitution is merely functional and adhoc, and not definitive, comprehensive or exhaustive.

In all systems of law and government particularly in ederal system judiciary is regarded one of the three organs of State which are equal and co-ordinate. The idea of ederation itself implies necessarily the imposition of limits in all authorities and all kind of institutions. This by itself ansures pre-eminent rather than equal status for judiciary. n fact it is recognized even in the judgment of the Supreme Court itself that judiciary is one of the three limbs of the tate which exercises the delegated functions of the divine
from the opposite and contradictory direction. Thus a situation of constitutional deadlock comes into being. The task for the court in a situation like this is to see whether some value or principle in the constitution itself can be found which might add decisive weight to one of the repugnant provision. In such circumstances the court itself can take the necessary remedial step in order to cope with the situation of repugnancy and the matter need not be consigned to the parliament. As far as Article 2-A is concerned, we have already established by means of a variety of considerations and detailed analysis that it is the most fundamental and the most weighty provision of our constitution. But for the sake of arguments even if we do not consider the content and subject matter as a ground of superiority directly, the Article 2-A must nonetheless be given the precedence due to the folioing fact. The fact is that if it is not done it would involve as a necessary result and incident the violation of oaths in the spheres of both legislative and executive organs of the State. If we are ready to tolerate even this consequence such an attitude can only be described as perverse and degenerating from the stand point of legality and proprietary.

## LEGISLATIVE BODIES AS EXCLUSIVE REPOSITORIES OF SOVEREIGNTY:

There is another and alternative line of reasoning which has received the stamp of approbation from the Supreme Court. This argument focusses on the language of the Objectives Resolution itself and contends that according td objectives resolution sovereignty has been delegated to the State. The idea of State has been linked with the chosen representatives of the people which in its turn is linked with the idea of people As such the legislative body is the exclusive repository of the sovereignty. Therefore, in cast there is internal conflict of the constitution of the kinc involved in Hakim Khan's case, the resolution of the conflic lies within the competence of the legislature rather thar
means a judge or an arbitrator. The command is therefore clear from All Almighty and directly addressed to all judges in an Islamic State that they must perform their judicial functions in accordance with what has been revealed by Allah Almighty. What an extraordinary situation we have here! The Divine and actual sovereign Almighty Allah and His delegatee the legislature of Pakistan gave spoken with one voice. Both have addressed the judges directly in very clear, unmistakable and insistent terms. What they have said enjoys passionate support of the people of Pakistan which is borne out by their participation in the struggle for Pakistan and various powerful movements for Islamic causes in the subsequent history of Pakistan. But believe it or not whatever all of them join together to demand and lay down cannot be made enforceable in Pakistan. Such is the power of judiciary. One is reminded here of a remark of Justice Harlan Stone, to the effect that ${ }^{36}$ The only check on our own exercise of power is our sense of self-restraint".

## CONFLICT RESOLUTION:

This is the stage where we can také up a basic misconception regarding the function of the court involved in the context of Hakim Khan's case. This misconception has to be dispelled, because it is at the root of all confusion. In the context of Hakim Khan's, it is wrong to speak of striking down a constitutional provision. The true function involved here is of conflict-resolution in the light of some discoverable principle or value or latent meanings within the ambit of constitution itself. We have noted already that whenever there are two or more repugnant provisions in the constitution, all of them cannot stand together in the constitution at the same time. This is a necessary consequence and inherently involved in the logic of repugnancy because whenever one of these provisions is attracted, the other repugnant provision is also attracted
"To thee we sent the scriptures in truth confessing the scriptures that came before it, and regarding it in safety! So judge between them by what God hath revealed and follow not their vain desires, diverging from the truth that hath come that hath come to thee."
"And this (He commands) judge between them by what God hath revealed and follow not their vain desires".

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It can be noticed that practically the same contents with a change of only one word at the end have been revealed in the form of first three verses quoted above. This is an eloquent indication of the emphasis intended by Allah Almighty. It is significant that only one and the same word is used and repeated in all three verses. The verb is (A) يx which means to judge or to adjudicate. The word (B) ( is a derivative from the same root and
one should prevail, the effect of a constitutional provisions i.e. 253 (2) or the effect of judicial pronouncement. The true position is that Article 253 (2) having been triggered into action by law relating to land reforms, its effect is still very much operative because to stop its effect a constitutional amendment is needed.

The words "shall be given effect to accordingly" occurring in Article 2-A are rather significant. These words can not have been aimed at the parliament, because parliament after it has passed the law can only amend, modify, repeal or annual that law, but it cannot do anything to give effect to it. The constitution - makers have obviously addressed these words to the courts in the main. These words have been brushed aside due to reasons and legal propositions set out in the judgment of the Supreme Court. But Allah Almighty whom the constitution recognizes as the only sovereign from whom all institutions individuals and organs of state derive legal and constitutional authority has also spoken on the subject making a direct address to the judges in the following verses of the Holy Quran:

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"If any do fail to judge by what God hath reveled, they are no better than non-believers."
"If any do fail to judge by what God has revealed, they are no better than wrong doers."
"If any do fail to judge by what God hath revealed, they are no better than those rebel."

conveniently disregarded, firstly that the laws under challenge were inseparably integrated into Article 253. Therefore, in a case like this even an indirect effect that completely and totally negates a constitutional provision can never be legally valid nor can it be treated as merely indirect consequence. Secondly, as soon as the impugned laws came into effect, they had triggered into action, the negative operation of article 253 (2) through invalidity clause contained therein remains very much operative,. even now. The negative operation of Article 253 (2) cannot be arrested short of amendment in the constitution. It is strange that what the legislature could not achieve directly because it has not power to pass any legislation that contravened article 253 (2) it could achieve indirectly by a clever tour-de-force of providing an opening to the courts. It could create a new and special jurisdiction under provisions of Chap. 3A of Part 7 of the Constitution and the court under these provisions could give a judicial verdict which could nonetheless destroy the effect of Article 253 (2). The whole argument rests on a facile assumption that judicial pronouncements cannot be termed as "law" within the meanings of Article 253 (2) and Article 253 it so happens places its embargo on "law" only. In this connection one question is altogether disregarded. The question is how can the legislature empower the courts to do something what under the Constitution the legislature itself has no power to do i.e. destroying the operation of Article 253 (2). A well known principle applies here by analogy. No one can pass on better title than he himself has. The question is if the legislature is debarred from passing any law on the subject, including the laws to vest the required power in the courts to act in the matter, from what other source the court can have derived the power to adjudicate and deliver its judgement in this matter. Now the situation is that the judicial pronouncement of the Supreme Court has struck down the land reforms as un-Islamic and thus defeated the operation of so many constitutional provisions including 253 (2). But it remains an open question even now as to which
any stage notwithstanding its technical and formalistic finding in Zia-ur-Rehman's case. In sharp contrast to this, we find many examples of extra-ordinary judicial activism in respect of rather mundane matters.

Judicial activism was resorted to in ${ }^{32}$ Dosso's case on the basis of Han's Kalsen theory, in ${ }^{33}$ Saifullah's case on the basis of "National Interest" in ${ }^{34}$ Nusrat Bhutto' case on the basis of doctrine of necessity. In the last mentioned case the court was amenable to pressure of necessity to such an extent that a single individual, that is, a Chief of Army Staff who had designated himself a Chief Martial Law Administrator was given an unqualified power to amend the Constitution. He was given this power although amendments in the constitution were not needed by any conceivable logic for the purpose of holding of election which was the declared basis of necessity. More recently in ${ }^{35} \mathrm{Qazil}$ bash Waqf's case the judicial power of the court has been strained to the maximum if not beyond it. This will be clear from the details given below.

In Qazilbash Waqf case, the Land Regulation of 1972 and Land Reforms Act of 1977 which fixed the ceiling for land holding were struck down on the basis of repugnancy to Islam. The court broke through the protective stonewall erected by Articles 253, 8(3), (24), 268(2), 269 and reinforced by Article 203B (c) of the Constitution. The court admitted that Article 253 would be affected, which in fact was the main and real consequence of the court's decision. It nevertheless went ahead on the ground that any of the constitutional provisions mentioned above, were not under direct challenge. The embargo of the word "law" in Article 253 (2) was circumvented by means of a truly erudite and ingenious argument. Furthermore in this process it is

[^0]articulates the ideals and higher principles of the nation, and also as a pronouncer and guardian of values. It can also be seen what a tremendous blow is dealt to the very essence and structure of the state, whenever the ideology or higher principle or values on which a nation is based is not given by higher judiciary the place which rightfully and by all logic of history belongs to it. When other organs of the state deviate, depart or disregard ideology the damage is curable but when the same is done by the higher judiciary the damage is almost irreparable. It must be pointed out here that although our higher judiciary has recognised the fact with remarkable consistency that Pakistan is an ideological state, it has not adopted the outlook that must necessarily go with it. This is due to handover of long tutelage under British rule which inculcated positivist tradition of law. It is vitally important to appreciate that as soon as we became an ideological state, its necessary consequence was an immense qualitative change, a complete break with the past. Thus relevance of positivist approach in such circumstances can lead to ,nothing but error and confusion. In an ideological state ideology is the paramount factor. Everything must be subordinated to ideology in an ideological state, or else it would not be an ideological state. Failure to adjust the mental gears to this fact is causing all the problems in appreciating the true meanings and scope of Article 2-A.

## JUDICIAL ACTIVISM:

In respect of Article 2-A the court's attitude of judicial hesitancy, exaggerated caution and bashfulness is somewhat remarkable, particularly when we remember that the Supreme Court has consistently stuck to the position that the objectives resolution contains the most fundamental principle, the grund-norms and ideology of Pakistan. Indeed the Supreme Court has not departed from this position at

In view of this situation, ${ }^{31}$ J. Allen Smith observed "while professing to be controlled by the constitution the Supreme Court does as a matter of fact control it, since the exclusive right to interpret necessarily involves the power to change its substance. This virtually gives to the aristocratic branch of our government the power to amend the constitution, though that power, is as we have seen practically denied to the people".

In the light of the above discussion the conclusion is inescapable that law is what the Supreme Court says it is. This is in line with Justice Marshal's pronouncement that the judges have inherent obligation to say what the law is because it is inherent in the nature of the act of judging itself. We have already noted above that this view of Justice Marshal was approved and further developed in 1958 in Cooper vs. Aaron case.

This has led modern American Jurists to conclude that law is created not by direct. commands of the Government but by the direct pronouncements of the court. Law consists of "rules recognized and acted on the courts of justice" Indeed the authority of the state or the sovereign as the ultimate or final source of law is not denied. But the idea is to emphasise following three facts:-

1. That an act passed by the legislature is not law but "a law" which is really noting but material source of law.
2. That a rule is law because courts of Justice would apply and enforce it in deciding cases rather than courts of Justice would apply or enforce it because it is law.
3. That we should turn to the courts of Justice to discover the true nature and origin of law. In this framework it is self-evident how vital is the role of judiciary as an institution that shelters, nourishes and
of that nation. According to ${ }^{27}$ Alexander Bickel the judges act as the pronouncers and guardians of our values". The court shapes policy also. During Chief Justice Earl Warren's tenure no one could doubt that the court shapes policy and more often Leads rather follow the public opinion. It has been said that the court possesses the best judgment of the nation. The court's grandest function is to think and reason with the polity on the best application of nation's highest principles, and in that process to discern afresh, articulate and develop them. At the same time, as Alexander Hamilto visualized, the court also acts as the bulwark of the limited government and watchdog over all constitutional infractions.

But the most profound function is the one for the first time claimed for judiciary by Justice Marshal in the case of ${ }^{2 x}$ Marbury Vs. Medison. Therein. he propounded the proposition that, "It is emphatically the province and duty of the judicial department to say what the law is'. In 1958 this doctrine was approved and further developed in ${ }^{29}$ Cooper Vs. Aarons's case. In that case, it was categorically claimed that judiciary has supremacy over the ultimate meaning of the constitutional text. In a sense the court is the final interpreter of the constitution, and in that capacity, the court is the final and supreme authority on all matters of constitutional nature. This position is re-enforced by two factors. Firstly, although the court's verdict is subject to reversal by means of amendment in the constitution, this amendment itself is subject to the interpretation of the court. Secondly, the legislature cannot keep pace with the court. As ${ }^{30}$ Sam Erwin observed "you can't pass constitutional amendments fast enough to control the court".

[^1]30 Sam Erwin. Statement before (Committec on the Judiciary Sub-committee on
the separation of powers. 90th Congress 2nd Session Hearings June 11,
legal systems in some form or the other. This is what inspired a hard-headed realist and secular-minded socialist like H.J. Laski to write to O.W. Holmse, "The truth is that we are witnessing a revival of natural law, and the natural is the purely inductive statement of certain minimum conditions we cannot do without if life is to be decent". Furthermore as ${ }^{25}$ Edward. S. Corwin has explained, the idea of an all-governing constitution was surely aided by the general idea of "kigher law" or laws of nature antecedent and superior to positive law.

However, the conception of judiciary's role and function takes on a different meaning in a Federal context. A Federal Government is characterised by two sets of authority with a limited and mutually checking power distributed to three organs of the State having their distinct spheres. Keeping this in mind ${ }^{26}$ A.V. Dicey has said that federalism means legalism. What it implies is that in a federal government, not authority or organ or state has unlimited and unchecked power and therefore no action on the part of any authority, including the parliament is valid unless it carries legal sanction behind it. Judiciary is the branch that oversees and checks transgressions and overlapping form the scope of limited power exercisable within accurately defined sphere that constitutionalism allows.

Judiciary is therefore the branch that interprets and sapplies the constitution. In this process ir ensures that whatever happens in a federal state conforms rigorously to the requirements and mandates of the constitution. It also ensures that at all occasions strict legality is maintained. For this purpose it grapples with the deepest thoughts of the nation. It brings a nation's philosophy to bear on the actions

[^2]26 Dicey, "Law of Constuman" 10th edition page 175 "Iedełation, lastly means legalism - the predominance of the Judiciary in the Constitution - the

# THE ROLE OF JUDICIARY AND THE OBJECTIVES RESOLUTION 

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(Part III)

## THE ROLE OR FUNCTION OF JUDICIARY:

At this stage, we must take up a fundamental question which is essential to the understanding of the whole issue. The question is: What under the circumstances should judiciary do and what are the limits of its powers. This will throw useful light on what judges are expected to do in a situation like that of Hakim Khan's case.

An extreme view is represented by Cicero and Chief Justice Lord Coke. Cicero contended for the striking down Bf positive laws which contravene natural law. "A legislature" he stated" which said that theft or forgery of wills or adultery was lawful would no more be making laws. Then what a band or robbers might pass in their assembly". Similarly, Chief Justice lord Coke laid down in Dr. Bonham's case in 1610 the proposition that an act of parliament which is against common right or reason or repugnant or impossible to be performed" should be struck down by the judiciary. Even Blackstone, the arch-exponent of parliamentary sovereignty, held doubts about parliament's power to enact and enforce statutes contrare to law of God and reason. Due to evolution of English constitutional history this proposition has not taken root in England. This is due to the fact that the doctrine of legislative supremacy which is a revised version of Dicey's doctrine of parliamentary sovereignty became the supreme constitutional principle in England. Nonetheless the fact is that even in England and else-where too the idea of an overriding law expressing a higher truth and a higher

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    P.L.D. 1958 S.c. (Pak) 533.

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[^1]:    27 Alexander Bickel. "Least Dangerours Branch" PP 24. 25.
    28 : t.US. (1 Cranch) 137 (1803. 176 180.
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[^2]:    Edward. S.Corwin, The Digher Law, the Background of American Constitufional Law."

