

DISCUSSION PAPER

July 2009

**PROPOSED AMENDMENTS TO
THE CONSTITUTION OF PAKISTAN**

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PREFACE

The discussion paper on **Proposed Amendments to the Constitution of Pakistan** has been authored by **Mr. Shahid Hamid**, Senior Advocate Supreme Court of Pakistan & Former Governor Punjab who is one of the most respected legal and constitutional experts of Pakistan.

The paper, as the title suggests, is an attempt to lead an informed debate and discussion on the question of required constitutional amendments currently under discussion by the Parliamentary Committee set up recently to consider various amendments to the Constitution of Pakistan. Mr. Shahid Hamid deserves credit for not only his initiative of penning down an excellent review of the various amendments made in the 1973 Constitution, but also point, for the benefit of various stakeholders and public and media at large, on what course the forthcoming amendments may take.

We wish to emphasise that this paper by no means represents the definitive recommendations of PILDAT. PILDAT instead plans to use this paper for discussion and consultation by a wider group of legal and constitutional experts so as to be able to present a collective set of recommendations for the use of the Parliamentary Committee. We hope that this paper will set a very sound basis to initiate an informed debate about the constitutional amendments needed in the country.

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Islamabad
July 2009

PROFILE OF THE AUTHOR

Mr. Shahid Hamid is serving as a Senior Advocate Supreme Court of Pakistan. He received his B.A. (Hons) and M. A. Economics degrees from the University of Cambridge, U. K and Barrister-at-Law from the Honourable Society of the Inner Temple, London.

Mr. Shahid Hamid joined the Civil Services of Pakistan in 1964 and during his career from 1964-1976, he held many portfolios ranging from district administration to provincial finance department and later as Secretary to the Chief Minister, Punjab. He has practiced as an Advocate of the High Court from 1978 onwards.

He has also served as Federal Minister for Defence, Establishment & Law from Nov. 1996 - February 1997 and as Governor of the Punjab Province from March 1997 to August 1999.

INTRODUCTION

The purpose of this discussion paper is to inform in the hope that this will lead to informed debate that may prove to be of some help to the Parliamentary Committee set up recently to consider various amendments to the Constitution. The paper focuses on the Objectives Resolution, the demand for more Provinces, Provincial Autonomy, Freedom of Association with reference to Political Parties, Local Government, the Powers of the President, General Zia-ul-Haq's Revival of Constitution Order 14 of 1985 and the 8th Amendment, General Pervez Musharraf's Legal Framework Order 2002 and the 17th Amendment, the Sharing of Powers between the President and the Prime Minister, the Sixth Schedule which gives constitutional protection to certain laws, the controversial Article 58(2)(b), the Senate and the electoral base for the Senators, Qualifications and Disqualifications for Parliament and the Provincial Assemblies and Constitutional Validations of the various periods of Martial Law or military rule.

The 1973 Constitution

The present Constitution was enacted by the National Assembly in April 1973 and came into force on August 14, 1973. It comprised as its pre-ambule the Objectives Resolution passed by the first Constituent Assembly in 1949 and included, at that time, 280 Articles and 6 Schedules. Power to amend the Constitution was contained in its Article 239. As originally enacted the Constitution could be amended by the affirmative vote of two-thirds of the total membership of the National Assembly and a majority, not two-thirds, of the total membership of the Senate. Alteration in the territorial limits of a Province required, in addition to the above, the affirmative vote of two-thirds of the total membership of the Assembly of that province. The original Article was substituted by the present one bearing the same number through General Zia-ul-Haq's Revival of the Constitution Order 14 of 1985 after which any amendment requires the affirmative vote of two-thirds of the total membership of the Senate also. Order 14 of 1985 was ratified/ validated by the 8th Amendment passed by Parliament later that year.

Amendments to the 1973 Constitution

During the last 36 years there have been 17 Amendments to the Constitution. Some of these amendments, especially the 8th and the 17th, amended several articles. There has been some comment lately of a return to the original Constitution. This appears impractical for more than one reason. The Constitution is a living document which needs periodic amendment to meet ever-changing social, economic and political challenges. India has amended its Constitution many more times than we have. Some of the changes made by us since 1973 have been positive in nature while others have had a negative impact. Further amendments should focus on strengthening the democratic institutional framework of the state. Only those previous changes should be targeted for omission, which tend to weaken or negate the aspirations set out in the pre-ambule to the Constitution.

The Objectives Resolution

Through aforesaid Order 14 of 1985 Zia-ul-Haq made the Objectives Resolution of 1949 a substantive part of the Constitution and an annexure in addition to being the pre-ambule of the original Constitution. A number of persons have voiced the view in recent days that making the Objectives Resolution a substantive part of the Constitution was a detrimental development. There are many others who believe that the Resolution well and truly embodies the national vision. The Resolution is re-produced below so that everyone can read and judge for themselves:

"Whereas sovereignty over the entire universe belongs to Allah Almighty alone and the authority which He has delegated to the State of Pakistan, through its people for being exercised within the limits prescribed by Him is a sacred trust;

This Constituent Assembly representing the people of Pakistan resolves to frame a Constitution for the sovereign independent State of Pakistan;

Wherein the State shall exercise its powers and authority through the chosen representatives of the people;

Wherein the principles of democracy, freedom,

equality, tolerance and social justice as enunciated by Islam shall be fully observed;

Wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and the Sunnah;

Wherein adequate provision shall be made for the minorities freely to profess and practice their religions and develop their cultures;

Wherein the territories now included in or in accession with Pakistan and such other territories as may hereafter be included in or accede to Pakistan shall form a Federation wherein the units will be autonomous with such boundaries and limitations on their powers and authority as may be prescribed;

Wherein shall be guaranteed fundamental rights including equality of status, of opportunity and before law, social, economic and political justice, and freedom of thought, expression, belief, faith, worship and association, subject to law and public morality;

Wherein adequate provisions shall be made to safeguard the legitimate interests of minorities and backward and depressed classes;

Wherein the independence of the Judiciary shall be fully secured;

Wherein the integrity of the territories of the Federation, its independence and all its rights including its sovereign rights on land, sea and air shall be safeguarded;

So that the people of Pakistan may prosper and attain their rightful and honoured place amongst the nations of the World and make their full contribution towards international peace and progress and happiness of humanity.”

The pre-amble to the Constitution says that the minorities are to be allowed freely to profess and practice their religions. However, in the annexure inserted by Zia-ul-Haq's Order 14 of 1985 the word 'freely' is missing. Was this a deliberate or accidental omission?

Would the Quaid have supported the Objectives Resolution had he been alive in 1949 or was it a departure from his vision of Pakistan? Those who hold the latter view refer to his August 11, 1947 speech. It appears to me, with respect to those who hold a contrary opinion, that there is nothing in the Objectives Resolution that runs counter to the Quaid's August 11 speech which, in any case, is not to be

read in isolation but together with his many other speeches before and after the creation of Pakistan. It is high time, however, that the omission of the word 'freely' in the Annexure to the Constitution be made good.

Article 1 of the 1973 Constitution

Article 1 of the 1973 Constitution envisaged the possible return of East Pakistan on vacation of Indian aggression. The enabling provision in this behalf was done away with by the First Amendment to the Constitution in 1974.

Provinces and Territories

Article 1 also defines the territories that comprise Pakistan. These are the four Provinces, the Islamabad Capital Territory, the seven Federally Administered Tribal Areas and such other territories as may be included in Pakistan. Has the time not come to end the anomalous status of the seven FATAs either by including them in the NWF Province or by constituting them into one or more new Province(s) after ascertaining the views of the tribals through their jirgas as provided in Article 247 of the Constitution? Has the time also not come to fully absorb the Northern Areas into the body politic of Pakistan by declaring them to be a new Province of Pakistan? Is there any need to pend such absorption till a final settlement of the Kashmir issue when, for many other purposes, we do not consider the Northern Areas to be part of Kashmir? Even if neither of these steps can be taken immediately surely there is a need to settle a strategy and set a time frame for achieving these objectives. Both these matters also find mention in the Charter of Democracy signed by the late Mohtarma Benazir Bhutto and Mian Nawaz Sharif.

When the Province of West Pakistan Establishment Act was enacted by the Constituent Assembly in 1955 there were as many as 15 provinces, states and areas that were merged into what became the 'Super' Province of West Pakistan. These were the Governor's Provinces of Punjab, Sindh and NWFP, the Chief Commissioner's Provinces of Baluchistan and Karachi, the Baluchistan States Union, the States of Bahawalpur and Khairpur, the tribal areas of Punjab, Baluchistan and NWFP and the States of Amb, Dir, Chitral and Swat. If, while un-doing One Unit i.e. West Pakistan, General Yahya Khan had simply repealed the West Pakistan Act of 1955, 15 constituent units would have re-emerged and not six viz the four Provinces, the Islamabad Capital Territory and the FATAs. The four Provinces with their enlarged boundaries are the creation of

the West Pakistan Dissolution Order of 1970. Pakistan was created under the leadership of the Quaid by our fathers and forefathers and not by the four Provinces in their present shape and form.

Provincial Autonomy and the New Provinces

This is perhaps not the right time to consider the creation of new Provinces when the finances of the country are under strain and one of the two major political parties suspects that the motivation is other than the national interest. The issue of more provinces nevertheless needs to be addressed in a longer term perspective. There is an intrinsic link between this issue and that of provincial autonomy.

This link is best explained by comparing the relevant provisions of the Pakistan and Indian Constitutions. Under the Indian Constitution there are 97 subjects in the Union, i.e. Federal List, another 47 in the Concurrent List, a total of 144. In our 1973 Constitution there are 67 subjects in the Federal List, another 47 in the Concurrent List, a total of 114. India started with 14 States i.e. Provinces. It now has 28. India's constitutional procedures for division of their States are much simpler than ours. All that is required is a simple majority in Parliament on a reference made by their President after ascertaining the views of the concerned State Assembly. In Pakistan, especially in our smaller provinces, there are large sections of political and public opinion demanding the abolition of the Concurrent List in order for the provinces to have true autonomy. There is no such demand of any significance in India. If there were 15 or 25 (as at one time mooted by General Zia-ul-Haq) provinces in Pakistan it would be unnecessary and impractical to devolve further powers from the federation to the provinces. Creation of more provinces in Pakistan will, in the long run, strengthen and not weaken the federation.

There is yet another important aspect of this issue. Punjab with nearly 60% of the total population is a super-large province. It is larger than most countries of the world. There are one or two countries which have provinces of the size of Punjab in terms of population but in none of these countries do such provinces constitute a majority of the total population. Citizens of the three smaller provinces are resentful of Punjab's dominance in the affairs of the federation. Russia dominated the affairs of the Soviet Union. Similarly Serbia was dominant in the erstwhile Yugoslav Federation. This dominance was one of the major causes of the collapse of both these federations. In the late

1960s the Biafran revolt in Nigeria was caused at least in part by the dominance of the Northern Region which was larger than the Eastern and Western Regions combined. The insurgency very nearly led to the break-up of Nigeria. In the aftermath of the Biafran civil war Nigeria has re-organized itself. Prior to the Biafran revolt it had just three regions i.e. provinces. It now has as many as 36 States. Is it not time that we too should do away with boundaries that make us think and act as Punjabis, Sindhis, Pashtuns and Baluchis? Does such thinking promote national integration?

Concurrent List of 47 Subjects

Given that the creation of new provinces any time soon is not a viable option Parliament should proceed with all due speed to devolve further powers from the federation to the provinces by deletion of the Concurrent List of 47 subjects or at least most of this List. The List includes criminal laws, criminal and civil procedures, marriage, divorce, infants, minors, adoption, wills, bankruptcy, arbitration, contracts, trusts, transfer of property, actionable wrongs, removal of prisoners from one province to another, preventive detention, arms and ammunition, explosives, opium, drugs and medicines, poisons, mental illness, contagious diseases, environmental pollution, population planning, welfare of labour, trade unions, labour exchanges, boilers, safety of labour in mines, factories and oil-fields, unemployment insurance, newspapers and books, ancient and historical monuments, electricity, evacuee property, educational standards and curriculum, Islamic education, zakat, tourism, legal and medical professions and auqaf. While it may be desirable to have some degree of uniformity of laws on these subjects this purpose can be achieved where required through Article 144 which empowers Parliament to make laws, if two or more Provincial Assemblies pass resolutions asking Parliament to do so, on subjects not included in the Federal or Concurrent Legislative Lists. The deletion of the Concurrent List and the consequential devolution of the powers to the provinces will not weaken the strength and stability of the federation. The abolition of the Concurrent List has been agreed to by the major political parties in the Charter of Democracy signed by them. Practically all the smaller political parties are also demanding deletion of this List. Why then has it not happened? The answer is not far to seek. It is because of vested interests, the vested interests of Ministers who will lose their jobs if their subjects and powers are transferred to the provinces, and the vested interests of thousands of bureaucrats who will have to re-

locate from Islamabad to the provincial capitals.

Freedom of Association: Article 17

Article 17 of the Constitution guarantees freedom of association including the right to form a political party. This Article was amended in 1974. The amendment permitted enactment of a law empowering the Federal Government to declare that a political party was operating in a manner prejudicial to the sovereignty and integrity of Pakistan, or to public order, and then referring such declaration to the Supreme Court. The law passed under this enabling provision was the Prevention of Anti-National Activities Act of 1974. In 1975 a six-member bench of the Supreme Court upheld the Federal Government's declaration that the National Awami Party led by the late Wali Khan was operating in a manner prejudicial to the sovereignty and integrity of Pakistan and was liable to be dissolved. In 2002 General Musharraf further amended Article 17 through the Legal Framework Order of 2002 ratified by the 17th Amendment of 2003. The 2002 amendment provides that no political party shall promote sectarian, ethnic, regional hatred or animosity or be titled or constituted as a militant group, and that every political party shall hold intra-party elections to select its office-bearers and party leaders. Is there anything fundamentally wrong with this change in Article 17? If not, why should it be repealed simply because it is a part of the 17th Amendment passed in the Musharraf era?

Local Government Institutions

Article 32 sets out as a Principle of Policy that the State shall encourage local government institutions composed of elected representatives of the concerned areas and that special representation shall be given in such institutions to peasants, workers and women. Through Article 140-A, inserted by Musharraf's Legal Framework Order 2002, each province is now required to make a law for establishing a local government system and to devolve political, administrative and financial responsibility to the elected representatives of the local governments. This new Article seeks to ensure implementation of the Principle of Policy set out in Article 32. I have no doubt that the federation should not impose Local Government systems on the Provinces as done by General Pervez Musharraf's National Reconstruction Bureau, through the Local Government Ordinances of 2001. At the same time the mandate contained in Article 140-A is surely a welcome development. There should be a functioning local government system made by each province to suit its own peculiar needs, and the provincial systems should have

some degree of permanence. The Charter of Democracy also speaks of the need to give constitutional protection to local bodies to make them autonomous and answerable to the people. This being so the intended repeal of the 'offending' parts of the 17th Amendment should not include Article 140-A.

The Presidency

Articles 41 to 49 of the Constitution deal with the Presidency. The original Constitution envisaged that the President was to be elected by the National Assembly and the Senate in a joint sitting. Zia-ul-Haq's Order 14 of 1985 expanded the electorate to include the four Provincial Assemblies. While doing so it is possible that Zia-ul-Haq had the Indian model in mind where too the President is elected by both the Union and the State Assemblies. However, it appears that Zia-ul-Haq's real intention was to make his electoral base substantially larger than that of the Prime Minister (Muhammad Khan Junejo) selected by him for election by only the National Assembly (Art 91).

The power to select the Prime Minister is one of the few areas in which Parliament was able to effect some change in Zia-ul-Haq's Order 14 of 1985 vide the 8th Amendment passed later that year. The 8th Amendment provided that after March 20, 1990 the President would be bound to appoint that MNA as Prime Minister who commanded a majority in the Assembly as ascertained in its special session.

President and the Composition of the Parliament

Article 50 of the original Constitution provided that Parliament shall consist of the National Assembly and the Senate. This was amended by Zia-ul-Haq's Order 14 of 1985 to prescribe that Parliament shall consist of the President, the National Assembly and the Senate. More frequently than not the debate on the supremacy of Parliament misses the obvious point that because the President is part of Parliament since 1985 the powers exercised by him do not conflict with the principle of Parliamentary supremacy. The right question to ask is what should be the powers of the President within the parliamentary system of which he is a part or, in other words, what should be the precise division of powers between the President on the one hand and the Prime Minister and his Cabinet on the other.

This question has been with us since 1947 when, unlike India where Jawarlal Nehru became Prime Minister, the Quaid-e-Azam decided to become the Governor-General of Pakistan. The Quaid presided over cabinet meetings. Had he lived till a constitution was framed would we have had a presidential or a parliamentary system? Even if the Quaid had decided in favour of a parliamentary system I doubt whether he would have agreed to a purely titular role for himself.

Till 1958 there was a sharing of power between the Governor-General/President and the Prime Minister with the balance tilting in favour of the latter, for a period of about 2-3 years, after the death of the Quaid and up to the assassination of Liaquat Ali Khan in 1951. From 1958 to 1972 we had three all-powerful Presidents. These include Ayub Khan, Yahya Khan and the late Zulfikar Ali Bhutto who was also during his tenure as President the first Civilian Martial Law Administrator. The Interim Constitution of 1972 envisaged a Presidential system.

1973 to 1977 was the first period in which the role of the Prime Minister was dominant. Then came General Zia-ul-Haq who was all in all till 1985. From 1985 to 1999 there was once again a sharing of powers between the President and the Prime Minister with the latter dominant only for that period of Mian Nawaz Sharif's tenure when Rafique Tarar was President and studiously refrained from exercising any of the powers vested in him.

After 1999 we have had two periods of Musharraf's rule - the first from 1999 to 2002 during which there was no Prime Minister and the second from 2002 to 2007 when there were Prime Ministers but whose continuance was at his (Musharraf's) suffering. Since 2008 we have yet again a system of shared power between the President and the Prime Minister. There are, in fact, evident signs of the re-emergence of the troika arrangement of the 1990s.

The Powers of the President

The powers presently enjoyed by the President under the Constitution, as amended by General Zia-ul-Haq and General Pervez Musarraf, need enumeration and discussion.

Power to Pardon

There is first the power to pardon, reprieve and respite, remit, suspend and commute sentences (Art 45). This power is to be exercised on the advice of the Prime Minister.

Right of Information to Cabinet Decisions

There is the right to be informed of all Cabinet decisions and proposals for legislation and the right to obtain such information relating to administrative affairs as the President may call for (Article 46). The President also has the right to ask the Cabinet to reconsider any matter that has been decided by the Prime Minister or a Minister (Art 46). The above rights have been made duties of the Prime Minister by the amended Art 46 inserted through Zia-ul-Haq's Order 14 of 1985. Under the original Constitution the President was to be kept informed on matters of internal and foreign policy and legislative proposals but not as a matter of duty cast on the Prime Minister.

Right to Require Cabinet to Re-Consider Decisions

The President has the right to require the Cabinet or the Prime Minister to re-consider any advice (Article 48). This too was inserted by Zia-ul-Haq's Order 14 of 1985. However, the President is bound to act as per the re-considered advice. Under the original provision the President was bound by the advice of the Prime Minister and no order signed by him was valid till counter-signed by the Prime Minister.

Power to Appoint Caretaker Cabinet

There is the power, in his discretion, to appoint a Caretaker Cabinet and to fix a date for General Elections where he, the President, has dissolved the National Assembly (Article 48). Once again this is an insertion made through Zia-ul-Haq's Order 14 of 1985.

Power to hold Referendum

There is the power, either in his discretion or on advice of the Prime Minister, to refer any matter of national importance to a national referendum. Yet again this was inserted through Zia-ul-Haq's Order 14 of 1985.

Right to Address the Parliament

There is the right to address the Parliament as also the right to send messages to Parliament. There is also the duty to address the first session of each Parliamentary year (Article 55). The right to send messages and the duty to address the first session were added by Zia-ul-Haq's Order 14 of 1985.

Power to Dissolve National Assembly

There is the power to dissolve the National Assembly, where after a vote of no confidence has been passed against the Prime Minister, no other member is able to secure the confidence of a majority. This Article 58(2)(a)

was added by the 8th Amendment in November 1985. There is also the power to dissolve the National Assembly where a situation has arisen in which the Government cannot be carried on in accordance with the Constitution and an appeal to the electorate is necessary. Article 58(2)(b) was also added by the 8th Amendment. In between 1988 and 1996, this power was exercised by Zia-ul-Haq (once), Ghulam Ishaq Khan (twice) and Sardar Farooq Ahmad Khan Leghari (once). It was omitted by the 13th Amendment in 1997 and reinstated by the 17th Amendment of 2003 with the addition that any dissolution has to be referred to the Supreme Court within 15 days and the Supreme Court has to give final decision in the matter within 30 days.

Right to Refer Bills back to the Parliament

There is the right to refer any bill, other than a money bill, back to Parliament for re-consideration (Article 75). This is yet again an insertion made by Zia-ul-Haq's Order 14 of 1985.

Power to Promulgate Ordinances

There is the power to promulgate Ordinances when the National Assembly is not in session if the President is satisfied that immediate action is required (Article 89). This is an unchanged power dating back to 1973. It is to be exercised on the advice of the Prime Minister. It is of some note that an Ordinance can be promulgated even if the Senate is in session. It is only when the National Assembly is in session that the power cannot be exercised.

Executive Authority of the Federation

Article 90 as amended by Zia-ul-Haq's Order 14 of 1985 vests the executive authority of the Federation in the President. The original Article stated that the executive authority shall be exercised in the name of the President by the Federal Government consisting of the Prime Minister and the Federal Ministers. The post 1985 Constitution does not contain any definition of what comprises the Federal Government.

Power to Require Prime Minister to Obtain Vote of Confidence

There is the power to require the Prime Minister to obtain a vote of confidence (Article 91). Yet again an insertion made by Zia-ul-Haq's Order 14 of 1985. This was the provision invoked by President Ghulam Ishaq when he required the late Mohtarma Benazir Bhutto to seek a fresh vote of confidence in 1989.

Power to Appoint Ministers

The President has the power to appoint the Federal Ministers, the Ministers of State and the Advisors (not more than 5) (Articles 92 and 93). The appointments are to be made on the advice of the Prime Minister. In the original Constitution, the President had no role as the Ministers were to be appointed by the Prime Minister himself. Also there was no provision for appointment of any Advisors. The changes as above were yet again brought about by Zia-ul-Haq's Order 14 of 1985.

Rules of Business

The original Article 99 provided that the Rules of Business would be made by the Federal Government. After Zia-ul-Haq's Order 14 of 1985 the power to make such rules vests in the President albeit on the advice of the Prime Minister.

Power to Appoint Attorney General

The President has the power to appoint the Attorney General of Pakistan who is to hold office during his pleasure (Article 100). This power is to be exercised on the advice of the Prime Minister and there has been no change in the original provision after 1973.

Power to Appoint Governors

There is the power to appoint Governors after consultation with the Prime Minister. As per the original 1973 Article the appointment was to be made on the advice of the Prime Minister. Zia-ul-Haq's Order 14 of 1985 empowered the President to make the appointment in his discretion. Through the 8th Amendment a compromise was struck and the appointments were to be made after consultation with the Prime Minister. The 13th Amendment of 1997 revived the original 1973 position. The 17th Amendment of 2003 has revived the 8th Amendment. Was the 'compromise' arrived at in 1985 a reasonable one that should be allowed to continue or is there a necessity to revert yet again to the original 1973 position?

Power to Approve Proposals of the Governor on Caretaker Cabinet

There is the power to approve the proposals of the Governor in regard to appointment of a Caretaker Cabinet where the Governor has dissolved the Provincial Assembly (Article 105). This power is yet again an insertion made by Zia-ul-Haq's Order 14 of 1985.

Power to Constitute National Economic Council

The President has the power to constitute the National Economic Council (Article 156). This power is to be exercised on the advice of the Prime Minister and there has been no change in the original provision after 1973.

Governors' Powers to Dissolve Provincial Assemblies

The Governors have powers akin to those of the President under Articles 58(2)(a) and 58(2)(b) viz to dissolve the Provincial Assembly where a vote of no confidence having been passed against the Chief Minister no other member is able to show a majority, and to dissolve the Provincial Assembly on forming an opinion that the Provincial Government is not being run in accordance with Constitution (Art 112).

However, the Governors cannot exercise these powers without the previous approval of the President. Article 112(2)(b) and Article 58(2)(b) have a common history inserted by the 8th Amendment, omitted by the 13th Amendment and re-instated by the 17th Amendment. However, while doing so the Constitution-makers have perhaps omitted to consider that whereas Article 58(2)(b) is the power of the President, the approval or otherwise under Article 112(2)(b) is to be given on the advice of the Prime Minister. The power under Article 112(2)(b) is in the ultimate analysis the power neither of the President nor the Governor but the Prime Minister.

Power to Constitute National Finance Commission

The President has the power to constitute a National Finance Commission, at intervals not exceeding 5 years, to make recommendations with regard to the distribution of revenues between the Federation and the Provinces, and to determine the share of each Province (Article 160). He is also empowered to pass an order in accordance with the NFC recommendations. The power to constitute the National Finance Commission is to be exercised on the advice of the Prime Minister and there has been no change in the original provision after 1973.

Approval of the President for Provincial Taxes

No bill or amendment, which imposes or varies a tax or duty in which the provinces are interested or which varies the meaning of 'agricultural income' for the purpose of income tax laws can be moved in the National Assembly except with the previous approval of the President (Article 162). This approval is to be given on the advice of the Prime Minister and there has been no change in the original provision after 1973.

Power to Appoint Auditor General

The President has the power to appoint the Auditor General of Pakistan (Article 168). This power is to be exercised on the advice of the Prime Minister and there has been no change in the original provision after 1973.

Power to Appoint Chief Justice

The President has the power to appoint the Chief Justice of Pakistan and other Judges of the Supreme Court (Article 177), Acting Judges of the Supreme Court (Article 181), the Adhoc Judges of the Supreme Court as proposed by the Chief Justice (Article 182), the Chief Justices and Judges of the High Courts (Article 193), Additional Judges of the High Courts (Article 197), Chief Justice and Judges of the Federal Shariat Court (Article 203-C), and to transfer Judges from one High Court to another (Article 200). The exercise of these powers is subject to consultations and procedures set out in the Al-Jihad Trust case decided by the Supreme Court in 1996. The President also has the power to refer a misconduct complaint against a Judge of the Superior Courts to the Supreme Judicial Council and to remove such Judge from office on the report of that Council (Article 209). The Federal Shariat Court was established by Zia-ul-Haq's Order 1 of 1980.

Power to Appoint Chief Election Commissioner

The President has the power to appoint, in his discretion, the Chief Election Commissioner. Yet again this power was conferred by Zia-ul-Haq's Order 14 of 1985. In view of the imperative requirement that the Chief Election Commissioner should be a person of high judicial probity who should also enjoy the confidence of the Opposition parties would it not be desirable to provide that his appointment shall be made by the President after consultation with the Prime Minister, the Chief Justice of Pakistan and the Leader of the Opposition in the National Assembly?

Power to Appoint Caretaker Cabinets

The President has power to appoint, in his discretion, Caretaker Cabinets after dissolution of the Assemblies (Article 224). This power has been conferred by the Legal Framework Order 2002. Given that elections should be held under neutral caretakers, should not this provision be retained even though it is part of the 17th Amendment? It would be desirable, however, to confine the scope of this power to the appointment of the Caretaker Prime Minister and Caretaker Chief Ministers who should be free to select their own Caretaker Ministers. Furthermore, the exercise of the power to appoint the Caretaker Prime Minister and Caretaker Chief Ministers should be made subject to consultation with the out-going incumbents and the Leaders of the Opposition in the respective assemblies.

Power to Appoint Chair and Members of the Council of Islamic Ideology

The President has the power to appoint the Chairman and Members of the Council of Islamic Ideology (Article 228). This power is to be exercised on the advice of the Prime Minister and there has been no substantial change, insofar as it relates to the power of the President, in the original provision after 1973.

Power to Issue Proclamations of Emergency

The President has the power to issue Proclamations of Emergency, as also an order suspending fundamental rights during the periods of emergency (Articles 232, 233, 234 and 235). These powers are to be exercised on the advice of the Prime Minister and there has been no substantial change in the original provisions, insofar as they relate to the powers of the President, after 1973.

Power to Appoint Chair Federal Public Service Commission

The President has the power to appoint, in his discretion, the Chairman of the Federal Public Service Commission (Article 242). Yet again this discretionary power was conferred by Zia-ul-Haq's Order 14 of 1985.

Supreme Command of the Armed Forces

The supreme command of the Armed Forces of Pakistan vests in the President (Article 243). This command was conferred by Zia-ul-Haq's Order 14 of 1985. It was not there in the original Constitution.

Power to Appoint Chairman Joint Chiefs and Services Chiefs

The President has power to appoint the Chairman Joint Chiefs and the Chiefs of Staff of the three services in consultation with the Prime Minister (Article 243). Under the original Article 243 the appointments were to be made on the advice of the Prime Minister. Through Zia-ul-Haq's Order 14 of 1985 the President was empowered to make these appointments in his discretion. The 13th Amendment of 1997 restored the original provision. Under Pervez Musharraf's Legal Framework Order of 2002 the President regained the power to make these appointments in his discretion. The 17th Amendment of 2003 resulted in the present compromise: the appointments are to be made by the President in consultation with the Prime Minister. The crucial appointment is that of the Chief of Army Staff (COAS). General Zia-ul-Haq though not the senior-most was appointed on the advice of the late Zulfikar Ali Bhutto. General Pervez Musharraf though not the senior-most was appointed on the advice of Mian Nawaz Sharif. Does it really matter therefore who appoints the Army Chief? Ghulam Ishaq Khan appointed General Waheed Kakar as the COAS

in his discretion but did this consideration weigh with General Waheed Kakar when he decided to facilitate the departure of both Ghulam Ishaq Khan and Mian Nawaz Sharif in 1993? Once he is appointed, the COAS becomes a power in the land. Would not future appointments made by the President and the Prime Minister in consultation with each other be more likely to result in selection of the right person to head the most powerful institution in the country, as against a selection made by one person only, be he the President or the Prime Minister?

Consultations a mere Formality

Under a new, indeed novel, definition of 'consultation' inserted in Article 260 through the Legal Framework Order 2002 consultations are not binding on the President except in the matter of appointment of judges. Constitutional consultations necessarily imply the development of a consensus. The new definition has made consultation a mere formality instead of a consensus building process. Clearly there is a need either to re-define this word or to omit the new definition.

Sixth Schedule and President's Powers

The laws specified in the Sixth Schedule to the Constitution cannot be amended without the previous sanction of the President after consultation with the Prime Minister (Article 268). Musharraf's Legal Framework Order of 2002 added to the list in the Sixth Schedule the State Bank of Pakistan Act 1956, the NAB Ordinance 1999, the four Provincial Local Government Ordinances of 2001, the Election Commission Order 2002, the Conduct of General Elections Order 2002, the Political Parties Order 2002, the Police Order 2002 and the 2002 Order which bars a person from holding office of Prime Minister or Chief Minister for a third term, as also the requirement for consultation with the Prime Minister. Since under the new definition of 'Consultation' in Article 260 the consultation is not binding this effectively means that the said laws cannot be amended without the consent of the President.

The protection given to the four Local Government Ordinances and to the Police Order was time-limited and is due to expire later this year. The Parliamentary Committee should give serious consideration to deletion of the entire Sixth Schedule which presently gives special protection to as many as 35 laws. There is no real rationale for protecting any of these 35 laws from the normal course of legislation.

Power to Give Directions on FATA Affairs

The President has the power to give directions with reference to the affairs of the Federally Administered Tribal

Areas (FATAs), to make Regulations for the peace and good governance of these Areas and to decide whether or not an act of Parliament or Provincial Assembly shall extend to such Areas (Article 247). He also has power to direct the Governors of the Provinces to act as his agent in the FATAs (Article 145). These powers are to be exercised on the advice of the Prime Minister and there has been no change in the original provisions after 1973.

Not Answerable to Court for the Exercise of Powers

The President is not answerable to any Court for the exercise of powers and performance of his functions. No criminal proceedings can be initiated or continued against him. Institution of civil proceedings against him in his personal capacity is also subject to specified restrictions (Art 248). There has been no change in the original provision after 1973.

Powers of the President: What Should be the Course for Constitutional Amendments?

A number of 'interesting' conclusions emerge from the above recital. After enactment of the 1973 Constitution the first and last President, who was a purely titular figure, was Ch. Fazal Elahi. At that time the President had no power that could be exercised by him independent of the advice of the Prime Minister to the extent that no order signed by him had any legal validity until countersigned by the Prime Minister. The balancing, or over-balancing, of powers between the President and the Prime Minister was brought about by Zia-ul-Haq's Order 14 of 1985. It was this Order which fundamentally altered the 'spirit' of the 1973 Constitution and made it the present mix of Presidential and Prime Ministerial powers. If the ultimate objective now is to make the President a purely titular figure, like the Queen of England, then we will need to repeal not only the 17th Amendment of 2003 which validated Pervez Musharraf's Legal Framework Order 2002 but also the 8th Amendment of 1985 which validated Zia-ul-Haq's Revival of Constitution Order 14 of 1985.

Since 1985 we have had a constitutional system in which there is a sharing of powers between the President and Prime Minister. It appears to me that, leaving aside other non-Constitutional factors such as the selection by Pervez Musharraf of Prime Ministers who had no independent political support and the fact that Asif Zardari, and not Yousaf Raza Gillani, is the head of the main party in the ruling coalition, the balance of power is tilted in favour of the Presidency by Article 58(2)(b). Should it therefore be

omitted as was done by the 13th Amendment of 1997? On the two occasions viz 1977 and 1999 when crisis situations arose and there was no Article 58(2)(b) to resolve them within constitutional parameters the end result was military rule. The dissolutions of the National Assembly in 1988, 1990, 1993 and 1996, in the exercise of Presidential powers under Article 58(2)(b), were not desirable events, notwithstanding the fact that in 1990 and 1996 these dissolutions were upheld by the Supreme Court, but at least what followed remained within constitutional limits. Might it then not be a better idea that instead of omitting Article 58(2)(b) the exercise of this power by the President is made subject to the condition that in case the dissolution order is struck down by the Supreme Court this will automatically result in the removal of the President from office and the fresh elections that follow will be for the office of the erring President and not for the National Assembly which he sought to dissolve.

Cabinet Government

With respect once again to those who may hold a contrary opinion a system in which the Prime Minister has all the powers is as flawed as one in which the President has them. A truly democratic parliamentary system is one in which the powers of Government vest in and are exercised by the Cabinet. Article 90 of the original Constitution spoke of the executive authority of the Federation to be exercised, in the name of the President, by the Federal Government consisting of the Prime Minister and the Federal Ministers who were to be collectively responsible to the National Assembly. Have we seen Cabinet Government since 1985? The short answer is no. The reason is again not far to seek. A Cabinet of 15 to 20 Ministers can govern. A Cabinet of 60 plus Ministers cannot. Over-sized Cabinets mean that all important decisions of State are taken elsewhere either by the President or by the Prime Minister or by both or by a troika and not by the Cabinet who may be informed after but not before such decisions are taken.

Increase in the Strength of Legislatures

The number of seats in the National Assembly has been increased to 342 including 60 seats for women and 10 for non-Muslims, and the voting age reduced to 18 by Pervez Musharraf's Legal Framework Order 2002 (Art 51). Similarly the number of seats in the Provincial Assemblies has been increased to 65 in the case of Baluchistan, 124 in the case of NWFP, 371 in the case of Punjab and 168 in the

case of Sindh, inclusive of reserved seats for women and non-Muslims by the aforesaid Order (Article 106). There is a consensus of opinion that these changes should be retained.

The number of Senators has also been increased to 100 by Pervez Musharraf's Legal Framework Order 2002. The 100 Senators include 22 from each of the four Provinces, 4 from Islamabad and 8 from the FATAs (Article 59). The Senators representing the Provinces are elected by the respective Provincial Assemblies. The 4 Islamabad Senators by the National Assembly while the 8 FATA Senators are elected by the 12 MNAs from FATA! Surely the electoral base of the Senators requires a revisit especially the electoral base for the FATA Senators. If, at any stage, the Senate is to be given co-equal powers with the National Assembly then like the MNAs the Senators should also be elected by the direct vote of the people of Pakistan.

Qualification for Membership of Assemblies

Article 62 sets out the qualifications for membership of the Assemblies. The original article required an aspirant to be a citizen of Pakistan, to be a registered voter and not less than 25 years of age in the case of the National Assembly and not less than 30 years of age in the case of the Senate and to possess such other qualifications as may be prescribed by an Act of Parliament. Article 62 sets out the disqualifications for membership. The original article disqualified a person declared by a Court to be of unsound mind, an un-discharged insolvent (i.e. a bankrupt person), a person who had ceased to be a Pakistani citizen or who had acquired citizenship of a foreign state, a holder of office of profit in the service of Pakistan and those held to be disqualified under an Act of Parliament. The Representation of the People Act 1976 added another dozen disqualifications.

In the Constitution of India the qualifications are citizenship of India, age not less than 25 years in the case of the Lower House and not less than 30 years in the case of the Upper House and such other qualifications as may be prescribed by law. The qualification added by the Indian Representation of the People Act of 1951 is that the aspirant must be a registered voter. The list of disqualifications, for periods upto five years, include convictions in election related offences, imprisonment of not less than 2 years in other offences, failure to lodge returns of election expenses, interest in government contracts for supply of goods and services, holding of office of profit in government and dismissal from

government service on grounds of corruption or disloyalty to the State.

Zia-ul-Haq's Order 14 of 1985 extended the list of qualifications from 4 to 9 and made the disqualifications contained in the 1976 Act part of the Constitution itself. The list of disqualifications was increased in Article 63 from 5 to 19. Pervez Musharraf's Legal Framework Order of 2002 has made the list of disqualifications even more stringent e.g. a person convicted by a Court on a charge of corrupt practice or misuse of powers is now disqualified for life as against 5 years disqualification set out in Zia-ul-Haq's Order 14 of 1985. Self-evidently the objective of this disqualification clause was the permanent disqualification of, amongst others, Mian Nawaz Sharif. It appears to me that the lists of qualifications and disqualifications should be reduced to a minimum. We should repeal the amendments made by both Zia-ul-Haq and Pervez Musharraf and restore the original provisions of 1973. Simultaneously Parliament should also re-visit and delete all those disqualifications contained in the Representation of the People Act whose original or continuing intent is the disqualification of specific politicians or political parties. It is for the people of Pakistan to decide who they should elect as their representatives in the National Assembly, Senate and the Provincial Assemblies. It should be for the people of Pakistan to 'disqualify' persons through their freely cast votes, and not the legal system. Apart from mostly fruitless litigation, after each election, the extended lists of qualifications and disqualifications serve little or no purpose whatsoever.

Validation of Military Rule

The Supreme Court validated Zia-ul-Haq's martial law in the Nusrat Bhutto case. Parliament followed suit vide the 8th Amendment and Article 270-A. The Supreme Court validated Pervez Musharraf's military rule imposed in 1999 in the Zafar Ali Shah case. Parliament followed suit vide the 17th Amendment and Article 270-AA.

In the Asma Jilani case the Supreme Court declared General Yahya Khan a usurper. Notwithstanding this declaration Parliament inserted Article 270 into the 1973 Constitution that validated all that was done during Yahya Khan's tenure. The only difference of any substance between Article 270 validating Yahya Khan's rule and Articles 270-A and 270-AA validating the military take-overs by Zia-ul-Haq in 1977 and Pervez Musharraf in 1999 is that in Article 270 Parliament reserved to itself the right to undo any of Yahya Khan's orders by a simple majority.

Articles 270-A and 270-AA can only be undone by Constitutional amendments.

The validation of Yahya Khan's rule was not the only such validation by the members of the National Assembly who passed the 1973 Constitution. They also approved Article 269 validating the Civilian Martial Law of the late Zulfikar Ali Bhutto from December 20, 1971 to April 20, 1972.

In the Tika Iqbal case, the Supreme Court, prior to the restoration of the present Chief Justice and other Judges made non-functional on 3rd November 2007, validated Pervez Musharraf's acts of 3rd November 2007 and the Provisional Constitution (Amendment) Order of November 15, 2007 whereby, amongst other things, Article 270-AAA has been inserted ratifying all that was done during the Emergency rule from 3rd November 2007 to December 15, 2007. Will Parliament follow suit yet again?

Parliament's Validation of the Actions of November 3, 2007

Clearly the act of removal of the Chief Justice of Pakistan and other Judges of the Superior Courts on November 3, 2007 cannot and must not be validated. But the orders passed during the aforesaid Emergency rule also include, for example, the establishment of the Islamabad High Court and conferring of powers on the Supreme Court to transfer a case from any High Court to its own jurisdiction. There is no necessary reason to undo either of these acts. Parliament will also have to decide how to regularize or not the oaths taken and appointments made during the Emergency. Eventually an amended Article 270-AAA similar to the original Article 270 validating Yahya Khan's rule may be the only way forward.

While deciding which provisions of the Musharraf-era amendments and orders, as also those made by Zia-ul-Haq, should be repealed or retained I would commend to the Parliamentary Committee the following observations from the judgment of the Supreme Court in Asma Jilani's case which declared Yahya Khan a usurper:

“There is no doubt that a usurper may do things both good and bad, and he may have during the period of usurpation also made many Regulations or taken actions which would be valid if emanating from a lawful Government and which may well have, in the course of time, affected the enforcement of contracts, the celebration of marriages, the settlement of estates, the transfer of property and similar subjects.

All these cannot be invalidated and the country landed once again into confusion. Such a principle has also been adopted in America in various cases which came up after the suppression of the rebellion of the Southern States and the American Courts too adopted the policy that where the acts done by the usurper were 'necessary to peace and good order among citizens and had affected property or contractual rights they should not be invalidated', not because they were legal but because they would cause inconvenience to innocent persons and lead to further difficulties.”



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