

The Constitutional and Political Dimensions of Eighth Amendment

Kausar Parveen*

Introduction

Pakistan has a unique constitutional experience as it has witnessed frequent and drastic changes in the constitution in the form of three successive constitutions and a host of provisional constitution set-ups. Therefore, Pakistan has kept on oscillating between presidential and parliamentary forms of government. The result has been instability and unpredictability in relationship between the democratic institutions and a powerful civil-military bureaucracy.¹ Very often, constitutions were used as an instrument for the pursuance of vested interests by regimes through manoeuvring or amending these to suit their short-term objectives. Judiciary, more often than not, did not help in restraining the authoritarian rulers. In this sense, they exposed itself to the charge that it did not quite succeed in its role as custodians of the fundamental law of the land.²

The first Constitution of 1956 envisaged a parliamentary form of government. But some of its grave contradictions led to its failure. The Constitution of 1962 conceptualised a presidential form of government but its dictatorial tinge virtually played havoc with

* Lecturer in History, Government College, Jalalpur Jattan.

1. Hassan Abbas, *Poleaxe or Politics of Eighth Amendment* (Lahore: Watandost, 1997), 7.

2. *Ibid.*, 7.

democracy. The basic principles regarding the adopted form of government were not given enough weightage in both cases. For example, in the Constitution of 1956, Governor-General was given more powers as compared to the Prime Minister, which did not suit the spirit of parliamentary democracy. In the Constitution of 1962, no system of 'checks and balances' was introduced which is the main characteristic of presidential system.³ In comparison, the Constitution of 1973 was a democratic one. It was debated and agreed upon in a directly elected legislature. All the political parties in the National Assembly adopted it unanimously. Thus, it has a national consensus behind it.⁴

Distortion of the Constitution of 1973 began with Zulfikar Ali Bhutto himself, the chief architect of the constitution, in the shape of amendments curtailing the power of judiciary.⁵ General Zia-ul-Haq ultimately distorted it in 1985 with the introduction of the Eighth Amendment, through a helpless parliament as a price for the lifting of Martial Law in the country. The Amendment introduced changes, which fundamentally affected the structure and nature of the constitution.⁶ Supporters of the Eighth Amendment viewed it as a step towards the eventual balancing of power between the President and the Prime Minister. Its opponents maintained that it had given the President preponderant authority in the country with most of the powers concentrated in his hands.⁷ Those in favour justified it as a natural outcome of the events that took place in 1977, leading to the ouster of Bhutto and imposition of the Martial Law. The opponents questioned the very intent and legality of the manner in which the constitution was amended. The Eighth

3. *Ibid.*, 10.

4. *Ibid.*, 10.

5. Hamid Yusuf, *Pakistan in Search of Democracy, 1947-77* (Lahore: Afrasia Publications, 1980), 136.

6. Sartaj Aziz, "8th Amendment: The Real Issues," *The Nation*, 25 February 1989.

7. *Ibid.*

Amendment was not merely an amendment; it was amalgamation of two systems to suit the man in charge, General Zia-ul-Haq.⁸

The Eighth Amendment was generally considered to consist of a few clauses empowering the President to dissolve the National Assembly at his discretion. The truth is that it is a comprehensive document, which altered about 67 Articles, and thus changed the entire character and nature of the 1973 Constitution. It should be borne in mind that apparently the provisions set out in the Amendment bill had amended only 17 Articles of the constitution but, in effect, it had validated a very large number of amendments made earlier in various Articles of the Constitution by General Zia-ul-Haq.⁹ In the following pages an attempt has been made to consider the impact of these changes on the institutional framework of the Constitution, as a whole.

Indemnity Law

The Eighth Amendment extended indemnity of unprecedented measure to all Martial Law acts, including the orders of military courts and tribunals.¹⁰ Unless specifically repealed, these martial law orders and decrees were to remain effective after the withdrawal of Martial Law in the country. The provision of indemnity to the outgoing Martial Law regimes was not a new practice. A similar stipulation was provided at the time of end of military rule in 1962 and 1972.¹¹ But indemnity in these two cases was for a limited period, and applied to selected decrees. The 1985 indemnity provided absolute and unqualified constitutional coverage to whatever policy decisions and actions the military government of General Zia-ul-Haq had taken during 1977-85 period and these were formally incorporated into Pakistan's

8. M. Akhtar, "Eighth Amendment-iv: Constitution Protection for Martial Law Action," *The Pakistan Times*, 18 February 1989.

9. Abbas, 55.

10. Constitution of the Islamic Republic of Pakistan 1973, Article 270 (A).

11. M. Bashir Butt, "Eighth Constitution Amendment" *The Muslim*, 13 February 1989.

constitutional and legal system, which ensured their enforcement in the years ahead.¹²

Balance of powers between the President and the Prime Minister

In the democratic systems, there are two forms of government: presidential and parliamentary. The form chosen determines who is going to be the chief executive, the President or the Prime Minister. The Constitution of 1973, in spite of all distortions, was supposed to be the parliamentary system in which the Prime Minister is the chief executive.¹³ The distribution of powers in parliamentary system is affected by three principal factors: 1) the role of the head of the state, 2) the relationship between the executive and the legislature and, 3) the relationship between the Prime Minister and the cabinet.¹⁴ In addition, one of the hallmarks of a parliamentary system is the distinction between the dignified and efficient aspects of government. Dignified or ceremonial leadership centres upon the head of the state, either a titular President, or a ceremonial monarch, while efficient leadership rests with a team of ministers headed by Prime Minister and accountable to Parliament.¹⁵ The king or the President has a *de jure* authority, and, legally, he possesses all the powers and privileges which the constitution and laws may confer upon him. But, in practice, he exercises none. In the often-quoted phrase of Bagehot: "the king has three rights: the right to be consulted; the right to encourage; and the right to warn and a king of great sense and sagacity would want no others."¹⁶ Politically, sensitive decisions such as the dissolution of the

12. A. Rizvi, *The Military and Politics in Pakistan* (Lahore: Progressive Publishers, 1987), 251.

13. Hague Rod and Martin Harrop, *Comparative Government and Politics* (London: Macmillan, 1982), 220.

14. *Ibid.*, 221.

15. *Ibid.*, 222.

16. *Ibid.*, 223.

legislature would normally be taken on the advice of the Prime Minister and his government.¹⁷

The locus basis of power in the parliamentary system is the assembly. A cabinet or council of ministers emerges from the assembly and is ultimately responsible to it. The government holds office just as long as it retains the confidence of the assembly. If that confidence is withdrawn, for example, through the "vote of no-confidence," the government is expected to resign. If no new government can be formed which commands the assembly's support, the normal course is the dissolution of the assembly and a general election.¹⁸ The Prime Minister has complete powers of appointment removal of his ministers. The Prime Minister and the cabinet are "collectively responsible" to the legislature. It means that ministers share responsibility for the decisions collectively agreed upon by the cabinet.¹⁹

Under the Constitution of 1973, the President was a ceremonial Head of the State. But, after the Eighth Amendment, the position of the President changed radically.

He was the Head of the State.

The executive authority of the Federation also rested in him and he could exercise the same either directly or through officers subordinate to him.

All executive actions of the federal government were to be taken in his name.

He was the necessary part of the Parliament.

He was the supreme commander of the armed forces.²⁰

In addition, in the amended constitution, there were three spheres in which constitutional interaction between the President and the Prime Minister could take place. The first consisted of the

17. Abbas, 71.

18. Hague Rod, 227.

19. *Ibid.*, 227.

20. Asif Saeed Khan Khosa, "Constitution Powers of the President-I." *The Nation*, 30 September 1996.

Articles where the President had "discretion." Here, though the President may seek the advice of the Prime Minister, he was neither required to do so nor to act in accordance with such advice.²¹ In the second sphere, the President was required to act both on and in accordance with such advice. In the third sphere, the condition to act on the advice or discretion was not present.²²

The original Constitution of 1973 expressly provided that the Prime Minister would be the Chief Executive: "The executive authority of the Federation shall be exercised in the name of the President by the Federal Government consisting of the Prime Minister and the federal ministers, which shall act through the Prime Minister who shall be the Chief Executive of the Federation." But the Eighth Amendment now provided that: "The executive authority of the Federation shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution". Thus, the word "Chief Executive" which was used for the Prime Minister in the constitution was dropped. Thus he was assigned a subordinate position.²³

In the Constitution of 1973 President's signature was merely a formality. Article 75 of the Eighth Amendment later changed it. Now the indirectly elected President, when presented with a bill duly passed by both the Houses, could keep it with him for 30 days and may return it to the Parliament unsigned for reconsideration. This greatly undermined the position of the Parliament and provided great opportunity to the President for manoeuvring, which could only be offset by two-third majority of both the Houses.²⁴

Article 48 (2) stated that the "validity of any thing done by the President in his discretion cannot be called in question on any grounds whatsoever." One writer argued that this Article "seems to widen the scope of the discretionary authority of the President to an

21. These Articles are 48(5), 48(46), 105(3), 105(4), 213(1), 242(A), 243(2C), 56 and 58.

22. Khosa

23. Sultan Ahmad, "The Question of Locus of Power," *Dawn*, 27 January 1989.

24. Muhammad Alyas, "8th Amendment: An Analysis." *The Nation*, 6 May 1989.

unlimited extent and, therefore, is not commensurate with the requirement of accountability and the parliamentary character of our Constitution.²⁵ This was all the more pronounced in the light of the Supreme Court ruling “that absolute, unchallengeable, and unlimited power is not available to an individual however high place he may occupy.” The Supreme Court placed certain restrictions on the discretionary powers of the President. It had declared in the case of Haji Saifullah Khan that: “the discretion or the formation of the opinion had to be based on facts and reasons which are objective realities. The discretion or formation of opinion cannot be based on illusions, fancy or whim. The authority, power, or discretion was not absolute. If the authority, power, or discretion were to be free from reason and absolute, it will partake of the omnipotent which is impermissible to a mortal however high he may be.”²⁶ Another radical shift in favour of the President was affected through amendment in Article 48(1). The original Article said: “In accordance with the exercise of his functions, the President shall act in accordance with the advice of the cabinet.” To this was added, “or Prime Minister,” thereby suggesting conflict between the Prime Minister and his cabinet to the advantage of the President. In parliamentary system of government, Prime Minister and the cabinet are inseparable, and Prime Minister is the only spokesman of the cabinet. Insertions of such provisions were clearly meant and designed to provide a handle to the President to create his own lobby.²⁷

Further, Article 46 was amended beyond recognition. The original Article stipulated that: “The Prime Minister shall keep the President informed on matters of internal and foreign policy and on all legislative proposals the federal government intends to bring before parliament.” The provision explicitly showed that the intent was to keep the President informed about the major policy decisions, without encouraging his active interference in the

25. Aqil Ahmad, *The Eighth Amendment: A Commentary*, p. 14. Cited in Abbas, 48.

26. Federation of Pakistan vs. Muhammad Saifullah Khan, *All Pakistan Legal Decisions*, Vol.XLI, No .4, April, 1989, SC.181.

27. Abbas, 67.

executive affairs. The amended Article suggested that it should be the “duty” of the Prime Minister:

To communicate to the President all decisions of the cabinet relating to the administration of the affairs of the federation and proposals for legislation;

To furnish such information relating to the administration of the affairs of the federation and proposals for legislation as the President may call for;

If the President so requires, to submit for the constitution of the cabinet any matter on which a decision has been taken by the Prime Minister or a minister but which has not been constitution by the cabinet.²⁸

The emphasis on the “duty” of the Prime Minister leaves no doubt as to the subordinate status of the office of the Prime Minister. In principle, it is not the President but the Parliament to whom Prime Minister of a country is answerable. The provision also undermines the Prime Minister’s position in his own backyard that is the cabinet.²⁹ No wonder, then: “The result of the amendment is to make the Prime Minister additionally answerable to the President and opens avenues for manipulation of the cabinet by the President.”³⁰

Furthermore, it was provided in Article 91(2) that: “the President shall, in his discretion, appoint from amongst the members of the National Assembly a Prime Minister who, in his opinion, is most likely to command the confidence of the majority of the members of the National Assembly.” Although this provision was to last up to 20 March 1990, still it provided power to the President to manoeuvre the appointment of the Prime Minister of his own choice for the first two elections after the revival of 1973 Constitution in 1985. The Article is silent as to how and through what mechanism the President will ascertain whether a certain person holds the majority. In a parliamentary form of government,

28. The Constitution of 1973, Article, 46.

29. Abbas, 68.

30. Aqil Ahmad, 12.

it is the sole prerogative of the legislature to elect its leader. Affecting such changes in the basic structure of the constitution meant "imposition of presidential autocracy on a parliamentary frame-work."³¹

Finally the climax of the Amendment was Article 58(2B), which read as follows:

The President may also dissolve the National Assembly in his discretion where in his opinion;

A vote of no confidence having been passed against the Prime Minister, no other members of the National Assembly is likely to command the confidence of the majority of the members of the National Assembly in accordance with the provisions of the Constitution as ascertained in a session of National Assembly summoned for the purpose, or;

A situation has arisen in which the government of the federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary.³²

It was not provided in the Article as to what yardstick the President will have to assess whether government of the federation can be carried on in accordance with the constitution or not. Obviously, decision was purely subjective in nature.³³ Another aspect of this presidential authority, as one member of the National Assembly argued at some length, was that:

it would be disastrous if two persons have the authority to use one power at any time as Prime Minister and President have the authority to dissolve the National Assembly. The Parliament is also under stress because two persons have the power to dissolve the Assembly at any time. The right of dissolution should rest with the Prime Minister alone because he is the representative and part of

31. Abbas, 69.

32. The Constitution of 1973, Article 58(2B).

33. *Ibid.*, 70.

Parliament and the Parliament has shown its trust and confidence in him.”³⁴

The fact of the matter was that the President who himself was the creation of the National Assembly could dissolve it without any fear of accountability. If the Supreme Court declared the presidential order null and void, the President could still continue to retain office without suffering penalty. On the contrary, when an elected Prime Minister advised the President to dissolve the National Assembly, he lost his Prime Ministership and had to face the electorate again.³⁵ The Article clearly limited the sovereignty of the Parliament and made the system subservient to the will of an individual who stood immune despite his interventions, if he so desired. It was precisely this context, which made one constitutional expert to remark, “the present presidential post is no less than that of any Constitutional dictator.”³⁶

In addition, the discretionary powers of the President were encroachment upon the powers of the Prime Minister. Empowering two persons in the same situation meant creating two centres of power in the civilian government, encouraging power struggle and political conspiracies between the two camps. The resultant political uncertainty was not conducive to framing long-term national policies. Above all, there was the military factor. The result was that a ‘troika’ ruled the country, with each element endeavouring to increase its own power base. The outcome could only be chaos, bad government, and political corruption.³⁷ Thus on close scrutiny, the Eighth Amendment provided for concentration of power in the person not entitled to it which was bound to result in confrontation between the two highest holders of power. It was not genuine power equilibrium by any standard. It was an

34. *The National Assembly Debates' Official Report*, Vol. iv, No.24, Monday, 4 October, 1985, 3224.

35. Ambreen Zaman, “Shadow of the 8th Amendment,” *The Frontier Post*, 23 May, 1992.

36. Farooq Hassan, *Nawa-i-Waqat*, 13 March 1993.

37. Ambreen Zaman.

unabashed, naked attempt to legitimise the status quo which was acquired by virtue of Martial Law.”³⁸

As opposed to the sub clause (2B) of Article 58, its clause (1) was amended and made reasonable. The amended clause read: “The President shall dissolve the National Assembly if so advised by the Prime Minister and National Assembly shall, unless sooner dissolved, stand dissolved at the expiration of forty eight hours after the Prime Minister has so advised.” Further, it was explained: “Reference in the article to Prime Minister shall not be constitution to include reference to a Prime Minister against whom notice of a resolution for a vote of no confidence has been given in the National Assembly but has not been voted upon or against whom such a resolution has been passed or who is continuing in office after his resignation or after the dissolution of the National Assembly.”³⁹

The original Article stated that the National Assembly would not be dissolved if a resolution for a vote of no confidence against the Prime Minister had already been moved. The Amendment made it relevant and applicable to cases where even a notice for such a resolution was given. This was done to bar dissolution on the advice of a Prime Minister whose representative character was doubtful. The legal advisers of the government were very adept and efficient in removing any privilege or power from the Prime Minister, which was provided to him against the norms of parliamentary system.⁴⁰

Provincial Autonomy

Federalism remained an inherent feature of Pakistan’s politics since its inception. Adopted in 1947, the federal form was retained in all subsequent constitutions as its relevance and need for the country was never disputed despite the recurrence of a series of

38. Abbas, 70.

39. The Constitution of 1973, Article, 58(1).

40. *Ibid.*, 71.

political and constitutional crises in the country.⁴¹ According to C. J. Friedrich, "Federalism is a process of federalising, that is, achieving a union of groups which retain their identity."⁴² K.C. Wheare defined federal principle as the method of dividing powers so that the general and regional governments are each within a sphere co-ordinate and independent.⁴³ In this sense, federalism fitted well into the historical and political conditions of Pakistan. Indeed, federalism offered the only mechanism and mode in which conflicting interests and social differences, ethnic, linguistic, and cultural, could be reconciled and divergent groups could co-exist under a general government without losing their separate identities.⁴⁴ The abrogation of the constitutions, political instability, and frequent political upheavals culminating in the break-up of the country in 1971, by no means indicated the irrelevance or failure of the federal form of government. In fact, it was never allowed to work in its true spirit. The military-bureaucratic governments were in favour of strong centre. Concessions were given to the provinces in the constitution, but, in practice, the country was ruled like a unitary state. Consequently, Pakistan lost the Bengalis and East Pakistan.⁴⁵

In the Constitution of 1973, an attempt was made to sanctify the federal principle with the creation of a Senate and Council of Common Interests to safeguard the interests of the smaller provinces but in actual operation, the government went on to allocate 67 jurisdictions to the federal government, 47 concurrent powers for both central and provincial governments, and none to provincial governments themselves. On top of it, the federal principle was again violated brutally by the summary dismissal of

41. Ali, Politics of Federalism, i.

42. *Ibid.*, ii.

43. *Ibid.*, 3.

44. *Ibid.*, i.

45. *Ibid.*, 75.

government of Baluchistan as well as military action against the Baluch people in 1973.⁴⁶

i) Enhanced Position of the Senate

The Eighth Amendment deserves credit for enhancing the position of Senate by delegating it powers equal to the National Assembly regarding the initiation of any bill, except money bills, whether it related to federal legislative list, or concurrent legislative list.⁴⁷ Senate was also empowered to originate any amendment in the constitution⁴⁸, which was previously the exclusive privilege of National Assembly. Another worthwhile contribution of the Amendment in this regard was widening the representative character of the Senate by providing for elections of 5 members from each provincial assembly to represent ulema, technocrats, and other professionals.⁴⁹

ii) Expansion of the Electorate for the President's Election

The electorate for President's election was to include members of the provincial assemblies. It was a measure in the interest of federation. This provision was consistent with the Indian Constitution and made the President dependent not only on the members of the Parliament but also on the various provincial assemblies in the country.⁵⁰

In short, the major redeeming feature of the Amendment in reference to provincial autonomy was enhanced and expanded role of the Senate. The rest of the provisions in this regard were meant to erode the authority of provinces. One good example was Article 165-A, which provided for Parliament's authority to make laws to tax corporations and institutions established by federal or provincial governments regardless of the ultimate destination of such income.

46. Azfar Kamal, *Pakistan: Political and Constitution Dilemmas* (Karachi: Pakistan Law House, 1987), 126.

47. The Constitution of the Islamic Republic of Pakistan 1973, Article 70(1).

48. *Ibid.*, Article 239(1).

49. *Ibid.*, Article 59(1D).

50. Abbas, 73.

It was a clear infringement on provincial autonomy in financial matters. The Article further excluded judicial review of laws made and actions taken in this respect during the eight years under Martial Law. This was against the principle of federation as well as natural justice. Clause 2 of the Article 165-A indicated how desperately Zia-ul-Haq wanted to provide legal protection to the regime's policies during Martial Law period by excluding judicial review.⁵¹

iii-Dissolution of Provincial Assemblies

The most devastating blow to provincial autonomy came through an addition in Article 112, which empowered the governors to dissolve provincial assemblies in their discretion subject, of course, to the prior approval of the President.⁵² This meant that an elected provincial government, along with the members of provincial assembly, could be ordered to pack up if the President so desired. Principles of provincial autonomy did not matter. The Amendment, thus, strengthened the position of the Governor vis-à-vis the Chief Minister in a fashion similar to the one adopted in case of the President and the Prime Minister.⁵³

In this sense, it was no exaggeration to argue that: "The 1985 Constitution is a more centralised version of the 1973 Constitution."⁵⁴ The enhanced and expanded representative character of Senate became immaterial in the face of deliberately contrived vulnerability of elected provincial government. Sartaj Aziz, while pointing out the real issues involved in the Eighth Amendment, aptly remarked: "How can issues arising in the distribution of powers between the governor and the chief minister of a province be resolved in the face of the added complication of

51. *Ibid.*, 74.

52. The Constitution of the Islamic Republic of Pakistan 1973, Article 112(2).

53. The relevant amended Articles are 105(1), 139(3), 139(5), 180(2), 131.

54. Azfar, 127.

the possible role that the President of the federal government might exercise in provincial matters?"⁵⁵

iv-Islamic Provisions

When Martial Law was imposed in July 1977, one justification, which General Zia-ul-Haq advanced, was that Islam had not been effectively put into practice in Pakistan.⁵⁶ Therefore, Zia-ul-Haq made an effort to promote Islam in the state and society through a variety of measures. However, the government's often-reiterated commitment to organise Pakistani society on Islamic principles was seen by quite a few observers "as a cynical attempt to justify authoritarianism."⁵⁷ In this estimate, Islam was used by the regime "as an instrument that provided with legitimacy and political allies."⁵⁸ Some of the more important steps taken by the government, which found sanction in Eighth Amendment, are discussed here.

Majlis-e Shura'

The Amendment provided an Islamic nomenclature for the Parliament, "Majlis-e Shura"."⁵⁹ But, then, a mere change of title made no difference until the government whole-heartedly devoted itself to enforcing the Islamic system in the country. Very few positive measures were adopted to transform the society into an Islamic one. It was due to this shortcoming that the various *Hadoop* ordinances promulgated in the country could not produce the desired results.⁶⁰

55. Aziz.

56. *Dawn*, 6 May 1977.

57. S. S. Bindra, *The Politics of Islamization* (New Delhi: Deep and Deep Publications, 1990), 199.

58. *Ibid.*, 269.

59. The Constitution of the Islamic Republic of Pakistan 1973, Article 50.

60. Prof. Rafiullah Shehab, "Islamic Provisions of Eighth Amendment," *The Pakistan Times*, 20 February 1989.

Objectives Resolution

The Objectives Resolution was made a part of the Constitution through Article 2(A), although the word 'freely' was deleted which was meant for the minorities. Many analysts were of the view that there was no need to reproduce Objectives Resolution as an annex to the Constitution, which could have been referred to anyway.⁶¹ Legal experts opined that principles enunciated in the Resolution were "so wide in scope and all-pervasive in character that these can be enforced only in the context of specified provisions that are made in the Constitution". Thus, according to one writer, "the insertion of 2 (A) is redundant and of symbolic significance only."⁶² Among others, Professor Khurshid Ahmad, an eminent leader of Jama'at-i Islami also maintained that, adding Objectives Resolution to Article 2 as 2 (A), and putting the text of the Objectives Resolution in the annexure were desirable but not enough. It suggested symbolism than any substantive change.⁶³

Supporters of the Amendment advanced the view that now all the Articles of the Constitution would be judged and interpreted in light of the Objectives Resolution, thereby exalting it to a higher status. Such a notion was put to rest when, in the case of Ghulam Mustafa Khar vs. Pakistan, a full Bench of Lahore High Court held that Objectives Resolution, as embodied in Article 2A of the Constitution was not to be given higher status than that of other provisions.⁶⁴

Shari'yyah Courts

The most significant and far-reaching amendment in the range of Islamic provisions was creation of a new hierarchy of Shari'yyah Court by adding Article 203 A, 203B, 203C, 204F, 203G, 203J, and 203H to Article 203, according to the Article 203D. It was in

61. Abbas, 76.

62. Aqil Ahmad, 71.

63. Khurshid Ahmad, "Eighth Amendment Bill: A Critical Appraisal." *The Muslim*, October, 13, 15 and 16, 1985.

64. Abbas, 77.

the jurisdiction of this Court to decide whether or not any law or provision was repugnant to the injunctions of Islam as laid down in the Holy Quran and Sunnah of the Prophet (Peace be upon him). Article 203 (G) further enhanced the powers of the Federal Shari'yyah Court by declaring that: "No court or tribunal, including the Supreme Court and a High Court, shall entertain any proceeding or exercise any power of jurisdiction in respect of any matter within the power or jurisdiction of the Court." However, Supreme Court was empowered to hear an appeal against the final decision of the Federal Shari'yyah Court.

Creation of a new judicial order was understandable, and, perhaps, necessary for the just implementation and interpretation of Islamic laws, and an impetus for *ijtihad*, the crowning character of Islam. But contrary to the nature of honourable Court, the Judges were practically made subservient to the will of the President. Their terms and conditions of service were liable to be modified by him, and they could be transferred and required to perform any other function as he may deem fit.⁶⁵

The logic behind these limitations on judges of the Court came to the forefront when the first Chief Justice was unceremoniously removed on the day he pronounced judgement on the question whether *rajm* was an Islamic punishment or not. The decision was not to the liking of Zia-ul-Haq. He dismissed the Chief Justice, and by another amendment, conferred with retrospective effect, the power of review on the Federal Shari'yyah Court. An application for review was moved and the Court reversed its previous judgement.⁶⁶ This prompted former Chief Justice to comment: "The members of the august Court were tied hand and feet to the pleasure of the President."⁶⁷ In a similar vein, Professor Khurshid Ahmad, too, advocated elimination of the discretionary powers of

65. The Constitution of the Islamic Republic of Pakistan, 1973, Article 203 C (4B).

66. Zulfiqar Khalid Maluka, *The Myth of Constitution in Pakistan* (Karachi: Oxford University Press, 1995), 267.

67. Justice Yaqoob Ali, "Why do Rulers Amend the Constitution," *The Nation*, 26 March 1989.

the President in Article 203 C (4B) as in his opinion, "this clearly affects the independence of the Court."⁶⁸

Islamic Qualifications of the Members of Assemblies

There were religious and, perhaps, political motives, which inspired the government of Zia-ul-Haq to add some qualifications for membership of Parliament and provincial assemblies. In this context, following additions in Article 62 were made:

A person shall not be qualified to be elected or chosen as member of Majlis-e Shura' unless:

He has adequate knowledge of Islamic teachings and practices and he performs ~~obligatory~~ duties prescribed by the Islam and abstain from major sins;

He is sagacious, righteous and non-profligate and honest and *ameen*; and;

He has been not convicted for a crime involving moral turpitude or for giving false evidence.

It was not difficult to see that these provisions were too general to be applied to any specific case. In Pakistan, on the average, six to seven candidates contest for a national or provisional assembly seat. It was well nigh impossible to evolve a mechanism based on these criteria, to judge the eligibility of thousands of candidates.⁶⁹

It was precisely because of this that, when a renowned constitutional lawyer, Khalid Ishaq, challenged the eligibility of a certain class of candidates for the National Assembly in the Federal Shari'yyah Court he could not convince the Judges of his case.⁷⁰

Separate Electorate

On the eve of its creation in 1947, the population of Pakistan included about fifteen million non-Muslims out of nearly seventy million citizens. Hindus, Christians, Sikhs, Parsees, and Buddhists

68. Khurshid Ahmad.

69. Abbas, 80.

70. Shehab.

were the main minorities.⁷¹ Among others, the Christians, living in the Muslim-majority areas of India, had whole-heartedly supported the Quaid-i Azam Muhammad Ali Jinnah and the creation of Pakistan.⁷² It was for this reason that the Quaid had publicly stated that, the Hindus, Christians, Sikhs and other non-Muslim communities were all part of the Pakistani nation. In his presidential address to the Constitution Assembly of Pakistan on 11 August 1947 he declared: "You may belong to any religion or caste or creed that has nothing to do with the business of the state".⁷³ The Quaid's commitment to the minorities was further reinforced in the Objectives Resolution adopted by the Constitution Assembly in March 1949.

Soon after the enactment of the Constitution of 1973, it was realised by the then government that there was no provision of representation for the minorities in the national and provincial assemblies. The Fourth Amendment corrected that shortcoming. Clause (2A) was inserted in Article 51 and Clause (3) was inserted in Article 106. These two clauses allocated reserved seats for the various minorities in the assemblies.⁷⁴ The procedure for filling these reserved seats was indicated in the two Articles 51(4A) and 106 (5) for the national and provincial assemblies, respectively.⁷⁵

After the adoption of this Amendment, the total seats of each of the assemblies could broadly be classified as general seats. Any member of the minority community, like any other citizen, was free to contest elections to any of the general seats of any of the assemblies. He was also free to vote for any candidate contesting

71. Q.W. Chaudury, (London: Longman, 1969), 56.

72. Cecil Chaudury, "Minorities and The Eighth Amendment," *The Muslim*, 12 February 1993.

73. Quaid-i-Azam Muhammad Ali Jinnah: Speeches and Statements, 1947-48 (Islamabad: Services Book Club, 1989), 46.

74. Cecil Chaudury.

75. *Ibid.*

election from the constitution to which he belonged. His status was therefore that of an "equal citizen".⁷⁶

In March 1985, the constitution was further amended through The Revival of Constitution Order (P.O. No. 14) of 1985, which was subsequently made part of the Eighth Amendment. Due to this Amendment, the earlier clauses, i.e., (4A) and (5) under Articles 51 and 106, respectively, were replaced by new clauses, which introduced the principle of separate electorates into the constitution.⁷⁷

Thus, the net outcome of the Eighth Amendment was that a member of the minority community is barred from contesting or voting for any of the general seats of any of the assemblies, as these seats were renamed as "Muslim seats." This Amendment, in fact, not only took away the political rights of the minorities but also removed them from the mainstream of the political life of Pakistan. The minorities were understandably bitter and frustrated. In their estimate, this made their status below that of the Muslim women who, too, had reserved seats but were permitted to contest elections for the general seats as well.⁷⁸

A major disadvantage of separate electorates is that compartmentalisation of communities is accentuated. An election builds bridges between different religious and ethnic groups. This interdependence helps to pull down the barriers created by parochialism and social history. The system of joint electorates promotes national integration. Further, the few minority representatives, in isolation, do not have the necessary clout to protect their communities. The majority members feel little responsibility to support minority issues, as minorities do not constitute their electoral support base. In joint electorates, the majority candidates are obliged to reach them for support.⁷⁹ But

76. *Ibid.*

77. *Ibid.*

78. *Ibid.*

79. P. Bhandara, "Minorities and the 8th Amendment," *Dawn*, 8 February 1989.

that was what the Eighth Amendment had come to deny to the minorities. They were to be on their own.

Conclusion

The Eighth Amendment, and particularly Article 58 (2B), was meant to affect a balance of powers between the President and the Prime Minister, and indeed to forestall the imposition of future martial laws in the country. But the realities on the ground hardly justified the optimism. Indeed, on the contrary, dismissal of the four successive governments and dissolution of four assemblies proved that, instead of providing stability to the system, it had weakened the political institutions by creating two centres of power,⁸⁰ encouraging power struggle, intrigues and opportunism.

There is no gainsaying that, with the introduction of Eighth Amendment in the Constitution, the nature of the parliamentary Constitution of 1973 was changed. The amended constitution was neither parliamentary nor presidential. It was rather a mixture of the two systems, with some features of parliamentary government and some characteristics of presidential system. In fact, keeping in view the discretionary powers of the President, the system could well be termed as a quasi-presidential system.⁸¹

The basic anomaly of the system was that an indirectly elected President had decisive powers over and above the directly elected Parliament and its head, the Prime Minister. The President had the powers to dissolve the National Assembly, against the spirit of parliamentary democracy.⁸²

In parliamentary democracies, Prime Minister is the elected representative of the people and the guardian of public trust. He should, therefore, be allowed to run the affairs of the state subject to the will of the people to be expressed in the general elections

80. Lawrence Ziring, "The Fall of Benazir Bhutto," *Asian Survey*, vol. XXXI, No.2 (February 1991), 122.

81. Farid A. Malik, "Moving Towards a Presidential Form of Government," *The Nation*, 18 November 1996.

82. Inayatullah, "Removing an anti-democratic article," *The News*, 25 October 1996.

held from time to time under the constitution. He should also have the opportunity to formulate and pursue policies to achieve the desired results.⁸³

After the Eighth Amendment, the President, under Article 58(2B), had power to dissolve the National Assembly, which was done quite often. To begin with, in May 1988, President Zia-ul-Haq dismissed the Junejo Government, and dissolved the Assembly. In 1990, President Ghulam Ishaq Khan made use of the Article to dismiss Benazir Bhutto from office. Again, on 18 April 1993, he used the Article to get rid of Sharif government. Although a Supreme Court verdict in favour of Nawaz Sharif helped him return to office, the die was cast. He could not continue to work as Prime Minister in the face of a President determined to make use of the powers vested in him through the Eighth Amendment.

The elections of 1993 brought back Benazir Bhutto as Prime Minister, for the second time. She made sure that her own party leader, Farooq Ahmad Khan Leghari, was elected the President. This development had convinced many political analysts that since both the President and the Prime Minister were from the same political party things would work better this time. But the two highest offices in the country could not work it out, and, consequently, on 5 November 1996, for the fourth time an elected government was dismissed by the President.

Interestingly, on each of the four occasions, dismissal of the Prime Minister was accompanied by the dissolution of the National Assembly. It is not quite clear why it was not possible to sack the Prime Minister alone without upsetting the whole system.⁸⁴ One may argue that since the Prime Minister was leader of the majority of the National Assembly, there was no way one could get rid of him without getting rid of his source of power. However, the fact of the matter was that in all the four above instances both the Prime Minister and the National Assembly were made to go together.

83. Mahmood Mirza, "8th Amendment and the Constitution 11", *The Nation*, 27 June 1993.

84. A.M.Sayied, "Eighth Amendment: The Blackest Law," *Pakistan Observer*, 11 June 1993.

The frequent use of the Article 58 (2B) showed, beyond any shadow of doubt that it failed to tame the Prime Minister. It could neither intimidate the humble Muhammad Khan Junejo, or, for that matter, the more ambitious Mohammad Nawaz Sharif and Benazir Bhutto from becoming assertive Prime Ministers. The Article was invariably used maliciously and without sufficient constitutional justification, as the Supreme Court determined in two cases, at least. The three presidents, General Zia-ul-Haq, Ghulam Ishaq Khan, and Farooq Ahmad Khan Leghari, who used it did not do so for promoting any national interest. They did it more for protecting and promoting their own personal power.⁸⁵

A decade had passed and all that Pakistan had experienced was instability in politics, early dissolutions of assemblies, provincialism, political violence, and confrontation not only between the two pillars of the state but also between the Executive and the Judiciary.

A significant outcome of the frequent dissolution of assemblies was the regular elections in the country. Since governments had come and gone with dazzling speed, elections were held with brief intervals. No wonder, Pakistan saw more elections in the post-1985 period than any time before, when elections were seldom held. These elections helped to raise the political consciousness of the voters, though, in the end, they had little to choose from. They went on electing Benazir Bhutto and Nawaz Sharif, turn by turn. Nawaz Sharif replaced Bhutto when she was dismissed in 1990. Benazir Bhutto returned to power as Prime Minister after Nawaz Sharif left in 1993. Once again Nawaz Sharif became the Prime Minister after Benazir Bhutto was sacked in 1996. In a way, this pattern suggested and encouraged the political analysts to argue that Pakistan was finally heading towards a two-party system. This may be true to some extent, but it is very hard to say that the two-party system had finally arrived in Pakistan, especially after the current plight of Benazir Bhutto and her Pakistan Peoples Party.

In spite of the fact that it was loudly proclaimed both by Benazir Bhutto and Nawaz Sharif and their respective party

85. Inayatullah. "Removing an anti-democratic article."

supporters that the Eighth Amendment must go, they did not touch this issue during their own tenures. For instance, Ghulam Mustafa Jatoi and Ghulam Mustafa Khar were on record to have said, "so long as Nawaz Sharif is Prime Minister the Amendment should stay." Similarly, Nawaz Sharif was not interested in the repeal of the Amendment during Benazir's two terms.⁸⁶

The question of the repeal of the Eighth Amendment did not merely relate to the balance of powers between the President and the Prime Minister. More importantly, it was linked with the restoration of the sanctity of the constitution. A constitution, without sanctity, is merely a piece of paper, which cannot prevent its violation by the so-called "adventurers". It is the sanctity of a constitution, which keeps the banner of rule of law aloft and checks use of coercive authority. Therefore, to ensure the sanctity of the constitution and to establish the rule of law, it was absolutely necessary to repeal the Eighth Amendment, and particularly the Article 58 (2B), which had been at the roots of all the political troubles for a long time.⁸⁷

This realization dawned on the political leaders, finally, on 1 April 1997. The Thirteenth Amendment, adopted unanimously by the Parliament, i.e., the National Assembly and the Senate repealed more problematic Articles of the Eighth Amendment. The Amendment deleted Articles 58(2B) and 112(2B) from the Constitution, thus undoing the powers of the President and the governors to dissolve, in their discretion, national and provincial assemblies. Article 101(1) was altered to remove the privilege of the President to appoint governors "in his discretion." The advice of the Prime Minister was made binding on the President.⁸⁸

The Thirteenth Amendment finally eliminated the lengthening shadows on the parliamentary form of government since 1985. With the balance of power restored in favour of the Prime Minister, the

86. *Jang*, 23 March 1993.

87. *The Pakistan Times*, 25 August 1989.

88. Amir Mir, "Parts of 8th amendment still leave President with claws." *The News*, 21 November 1997.

role of the army, which had largely acted through the President, was also curtailed. This will, it is hoped, strengthen democracy and democratic institutions in the country. Hopefully, there will be less of 'intrigues' witnessed during the days of intense polarization between Presidents and Prime Ministers in the past. In this sense, it will free a Prime Minister to attend more to his political goals and objectives than to worry about his sheer survival in a system inherently pitted against him.

Although Nawaz Sharif was successful in clipping the President's discretionary powers, several important Articles of the Eighth Amendment were left untouched. They, as indicated before, include Articles 46, 48, 50, 75, 91, 92 and 99. These Articles still empower the President to check the Prime Minister on a number of fronts, and thus frustrate his initiatives and decisions. Likewise, unless corresponding Articles in provincial spheres, such as Articles 116, 129, 130, 131 and 139 affecting the balance of power between the Governors and elected Chief Ministers are not removed, it cannot be said that the original Constitution of 1973 is restored completely. Yet, all said and done, a constitution advance has been made in that direction.

Before we conclude, it will be pertinent to note that the frequent dismissals of governments and assemblies under Article 58(2B) of the Eighth Amendment have helped judicial activism in the country. Political leaders in general and the ousted Prime Ministers in particular have, more often than not, challenged the constitutional validity of the presidential actions in High Courts and the Supreme Court. This trend of filing of petitions by the affected parties helped the judiciary to assert its position on issues of constitution and political importance to the country. Judgements in the Judges Case of March 1996, restoration of Nawaz Sharif's government, and verdict on Achakzai's petition are a few cases in point. Indeed, the dismissal of Benazir Bhutto in 1996 included, among other things, the charge that she had failed to implement the judgement of the Supreme Court of 20 March 1996. In addition, she had failed to take necessary steps to separate the judiciary from the executive as directed by the Court. This clearly showed that the

judiciary today, more than ever, was keen to play its part in upholding the rule of law and the supremacy of the constitution.

However, after the passage of the Thirteenth Amendment, it is the responsibility of the representatives of the people, especially the Prime Minister, to ensure that the people they claim to represent are served well and the political institutions not only contribute to the development of democracy but also to progress and prosperity of the country. Now there is plenty of support in the constitution and constitutional system to help.