

EIGHTH AMENDMENT – A MISNOMER

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Although so much has been said about the so called eighth amendment ever since the time of its inception, it has not yet assumed the character of a cliché; and it is not going to lose its relevancy so long as it stays on the Statute Book. It is obviously because of its impact in terms of consequences on our unenviable political and constitutional history. Regardless of all said and done, the subject has not exhausted itself and it still presents certain aspects to our view.

2. In his article published in *The Nation* on 15-1-1994, Mr. Fazal Qureshi observed that “If we are all agreed over Pakistan as a Parliamentary democracy, it should not be difficult to review the lengthy list of 59 clauses of eighth amendment to see where it deviates from the path of democracy. The sole guiding criterion of such an exercise should be merit, a fair assessment on the basis of which a particular clause should be retained, modified or totally scrapped.” He further said that the “eighth amendment was adopted on the argument of removing lacuna in the 1973 Constitution, specially to create a balance in the powers of the President and Prime Minister, then heavily tilted in favour of the Prime Minister”.

3. From the point of view of pertinence, two observations deserve notice. First that it is not difficult to review where it deviates from path of democracy. The second is that it was adopted on the argument of removing lacuna in 1973 Constitution. With all the respect due, the question regarding deviation from the path of democracy and the purpose of its adoption are, in my humble opinion, only secondary in nature. The foremost is whether it can, by any means whatever, be called or described as amendment. I would rather go to the extent of saying that its import and implications can become relevant only if it deserves the name and status of an amendment, in the sense this word is commonly understood.

4. For an answer, recourse will have to be made to the events, in the back drop of which this ‘amendment’ was placed on the Book. First of all it must always be borne in mind that Late President General Muhammad Zia-ul-Haq was the Chief Martial Law Administrator at the relevant time, who ruled the roost on the strength of the proclamation of Martial Law of 5th July 1977 whereby the constitution of 1973 was held in abeyance and the Assemblies were dissolved. The field was held by the Laws (Continuance in Force) Order 1977 and the Provisional Constitution Order 1981, enforced by him in pursuance of that Proclamation and which was known as a black law. Of all importance was the fact that the country was under the yoke of a Dictator, the source of whose power was the Proclamation of 5th July 1977 and not the will of the people and who, by virtue of that circumstance, had no authority whatsoever to effect any change in the Constitution of 1973 put in vogue by the chosen representatives of the people with a mandate. Furthermore, it may also be mentioned with advantage that whatever he did, had only one purpose in view and it was the prolongation of his autocratic rule as far as possible.

5. This was about the Author of the amendment. A few words about those to whom the adoption of this amendment is attributed. Section 11 of the Representation of the Peoples Act 1976 provides that as soon as the President makes an announcement of the date or dates on which the polls shall be taken, the Election Commission shall, by Notification in the official gazette, call upon a constituency to elect a representative or representatives. The requisite announcement having been made by the President, the General Elections were held on the 25th of February, 1985, as a result of Notification dated 14.1.1985 issued by the Election Commission in pursuance of the President’s announcement.

6. Since the provisions of 1973 Constitution regarding fundamental rights were in abeyance, there was no freedom of association, no political party and no right to form or be a member of any such party. So the elections were held on non-party basis, evidently against the spirit of the Constitution which had the parliamentary form of democracy as its foundation. The least said is that these elections did not have the support of a Constitution framed by the people and were for that reason absolutely meaningless, bogus and a farce. Even if they be assumed to have had any substance, it was taken away by the abstinence of some major political parties. The result was that those who were returned to the Assemblies were without any commitment to the system of Government envisaged by the 1973 Constitution, which incidentally was the

dictate of so much toil, sweat, anxious moments and the result of a consensus – an achievement of no mean proportions.

7. After the General Elections had thus been contrived and the National Assembly was ready to be commissioned, the late President rewrote the Constitution Book from one end to the other and came out with the Revival of the Constitution of 1973 Order 1985, which inter-alia provided that the Constitution of the Islamic Republic of Pakistan 1973 is hereby amended to the extent and in the manner specified. Para-4 of the Order laid down that the provisions of the Constitution, as amended by this Order, shall stand revived on such day as the President may, by Notification in the Official Gazette, appoint and different days may be so appointed in respect of different provisions. This was followed by the Notification of Enforcement of Constitution Order whereby the President was pleased to enforce the re-drafted Constitution with effect from 10th March 1985. It would appear that though ostensibly revived, in actual fact the Constitution of 1973 was done to death for all intents and purposes.

8. It may here be mentioned as material fact that a peculiar feature of the Enforcement Order was that it made an exception in the case of the provisions of Articles 6,8 to 28 (both inclusive) Clauses (2) and (2)a of Article 101, Articles 199, 213 to 216 (both inclusive) and 270-A of the erstwhile Constitution. The purpose was never in doubt. Their enforcement was withheld to remain in a bargaining position. The sword of Martial Law was kept hanging over-head, closer to the necks of the Members thus elected, to be used to meet any eventuality which, though remote, could not be completely ruled out as impossible.

9. It was in the background of these facts that the re-drafted Constitution was placed before the Members of the National Assembly for ratification with their heads on the blocks. After a lot of wheeling dealing and lengthy sessions, the Constitution (Eighth Amendment) Act 1985 was passed. Section 1(2) of the Act provided that it shall come into force at once, except Section 19 which was to come into force on the day of revocation of the Proclamation of 5th July, 1977. The merits or otherwise of this Act are not relevant to the subject matter and they will be dealt with on some other occasion. What we are now concerned with is that the Constitution re-drafted by the late President was ratified and adopted by the National Assembly with certain modifications. The point is that the purpose in view was achieved to the President's satisfaction.

10. On 29.12.1985, a Notification regarding enforcement of the aforementioned remaining provisions of the Constitution was issued by the Ministry of Justice. It said that in exercise of the powers conferred by Article 4 of the Revival of the Constitution of 1973, Order 1985, the President is pleased to appoint the day on which the Proclamation of 5th July, 1977 is revoked, to be the day on which those provisions of the Constitution shall come into force. In its wake came the Proclamation of withdrawal of Martial Law on 30.12.1985. It revoked the Proclamation of 5th July 1977. The Laws (Continuance in Force) Order 1977 and the Provisional Constitution Order 1981 were repealed. The Offices of the Chief Martial Law Administrator, the Martial Law Administrators and all other Martial Law Authorities and Military Courts appointed in pursuance of the Proclamation of 5th of July 1977 were abolished. It was further proclaimed that the powers of the Chief Martial Law Administrator to issue Martial Law Regulations, Martial Law Orders and Constitution Orders stood lapsed and with that went also the power of any Martial Law Authority subordinate to the Chief Martial Law Administrator to issue any order or take any action.

11. If considered in the background of these facts, what was done by the National Assembly of 1985, can hardly be given the name of an Amendment. My first reason in support of this view is that the Chief Martial Law Administrator had no authority whatsoever to effect any change in the Constitution. As already noticed before, he had a new draft prepared, not only under his supervision but with positive association, no matter how arduous in nature was the task, and his mind was there in almost every provision. The purpose of this contraption was to bring about a radical change in the complexion of the parliamentary system. Ordinarily, amendments in the prevalent laws originate in the Legislature. In the present case, however, we experienced a novel procedure, in that a new draft was placed before the Assembly and they were asked to endorse it under threat of the continuation of Martial Law.

12. Secondly, the Assembly managed by the General Elections of 1985, did not have the Constitutional sanction. This aside, it did not enjoy a truly representative character on account of the non-participation of some major political parties. By virtue of this circumstance alone, it was without any mandate, message or authorization to ratify and adopt the draft Constitution laid on its table.

13. Finally, we must keep our minds alive to the consideration that the word amendment' conveys the sense of a positive and voluntary act. As we have seen, the Members were forced to deliver what they would not have normally done. They had come to the Assembly after so much expense and industry and they could ill-afford to lose their seats, which could have happened in case of an insurgency. They made no bones of the apprehension that there was imminent probability of the continuation of Martial Law in the eventuality of refusal to adopt the amendment, which amounted to a rapine of the Constitution. By no stretch of imagination could the Assembly's adoption be regarded as the result of volition.

14. Therefore, as I look at the whole thing, the expression 'eighth amendment' is a misnomer and it might have had any effect, but that of modifying the 1973 Constitution. In the context of what has been said afore, it was, as they say at the bar, void ab-initio and of no legal effect whatsoever. By the same token, it is not susceptible of any review, and it is immaterial that it was adopted on the ground of removing any lacuna in the 1973 Constitution, or for that matter on any other ground. Any such argument, if at all there, was without factual foundation and fallacious.

15. I may not be taken to have suggested that the 1973 Constitution was or is a paragon and that it does not require any amendment. All I maintain is that the provisions commonly known by the name of 'eighth amendment' cannot possibly be supported on any legal terrain and that they should be struck down and effaced from the Constitution Book in sheer acknowledgement of their illegal character. Thereafter, it will be for the parliament to effect any change in the Constitution, it considers appropriate to suit the exigencies of socio-political conditions now obtaining in the country.