

COURTS AND CULTURE OF TOLERANCE

Group intolerance is one of the worst human traits which has caused immense harm and misery to humankind and resulted in the worst of injustices. It has taken the shape of racial prejudice, gender violence, genocide, ethnic cleansing, provincial bias and civil war.

Quaid-e-Azam Muhammad Ali Jinnah, in his presidential address to the constituent Assembly of Pakistan in 11th August 1949, warned the would-be citizens of the new country of the menace and divisive consequences of intolerance. Likewise leaders, reformists, jurists, and judges of free world have been and are still striving to minimize and remove intolerance nationally and internationally. They had to struggle against the prejudices created in the name of such values or concepts as patriotism, faith, differences of sex, colour and ownership of private property. Aforesaid concepts in reverse have taken form of collective prejudices resulting in group affiliation and inversely in group intolerance.

Conscious of these negative factors and impulses and the need to encourage and develop culture of tolerance, the present constitution of Pakistan (1973) has addressed these issues directly and in a comprehensive manner. Preamble of our Constitution inter alia declares that “in Pakistan the principle of equality and tolerance shall be fully observed.”

And that, “adequate provisions shall be made for the minorities to profess and practice their religion and develop their culture and to safeguard the legitimate interest of the backward and depressed classes.”

Then, there is a solemn commitment on behalf of the State ‘to eliminate all forms of exploitation’ (Article 3). Additionally through fundamental rights discrimination on the basis of sex, religion or caste is prohibited. It is further declared that the State shall “discourage parochial, racial, tribal and sectarian and provincial prejudices. Even concentration of wealth which can become the source of exploitation is to be prevented.

Provincial tensions and sensitivities are taken care of within the structure of the Constitution, particularly through institutions like council of Common Interest and National Finance Commission. In order to control the growth of arbitrary power in the hands of executive or any other branch, separation of powers is demarcated. The object of all these provisions is to create a democratic and tolerant constitutional culture which would permeate in the socio-political psyche and day-to-day affairs of the nation.

Courts, as guardian of the constitution, are expected to preserve and protect the Constitution. This, however, does not explain the full spectrum of the responsibility of the judge in democracy. As the judges are the final interpreters of the Constitution and the law and its is emphatically the province and duty of the judicial department to say what the law is, I shall like to supplement the statement and by way of emphasis, add, that the judge under constitutional democracy, must protect the Constitution and *the democracy itself*.

I should perhaps explain, as to what do I mean when I say that the courts must protect democracy itself! Do I mean the enforcement of the rules relating to the representativeness of the elected officials, such as the age and qualifications of the voters and of the candidate, delimitation of the constituencies, independence of the Election Commission and electoral laws ensuring equal opportunity and transparency? Or do I mean something more? One aspect of democracy is representativeness that is formal democracy and it results in the “rule of majority”, meaning thereby, anything which the majority or plurality wishes would be legitimate.

This aspect of democracy is no doubt of central importance without which a regime cannot be democratic. The Executive Governments (central, provincial and local) must be chosen representatives of the people; otherwise they cannot be democratic.

But having achieved the formal democracy is no guarantee in itself that the regime would act democratically. We have many examples in history, of highly representative majorities behaving intolerantly towards the minority or their rights.

In order to ensure that the democratically installed regime acts democratically, it is necessary to supplement the ‘rule of majority’ with the ‘rule of values’. This may be described as the substantial democracy consists of a bundle of rules or principles which

have evolved over the years and have now taken definite form in the constitutions and working of modern democracy. Briefly, these principles are:

- i. Separation of power;
- ii. Rule of law or equality before law,
- iii. Independence of judiciary, and,
- iv. Principles of fair play and tolerance.

Both aspects of democracy, formal and substantive, operating *in tendam* within the framework of the Constitution produce true democracy. As Ronald Dworkin says:

“True democracy is not just *statistical* democracy... but communal democracy in which majority decision is legitimate only when it is majority within a community of equals.”

“that means not only that anyone must be allowed to participate in politics as an equal through the vote... but that political decisions must treat everyone equal with legal concern and respect, that each individual person must be guaranteed fundamental civil and political rights no combination or other citizens can take away, no matter how numerous they are or how much they despise his or her race or morals or way of life.”

Courts must conceptualize the values that ensure and enhance democracy and prevent the opposite trend. They must read within the given words and between the lines of the Constitution and provide strength to the rule of values without substantive democracy, formal democracy can lead to autocratic rule by the majority and degenerate into intolerance. This is an area where the Courts are best qualified to determine the extent and importance of those values. The Courts provide a national forum where substantive aspect of democracy can be debated and actualized.

Let us examine the issue of separation of powers. According to the author of American Constitutional Law(3rd Edition, 2002), “substantive democracy is based on the separation of powers”. It is the backbone of constitutional system. The purpose of separation is to strengthen freedom and prevent the concentration of power. According to Justice Brandeis it is “to save the people fro autocracy and the object is to maintain the internal harmony of the Government.”

Separation of powers means that each branch is independent within its field. But who decides when a branch acts with authorization and according to Law? We can start with the presumption that each branch is authorized and would correctly determine the scope of its authority. But would that determination be final? If not, who shall have the last word? When disputes arise as to the legality of interpretation by a branch of its jurisdiction, the final decision has to be that of the judiciary. There is no superior system in a constitutional setup except to leave this task to the courts. The independence of judges, their knowledge of law and history, their professional training and the benefit of adversarial system through which they arrive at their decision make them the most qualified to supervise functioning of the separation of powers. Separation of power is not an independent value, but is a constitutional value inseparable from democracy, which it is for the courts to define in the context of each constitutional regime and enforce it as a part of its responsibility to preserve and protect democracy itself.

Having said that Courts must protect democracy in all its aspects, formal and substantive i.e. the rule of majority and the rule of values, it is necessary to point out that to maintain a balance between these two aspects is a delicate task. Democracies are judged as good or poor, or as strong or weak with reference to the balance that is struck between these two aspects. It may not be possible in this paper to dilate on how judicial activism is to be tempered with judicial restraint. Suffice it is to say that this is where a judge is put to real test and whenever he has space for judicial discretion, he must exercise it with the object of enhancing the substantive democracy.

One important ingredient in substantive democracy is tolerance. In fact, the best of the democracy will wither away if it cannot practice tolerance. In a pluralistic society, tolerance is the unifying force. In that sense tolerance constitutes both the means and the end. By a process of give and take, and mutual understanding and adjustment, groups of people form societies and merge themselves into a nation and stay together and prosper under a democratic constitution when they practice substantive democracy which ensures respect and tolerance. Tolerance has many shades. In politics, it means fair play and includes the right of the minority to criticize the government and to protest. This is well summed up in the oft repeated rule that “the opposition of today may be the government of tomorrow and vice versa”. Courts have to jealously guard the political rights of the minority and to provide level ground to all the players.

But there is a need for tolerance in a religious-secular relationship. We in Pakistan are especially concerned with it as Pakistan is an ideological State. It is important not only to ensure religious freedom to the minorities and to protect and respect their beliefs and places of religion, but we must recognize the two interconnected immutable rights i.e. freedom of religion and freedom from religion. Such should be the foundation of tolerance on which democracy is built.

To sum up, when judges play their role as protectors of Constitution and democracy, they bridge the distance between the constitutional law or the laws made by legislature and the society. Without the active contribution by the superior courts, the flowering of the rule of value will be left to the political forces which by their very nature of competitiveness, have a tendency to ignore these values. When courts discover meanings in the words of the constitution and extend the scope of the rule of values, they help harmony within the structure fashioned by the Constitution and reduce the friction between various department and units of the government by monitoring them to work within the limits assigned to each. Courts, thereby help in strengthening democracy, reducing tension and enhancing tolerance.