

Reforms or restructuring-II

No basic changes without debate

By Prof Khurshid Ahmad

SINCE the new constitutional package is being linked with the popular mandate, it is incumbent that the reality of the mandate is determined in clear terms. From 1985 to 1997, there have been five elections for legislature under the 1973 Constitution. None was meant for a constituent assembly.

Then the 1997 elections were held under extraordinary conditions and were boycotted by a heavy majority. While official figures say that one-third of the total voters turned up, all the national and foreign observers concluded that hardly twenty to twenty five per cent voters participated in the polls. The winning party carried the support of not more than twelve or thirteen per cent of all the votes cast.

Even if we ignore the question of numbers and concentrate on real issues, it becomes evident that the manifesto, which the Muslim League presented to the nation, contained nothing about constitutional amendments. The whole manifesto carried not even a single sentence whereby non-satisfaction about the Constitution or about any part of it had been expressed. Thus, no authorization has been obtained from the people for such amendments. The only matters that can be directly or indirectly deemed as pertaining to constitutional amendments are as under:

1. To restrict legislation through ordinances (though ordinances have been promulgated by this government, too).
2. To mend the Constitution to banish horse-trading and changing political allegiance. (It was done in the form of the 14th Amendment with a rightful purpose but in an objectionable way as it shall lead to dictatorship of the party leader).
3. Increase in the seats of the parliament so as to make the national and provincial assemblies fully represent different sections of society, to give representation to women and specialists of different professions through proportionate representation.
4. Declaration of the assets of the elected representatives; putting an end to the discretionary powers or to 'minimize' them; slashing the number of ministers and advisers restricting the elected representatives engaged in private business through 'conflict of interest legislation' (none of these promises has been acted upon; rather there has been an increase in the number of ministers and advisers).
5. To increase the number of judges. (Instead, the government tried to reduce the already fixed number of judges in the Supreme Court).
6. Stabilizing the accountability process. It would be incumbent upon every civil servant and elected representative to declare his personal interests and assets periodically and these declarations being kept open for public inspection. Setting up of an independent body to investigate public complaints against public representatives and state officials. It shall have its own machinery for investigation and filing of suits. (Its mutilation is manifest in the shape of an Accountability Cell at the Prime Minister Secretariat).

In the PML manifesto, these were only six matters having some bearing on constitutional amendments. There is absolutely nothing in it about the Eighth Amendment, the president's powers, abridging the

constitutional rights and duties of the judiciary. If the manifesto was devoid of these matters, how could the PM get a mandate for them?

The manner in which the present government forced the parliament to approve two amendments to the Constitution points to the ways of its governance and the mode of working. They are an ugly blot on the face of democracy and the parliament. The National Assembly discussed the Eighth Amendment for forty days and the Senate devoted seven days to it. As many as fifteen amendments were made in the original bill by dint of reasoning and political pressure and thus the institution of National Security Council was dropped.

The powers of the prime minister and the president were somewhat balanced, dissolution of the Assembly was subjected to a judicial review, elections of prime minister and chief ministers were shifted to national and provincial assemblies and a firm commitment was obtained from the government for the Ninth Amendment, which remained un honored. Against all this, we have to ponder how the drama of the Thirteenth and Fourteenth Amendments was staged.

It took only five hours each in getting through these two basic amendments without any discussion and by suspending all the rules and regulations for legislation. Obviously, it is not law making, it is making a joke of the Constitution. We can say with confidence that there exists no other example in the history of world's parliaments where constitutional amendments were carried out in such a haste and with such indifference to matters of great importance.

The fear is that such dramas may again be staged in the future. Such moves should be effectively resisted since they amount to negating the Constitution, law, morality and democratic norms. If the Constitution carries, some deficiencies or some changes are necessary for a more effective constitutional structure, open discussions should be initiated at academic and public levels.

A commission comprising members of the Parliament and learned and experienced persons be set up to formulate constitutional suggestions. It may also seek advices from public and academic circles and finally draw up its own suggestions. Obviously, there should be open discussions in and outside the parliament so that amendments to the Constitution are carried out with maximum national consensus. They should form part of the Constitution only after a thorough consideration of each and every word of it. Any deviation from this course would be unacceptable.

There is yet another basic and fundamental matter that needs be explained. It is a well-known fact that the mental tilt of the prime minister is towards maximum concentration of powers in his own hands. The way the Twelfth Amendment, of 1991 was pushed through provides an example. An attempt was made in the proposed amendment to empower the prime minister to suspend any clause of the Constitution at his discretion and to appoint special tribunals to deal with extraordinary conditions. The intention was to confer on Prime Minister the right to suspend, for the time being, any clause of the Constitution concerning the Parliament, the Supreme Court, the Federal Shariat Court or fundamental rights.

It is regrettable that the advice for it came from a former judge of the high court who himself drafted it. The cabinet approved it. When Qazi Hussain Ahmad and I opposed it, the prime minister was shocked and jolted. The then President Ghulam Ishaq Khan also criticized it severely. When opposition to it

mounted, members of the cabinet got perturbed and at least two members of the cabinet - General Majeed Malik and Hamid Nasir Chatta openly admitted that they had supported it without

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a thorough study. Senate Chairman Wasim Sajjad played a positive role in stopping the proposed amendment and drafting another amendment relating to the appointment of tribunals for two years only to counter the lawlessness. There are three aspects of this event about which a warning is called for:

First, the tendency of Nawaz Sharif that all powers should be concentrated in his hands. It is against democracy and the consultative system (Shoora) and paves the way for dictatorship.

Second, the cabinet's skipping such vital matters and not taking care of the precautions, consultations and deep insight.

Third, the attitude of some of our former judges who administered justice for a long time and acted as protectors of the Constitution and law, but when they enter into the arena of politics one wonders how they behave.

Whatever we have put on record about this happening is a hard fact, and in doing so we do not intend to castigate anyone but it is a warning to the nation for its future.

While concluding we want to appeal to the nation and to all the responsible people to do their best to save the country from confusion and constitutional anarchy. They should contact members of the parliament, remind them of the wrath of Allah and that they have to go to the people again. Further, it is our submission to the Ulema, jurists, and political leaders that they study the Constitution in depth and, instead of government introducing a constitutional package, the intelligent sections of society prepare a package of constitutional amendments which may be considered as reflecting the entire nation's will.

Fortunately, there is also a precedent. Maulana Maudoodi and other leading Ulema had led the constitutional discussions in 1952, and even later constitution making could not deviate from it. Similarly, the need of the hour is that changes needed for stabilizing the original structure of the Constitution in the light of the Objectives Resolution must be explained, and the distribution of powers should be balanced. The government and the parliament should be persuaded to adopt them.

Now what basic reforms are needed in the Constitution, we present here a brief sketch:

- 1) The most important amendment to the Constitution should be for the supremacy of Shariah and for its recognition as the Supreme Law of the country. Islami Jamhoori Ittehad (IJI) in its manifestos of 1988 and 1990 was committed to this. Earlier, the National Assembly and the Senate had promised to do it in the shape of the Ninth Amendment and the Senate had passed this amendment unanimously. Mr. Nawaz Sharif had himself made a promise about it in 1991 in a meeting of the parliament held in the month of Ramadan. There was a consensus among all schools of thought that the following addition shall be made in Article 2 of the Constitution through another amendment:

"Shariat-i-Islami shall be the supreme law of the country and Shariah shall be defined through those Islamic injunctions that are proved by the Qur'an and Sunnah."

- 2) Articles 4 and 5 of the Constitution are basic Articles and form the very foundation of the entire legal system. In the light of the above amendment (the supremacy of Shariah) further necessary amendments should be carried out:

In Article 4, the right of all the people of the country should be established that they shall be treated according to Shariah and the law; and

In Article 5, it should be clarified that every law, order, discretion, decision or its compliance, which is issued or enforced anytime against Shariah, shall be deemed void.

- 3) For the enforcement of the guiding principles for government policy as contained in Article 31 of the Constitution, an effective machinery shall be set up that shall ensure their full implementation.

- 4) In Articles 45 and 248 such powers and reservations as contravening Shariah, shall be eliminated.

- 5) That Prime Minister should be a Muslim," as it is evident from the contents of the Prime Minister's oath, shall be incorporated in Article 9.

- 6) The jurisdiction of Federal Shariat Court shall be extended to include all laws and procedures of the judiciary and the executive, and the appointment of the Chief Justice and the judges of the Shariat Court shall be permanent. They shall enjoy the security and authority of the judges of the Supreme Court and High Courts. All distinctive provisions in regard to their appointment, transfer, and change in their official assignments shall be removed. All the principles and rules and regulations of the freedom of the judiciary and its separation from the executive shall be one and the same in the Federal Shariat Court and in all other courts. Similarly, the Shariat Court shall exercise power of relief in its own jurisdiction.

- 7) More powers should be given to the Senate, particularly the right to discuss and to give suggestions on financial matters; right to confirm all the international agreements and confirmation of some important appointments.

- 8) For the most important institutions of the state, including chiefs of the armed forces, the Chief Justice of Pakistan, Chief Election Commissioner, chairman of the Public Service Commission and Auditor-General, there should be an unambiguous code. For suggesting names, there should be a system free from political interference, purely based on merit. For the appointments of a political nature, a system of consultations between the government and the opposition should be evolved, and approval of the concerned committees of the Senate and the National Assembly should be sought as is done in many other democratic countries.

- 9) Complete separation of the judiciary from the executive, making it independent. For retiring judges, there should exist some arrangements for making maximum use of them in national matters but leaving no room for seeking offices of profit. The principles set by the Supreme Court in its judgment of March 20, 1996, should be given constitutional protection.

10) It would be appropriate to consider anew the terms of the parliament and the provincial assemblies. It could be reduced to four years so that peoples' mandate could be renewed earlier. Proper arrangements should be made for increasing the number of the members of Parliament and for giving representation to important sections of society, including women. In this regard, the system of proportionate representation completely or partially could be useful.

11) To strike a balance between the powers of the president and the prime minister and to make such arrangements for the executive and the parliament as may give supremacy and effective grip to the parliament over the government and the administrative machinery. The parliament should not become a hostage to the government and the administration.

12) To establish the system of accountability as a permanent entity and an authoritative system, giving it constitutional protection, financial freedom and its own independent mode of investigation and filing of cases is as important as providing it with sue moto powers to take action on the motivation of the people and the government.

13) Enforcement of the federal system in its real spirit, effective implementation of the distribution of powers as contained in the Constitution and real delegation of powers to provinces and local bodies in respect of administration, taxation, planning and development, and in all other relevant fields.

14) Deliverance from the system of interest and loans.

15) Judicious distribution of wealth, provision of health, education, housing and opportunities for employment; preparing charters for the rights of citizens in respect of the security of life, property and honor; and an effective system for their enforcement with a constitutional guarantee.

16) Constitutional and legal arrangements for economic self-reliance and restriction on deficit budgeting.

These are the points, which need an urgent and serious attention. The intended life pattern emerging in the light of the Objectives Resolution is possible only when all these matters are in focus; the Constitution be also made effective for this purpose, and struggle is made for the realization of these objectives at the government and the public levels and to adopt them as a national agenda. Only then, it can be expected that Pakistan, during the next century, shall be able to realize the objectives for which it was established.