Eighth Amendment and the Attorney General

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By Senator PROF KHURSHID AHMAD

In response to my rejoinder to his statement published in the *Pakistan Times* of August 24, 1989, the Attorney General chose to draw up on an article of mine written in October 1985 while discussion in the National Assembly on the Eighth Amendment was unfolding and a final version of the Bill on which consensus was sought had yet to crystallise. In that article I had emphasised that "Constitution must never be tailored to suit individuals howsoever noble or great they may be. Whenever institutions have been tailored to fit individuals, such institutions have not outlived the persons for whom they were made." I also emphasised that "Constitution should always be a consensus document. It should be above party politics." In view of this, I *had submitted that the amendments made by the PPP government during 1972-77* (except the one about the Ahmadis had been incorporated arbitrarily in the interest of and at the strength of the party in power alone, and "were never accepted by the nation and never enjoyed the confidence of the people." I had requested the Official Parliamentary Group and the Independent Parliamentary Group to arrive at a consensus, as "parliament is competent to amend a consensus Constitution through a new consensus."

GENERAL THRUST

While I stand by the general thrust of my argument and acknowledge that the final consensus version of the Eighth Amendment did correct a number of weaknesses and lapses of P.O. 11, 14, 20 and 24 of March 1985, there is scope for improvement in a number of provisions of the Constitution as they stand today. Negotiations between the PPP, the IJI and other opposition groups, and dialogue between representatives in the National Assembly and the Senate is the only way to arrive at an agreed set of amendments to the Constitution.

Every Constitution is a living document and is expected to respond to the challenges that emerge from time to time. I had written in my first rejoinder (full text published in *The Nation*) that "even those who had certain reservations about some provisions of the Eighth Amendment are now heaving a sigh of relief, admitting that now there is a better balance of power and a more effective set of checks and balances between the President and the Prime Minister, safeguarding the process of democracy in the country and restraining the People's Party from becoming wielders of despotic power." I confess, I am one of them. If I had adopted the technique the learned Attorney General had chosen to follow, I could have advanced ample material to draw from the positions he took in the Asma Gilani case.

I would like to thank the learned Attorney General for correcting me on the matter of constitutional amendments made by Gen. Ziaul Haq. I have no hesitation in admitting that he is right in the case of President's Order No.3 of 1979 through which Chapter 3-A in Part VII of the Constitution was added, i.e the creation of the institution of Shariat Benches at High Courts and Supreme Court. However, it deserves to be noted that this Amendment represented a step in the direction of fulfilling the Islamic provisions of the Constitution and was vastly acclaimed in the country and abroad. It added to the rights of the people and did not deprive them of any rights that the Constitution ensured them.

Secondly, the Attorney General disclaims my observation that "during the entire PPP rule — 1972-77 the country was under Martial Law or was under Emergency powers and suspension of fundamental rights." He justifies that Bhutto had to become a civilian Chief Martial Law Administrator because the Supreme Court laid down that after abrogation of the Constitution, the 'law-giver' of the land was the CMLA. If this was the position then what was the status and role of the National Assembly in adopting the Interim Constitution (1972) and the Constitution of 1973? And if, according to the Supreme Court, President Ayub had no authority to hand over the reins of power to Gen. Yahya Khan and that Gen. Yahya Khan was a "usurper", how could he transfer legitimate power to the civilian CMLA and the two act as valid law-givers? Has not the Supreme Court observed in the Asma Gilani case that:

CIVILIAN CMLA

"Kelson, therefore, does not contemplate an all-omnipotent President and Chief Martial Law Administrator sitting high above the society and handing its behests downwards. No single man can give a Constitution to the society which, in one sense, is an agreement between the people to live together under an order which will fulfil their expectations, reflect their aspirations and hold proviso for the realisation of their selves. It must, therefore, embody the will of the people which is usually expressed through the chosen representatives. It must be this type of Constitution from which the norms of the new legal order will derive their validity ... A person who destroys the national legal order in an illegitimate manner cannot be regarded as a valid source of law-making.".

Was it really essential for Mr Bhutto to take over and continue as Chief Martial Law Administrator? Did Mujibur Rahman become a CMLA in Bangladesh or did he just take over as Prime Minister and framed a new Constitution? Is it not a fact that the Assembly was called in April 1972 only after persistent demands from all parts of the country and after all efforts on the part of the PPP government to justify continuation of Martial Law had totally failed? Is it not a fact that all actions taken under Martial Law by Mr Bhutto were given blanket indemnity in the Interim Constitution (1972) as also in the 1973 Constitution ([illegible])?

About continuation of Emergency and suspension of Fundamental Rights, the Attorney General's claim is not correct. Emergency was imposed on November 23, 1971, and "continued in force by Article 280 of the Constitution of the Islamic Republic of Pakistan, and varied on 21st April 1977". It was revoked by a Presidential Proclamation dated September 15, 1977. During the period of Mr Bhutto's government, there was not a single day on which Emergency did not remain imposed on the country.

The learned Attorney General claims that Fundamental Rights were suspended on July 5, 1977. Perhaps, he has forgotten that the accord between PPP and PNA which he has invoked contained as item number seven, the fol-

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The declaration of Emergency shall be withdrawn the signing of the Accord and all Fundamental Rights shall stand restored. shall a new Emergency be imposed for the duration of the Accord except with the previous approval of the Council.

Fundamental Rights were not restored, what had been sought restored? He claims Fun-

damental Rights were restored in August 1974. To set the record straight, let me quote from the Report of the Amnesty International, London, for the year 1975-76:

"The pattern of arrest and detention in Pakistan of critics of the government: — mainly under the emergency laws — has continued over the past year. Those arrested include writers, editors, printers and, on one particular occasion, even lawyers assisting in ca[illegible] a political nature ... In De[illegible]er 1975, Attorney General [illegible]hya Bakhtiar stated that there were only nine political prisoners in Pakistan. Amnesty International feels that this figure in no way reflects the true scale of political imprisonment... "In November 1975, unofficial estimates of the number of political prisoners in Pakistan ranged as high as 38,000. This figure appears to be based on a statement given by the government of Sindh province, giving the total of prisoners detained during 1974 under preventive detention laws (other than DPR) 36,279. Figures of a similar range were given by the government for 1972 and 1973... Amnesty International estimates on the basis of these and other reports that at least several thousand prisoners are actually in prison for political reasons."

Amnesty International Report for 1977 expressed deep concern about the detention, trial procedures, and treatment of government opponents in Pakistan. It estimated that "before 1977, there were already at least several thousand political prisoners in Pakistan, the vast majority held without trial." The Report described "the serious erosion of fundamental rights in Pakistan reflected in the post-election events."

The learned Attorney General has also claimed that "not a single amendment was passed by throwing out any member of the opposition from the Assembly," and has asked me to specify the date and the amendment which was passed by throwing the opposition MNAs out. He has called my allegation "baseless" and a "wild statement." it is not my memory that is failing; it is the Attorney General who is trying to hide facts and to mislead the public.

The facts are that on November 14, 1975 when the Assembly was discussing the Constitution (Fourth Amendment) Bill, members of the opposition were not allowed to introduce amendments, were harassed and then on the pretext of disorderly behaviour, thrown out physically from the Assembly. Although only three persons were named by the Speaker, almost all opposition members — including the acting Leader of the Opposition Mufti Mahmud and Mr Ahmad Raza Khan Qasuri who held the [illegible] the time of adjournment

day had passed differently in the history of Pakistan. It had been an achievement of the PPP that it had taken the opposition into confidence and produced an acceptable Constitution. The scenario changed after that. Till then we had been complaining that the government was not working according to the Constitution. It then resorted to bringing about amendments in the Constitution simply on the basis of its brute majority, — amendments that changed the very structure of the Constitution. The Constitution (Fourth Amendment) Bill was steam-rollered on November 14 without giving the opposition an opportunity to express its viewpoint. Opposition MNAs were thrown out of the Assembly by persons belonging to the Federal Security Force. Outside doors of the Assembly were closed and the Bill was passed in twenty-three minutes after that (expulsion)."

This is the evidence given by one who was physically thrown out. The disgraceful event has also been recorded in a number of books published in the world. Let me quote Professor Khalid B. Sayeed, who records in his book *Politics in Pakistan: The Nature and Direction of Change* (Praeger, New York, 1980):

"Later, during a National Assembly session in November 1975, when the opposition members voiced their bitter opposition to the way the government was pushing through a constitutional amendment limiting dissent, the Federal Security Force was brought in and several protesting opposition members were beaten and physically ejected from the assembly (p.107)."

A special correspondent of *The Guardian*, London, also records the incident in a story published on February 6, 1976. Let the readers decide who is distorting facts: the Attorney General or someone else?

The Attorney General insists that amendments to the 1973 Constitution were not arbitrary because they were passed by the majority. Nobody denies their having been passed by majority.

PPP had 102 captive votes [illegible] Assembly of 144. The whole question about their arbitrariness relates to three aspects: First, they were introduced by the government on the basis of brute majori-

Eighth Amendment and the Attorney General—IV

By Senator PROF. KHURSHID AHMAD

The Attorney General has contended that in a parliamentary system the President cannot dissolve the National Assembly/Parliament without the advice of the Prime Minister. I have shown that in a number of parliamentary democracies of the West, President has the right to dissolve parliament in certain cases without the advice of the Prime Minister or even against his advice, and that does not adversely affect the parliamentary character of the Constitution. The Inter-Parliamentary Union reference book *Parliaments of the World*, states:

"In its classic form the power to dissolve parliament is strictly speaking one of the prerogatives of the head of the state, who is called upon to arbitrate in dispute between the executive and the legislature: this is the spirit of the provision for this power in fourteen countries which include France, Italy."

DISSOLUTION

It is not too difficult to realise that in a case where the head of the state has to arbitrate between the executive and the legislature, his power is discretionary. If he was to act on the advice of the executive head (the Prime Minister) how could he arbitrate? The power to dissolve parliament in all these cases is not dependent on the advice of the Prime Minister, but is there in spite of him. If this is not discretion, what else is?

The learned Attorney General also tries to shift the ground 'from all parliamentary democracies' to 'the Westminster model'. He says: "Besides, we are following and talking about the British pattern of parliamentary system."

Let us now take up the British model. First of all, the 1973 Constitution is based on the British parliamentary model, as we have earlier shown. In the British parliamentary model, the Prime Minister can be removed by a simple majority and has no absolute power over parliament. The Prime Minister is a creature of parliament and is accountable to it. The 1973 Constitution made even parliament subservient to the Prime Minister. It was not a parliamentary system, but a mockery of it.

For the sake of argument, I ignore these and other differences between the two systems including the fact that Britain has no written Constitution and we have one; that Britain has constitutional hereditary monarchy and a hereditary House of Lords, we have none; that Britain has a civil service which is truly apolitical and works as a faceless steel framework for administration and we lack such an administrative machinery; that Britain has a judiciary whose powers have never been tampered with in recent history and we only wish we could have a similar institution; that Britain has a free press that works as a watch-dog of democracy and is not subject to the influence, interference and manipulation by the executive, and less said about the state of our media (a few illustrious examples notwithstanding), the better.

Even if we ignore all these realities, I want to submit with all humility that the learned Attorney General is not correct when he asserts that the issue is so firmly settled in the British parliamentary system. If anyone cares to study and examine the literature produced on this issue during the last one century, one cannot but agree that the issue is not uncontroversial and settled as the learned Attorney General assumes. The leading constitutional lawyer, Sir Ivor Jennings, says in his book, *Cabinet Government*

"The queen's funcition is, it is suggested, to see that the Constitution functions in the normal manner. It functions in the normal manner so long as the electors are asked to decide between competing parties at intervals of reasonable length. She would be justified in refusing to assent to a policy which subverted democratic basis of the Constitution, by unnecessary or indefinite prolongations of the life of parliament, by a gerrymandering of the constituencies in the interests of one party, or by fundamental modification of the electoral system to the same end. She would not be justified in other circumstances; and certainly the King would not have been justified in 1913."

BRITISH CASE

After establishing the fact that in practice "a parliament is dissolved by the Queen on advice before the five years elapse:" and formulating three critical questions about the exercise of this prerogative, that is, (a) the advice upon which it is exercised, (b) whether the Queen is constitutionally bound to accept such advice, and (c) whether the Queen can dissolve parliament without advice; Sir Ivor Jennings concludes:

"It will be seen that for more than a hundred years there is no clear case in which the sovereign has rejected advice to dissolve, though there have been examples in other Commonwealth countries. There has been, nevertheless, a persistent tradition that he could refuse if the necessary circumstances arose. It is difficult to see, what those circumstances would be. An appeal to the electorate is an appeal to the supreme contitutional authority...If the major parties break up, the whole balance of the Constitution alters; and then, possibly, the Queen's prerogative becomes important...Thus, while the Queen's personal prerogative is maintained in theory, it can hardly be exercised in practice."

So the situation is not as monolithic as the learned Attorney General would like us to believe. In the constitutional debate that arose on the Home Rule Bill in 1913 *The Times* took the position as to the "undoubted right of the sovereign to dissolve parliament" that: "Legally there is no question that under the Constitution there are certain reserved rights of the Crown; but they are atrophied by long disuse."

In response to this, Sir William R. Anson, a leading constitutional lawyer, wrote:

"The facts are there. The government have taken advantage of a combination of groups in the House of Commons to deprive the Second Chamber of its constitutional right to bring about an appeal to the people on measures of high importance which have never been submitted to the consideration of the electorate. While this part of our Constitution is in abeyance, they are pressing on legislation which will shortly lead to civil war.

"Our only safeguard against such a disaster is to be found in the exercise of the prerogatives of the Crown. I am not ready to admit that, under such circumstances, these prerogatives have been atrophied by disuse; but, on

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the other hand, they can be exercised only under certain conditions which those who write on this subject are apt to ignore.

"Mr Cave (letter in *The Times* is doubtless right in holding that a dissolution would be a milder exercise of the prerogative than the refusal of the Royal Assent to a Bill."

While Lord Hugh Cecil, Prof. J.H. Morgans and others did not agree with the view that the Crown may use its prerogative without the advice of the ministers, leading constitutional lawyer, Prof A.V. Dicey supported the view that the prerogative was very much there. He wrote:

"Allow me to express my complete agreement with Sir William Anson's masterly exposition of the principles regulating the exercise of the prerogative of dissolution...

"The question is sometimes now raised whether during the present political crisis the King could rightly or wisely refuse assent to the Home Rule Bill after it should for a third time have been passed by the House of Commons and rejected by the House of Lords. This is happily a purely academic inquiry on which I decline now to enter. Every advantage by way of appeal to the electors, in consequence of the exercise of the so-called Royal veto, can be far better and more regularly obtained by a dissolution of parliament. Mr Balfour has struck the right note. The safety and the prosperity of the United Kingdom absolutely demand a speedy dissolution."

Let me conclude this part of our discussion by quoting from Dicey's *Law of the Constitution* (ninth edition, London: Macmillan & Co. 1941), where he expounds the established doctrine and about which he has claimed in his letter to The Times (September 15, 1913) that "this doctrine has been repeated and defended during the last 28 years in every edition of my book. My opinion as to the occasions on which a dissolution may rightly take place has, as far as I know, never been assailed and assuredly has never been controverted by any writer of authority." Let us see what that constitutional doctrine is:

"...There are certainly combinations of circumstances under which the Crown has a right to dismiss a Ministry who command a parliamentary majority, and to dissolve the parliament by which the Ministry is supported. The prerogative, in short, of dissolution may constitutionally be so employed as to override the will of the representative body, or, as it is popularly called, 'the People's House of Parliament'. This looks at first sight like saying that in certain cases the prerogative can be so used as to set at nought the will of the nation. But in reality it is far otherwise. The discretionary power of the Crown occasionally may be, and according to constitutional precedents sometimes ought to be, used to strip an existing House of Commons of its authority. But the reason why the House can in accordance with the constitution be deprived of power and of existence is that an occasion has arisen on which there is fair reason to suppose that the opinion of the House is not the opinion of the electors. A dissolution is in its essence an appeal from the legal to the political sovereign. A dissolution is allowable, or necessary, whenever the wishes of the legislature are, or may fairly be presumed to be, different from the wishes of the nation."

The legal position, as far as I could ascertain, is that this prerogative has remained unchanged and operative. Why it has not been resorted to in practice is a different matter. If all parties to the democratic process respect rules of the game, not taking resort to such prerogatives and discretions would not mean their non-existence. That is the mistake some persons make. Moreover, the fact remains that in extraordinary situations, the Crown has taken initiatives. One such example is the establishment of a national government in the 1930s at the initiative of King George V. Intention is not to go into the political history of the United Kingdom. I only wanted to show that the position about discretion to dissolve parliament without the advice of the Prime Minister even in the Constitution of the United Kingdom is not what the learned Attorney General is trying to establish.

Finally, I want to make two more submissions: First, the electorate has, in the election of November 1988, given a very limited mandate to the parties that have been voted into the National Assembly. The PPP has received only 39 per cent of the votes cast, which goes to make only 14 per cent of the total registered voters in the country. It could get only 104 seats in a House of 237 (as against 102 it had in a House of 144 in the 1972-76 National Assembly). In the provinces, the position is that it does not have majority in three out of four provinces of the country. Its manifesto mentioned the question of constitutional changes it would like to make, and as such, by not giving it two-third majority that is needed to amend the Constitution, the electorate has refused to give it the authority to change the Constitution. It has fought elections under the amended Constitution and all its members, ministers, the Attorney General and the Prime Minister have taken oath to defend and safeguard this Constitution. In this context they must accept the realities as they are. The manner in which this crusade against the Eighth Amendment is being made shows that it is an effort to subvert the Constitution. If they are honest about democracy they must try to operate within the framework of the mandate people have given to the two major parties in parliament.

It should also be understood clearly that the Constitution cannot be amended by a referendum, as an honourable minister has tried to shout from the hip. Amendment to the Constitution can be made only through the process laid down in Article 239 of the Constitution. Referendum is not a constitutional option in this respect.

There is some clamour that the Eighth Amendment should be struck off. This is nonsense. It is an accepted principle of law that merely by repealing an Amendment, the amended law is not changed. It can be changed only by a new constitutional Amendment, which needs two-third majority of both the Houses of parliament. Moreover, it must be understood that if the entire Eighth Amendment goes, the whole fabric of the present political system would collapse. The Eighth Amendment has also changed the composition of the National Assembly. Its original strength of 200 has been increased to 207. Women's representation has been increased from 10 to 20.

Representation for non-Muslims has also been increased. If the Eighth Amendment goes out in toto, the National Assembly will also go with it, otherwise there is no criterion to retire some of the MNAs. All constituencies would have to be re-allocated and re-demarcated. If Senate's position is affected, so would be the authority of the Acting President who took over by virtue of being the Chairman of the Senate and under whose authority the elections of November 1988 took place.

The whole system would collapse.

The talk of revocation of the Eighth Amendment, *ab initio* is not only wild, but an invitation to disaster. People in seats of authority must avoid making such statements. There is no harm in reasoned discussion on constitutional issues, including the merits and demerits of changes made in the Constitution through the III, IV, V, VI and VIII Amendments. The only reasonable course to amend the Constitution is to develop a new consensus. Unless PPP and IJI cooperate and unless the National Assembly and the Senate concur, no Amendment in the Constitution can take place. The PPP government has refused to respond to the IJI offer to come out with concrete proposals about constitutional amendments and initiate negotiations with the IJI thereon. They are resorting to petty agitational tactics which can hardly help in this respect. Justice (retired) Mohammad Yaqub Ali Khan is also very critical of the Eighth Amendment. But his proposal contains the most reasonable way out of this controversy — that a committee of parliament (both Houses) may "review all the amendments made in the 1973 Constitution since it was enacted on August 15, 1973, and submit its report to both the Houses." This is a counsel of sanity in an otherwise tower of Babel.—(Concluded)