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Bhutto Era Amendments in the Constitution 1973: An Analysis in the context of Federalism

Abstract

The Constitution 1973 was the result of national consensus among representatives of all provinces. It was deliberated by directly elected representatives of people and unanimously acknowledge by all members of the parliament. Under the constitution federal parliamentary system was adopted which was considered an appropriate system for a heterogeneous society like Pakistan. The credit of constitution making goes to Z.A Bhutto. It was a social contract among all political parties for the smooth running of state affairs. Soon after its implementation differences arose on the issue of power sharing and distribution of authority. Seven amendments were made in the constitution to cope with the prevalent issues. In this paper an effort will be made to analyze the causes of amendments by its creators and why/how the federal principles were overruled.

The federal parliamentary system was introduced by Quaid-i-Azam Muhammad Ali Jinnah after consultation with first Constituent Assembly of Pakistan.¹ The federal system works on the principle 'Unity in Diversity', under which mutually diverse elements accommodated each other for their common interests. This system has been successful in diverse and heterogeneous societies like Pakistan. Unfortunately due to centralist tendencies the federal system could not remain operative properly in Pakistan which led to the failure of democracy as well as decline of Muslim League rule during the early phase of Pakistani politics.

The constitutional history in Pakistan has always been under criticism since beginning. The constitution of any nation reflects the aspirations of the nation.

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People are guaranteed about personal and collective liberty and their basic rights are safeguarded. The constitution elaborates the infrastructure of administrative, judicial, political and democratic system. The Constitution of any nation is a legal document of a collective institution which declares an individual as a representative unit and establishes its relations with other individuals as well as society. The constitution making in Pakistan had been delayed rather suspended for a long time. The main reasons were the problems faced by the country during initial phase i.e. instable governments, severe differences on ideological and regional context. The tale starts from Interim Constitution² and continued with Objective Resolution³, Basic Principles Committees⁴, Bogra Formula⁵ and violations of federal principles. That damaged the distribution of power and authority among different organs of the state which created imbalance between federating units.

The constitution of Pakistan 1973 was adopted after a long struggle and passing through the bitter experiences and consequences on 1956 and 1962 constitutions. It was misfortune with country that constitutional development took place with slow pace due to hurdles from unseen forces of autocracy and dictatorship. The constitution of Pakistan 1956 was a good start. It was highly objected soon after its implementation due to certain flaws.⁶ It was a first experience almost at such a time when democracy was going to be derailed. This constitution could be improved gradually but the show of power politics did not allow so. The constitution of Pakistan 1962 under Ayub Regime was reflection of highly centralist tendencies and was declared as 'One Man Show' and Syed Noor Ahmad rightly said that the position of President in the constitution was of 'Clock Tower' of Lyallpur⁷. This constitution was abrogated after the decline of Ayub Khan.

The nation was victim of disappointment after the separation of East Pakistan in 1971, along with other reasons one was the constitutional issues and ignoring the spirit of federalism due to which the national life in Pakistan became paralyzed. After the resignation of Yahya Khan the powers were handed over to Zulfikar Ali Bhutto the majority party leader of rest of Pakistan after 1971. The first priority of the new government was constitution making. Generally all political parties and politicians were of the view that constitution of Pakistan should be based on parliamentary democracy. Some political parties were in the favour of a weak federation and demanding more authority and provincial autonomy for the provinces. The issue remained under discussion in assembly for two years. At last the constitution of 1973 was approved unanimously and implemented on August 14, 1973. It was a federal, parliamentary and Islamic constitution.

The laws are generally started with certain preamble which explains the causes and objectives of the said law. It is such an introductory part of the constitution or law which provides rationale of constitution making. It explains the aims, objectives and sources of constitution making along with principles of law. The preamble is not a part of constitution but has constitutional importance. It actually elaborates the unclear and vague words, terminologies and orders. It cannot be implemented legally but can be helpful for the elaboration of constitution.

The preamble of the constitution 1973 is based on the principles laid down in objective resolution. This resolution was unanimously approved by the first

constituent assembly of Pakistan on March 12, 1949. It was a milestone in the constitution making process. These principles have been permanently included in constitution 1973. These are as under;

- 1) Complete sovereignty of Allah Almighty
- 2) Democratic State
- 3) Islamic in junctions
- 4) Federation
- 5) Solidarity of federation of Pakistan
- 6) Basic rights
- 7) Safeguard of minority rights
- 8) Independence of judiciary
- 9) World prosperity and welfare of people of Pakistan

It has been elaborated clearly the Allah Almighty if supreme sovereign over whole of the universe. Its main objective is that the determination of power and authority of government cannot be determined by the endless human sovereign but is limited by the divine sphere of sovereignty. The people and government of Pakistan have acknowledged the divine authority but could not shape the system of state on theocratic lines. Pakistan has been declared as democratic state. It is the aim and objective of people of Pakistan to constitute such a system under which state should exercise its authority through elected representatives of people. The system of government is adopted under federal lines in this constitution. It has been elaborated that areas and provinces in federation of Pakistan have to accept certain limitations on their power and authority so that the federation may not be titular state. Certain federal units have to surrender their rights in the favour of federation. The solidarity of area included in federation, independence of federation and safeguards of federal rights have been ensured.

The constitution of 1973 as unanimously agreed document of all divergent forces having representation in National Assembly of Pakistan. Its architects had high hopes regarding its practicability. As for as domination of centre and administrative dictatorship is concerned Bhutto's rule was not much different from the previous regimes. The acceptance of federal and regional boundaries by provincial leaders was a good start under this constitution for provincial autonomy. The justified participation in resource distribution and allocation of residue powers to provinces was also granted in this constitution though the concurrent list was there.

The constitutions do not provide guarantee for any system unless they are not adopted in letter and spirit. Despite of implementation of 1973 constitution the executive was made more powerful as compared to other institutions which are strong indicator of Centralism. Prime Minister had upper hand as compared to President along with National Assembly. It was ensured that Prime Minister would countersign the orders issued by President and National Assembly's authority of No Confidence against Cabinet was limited.

Therefore, Bhutto strengthened more his position through constitutional amendments and this weakened the assembly and judiciary subsequently. Seven amendments in constitution were made in a short span of four years. The first amendment was regarding recognition of Bangladesh. Since the fall of Dhaka the recognition of Bangladesh was of sensitive nature. Although Bhutto himself was convinced to recognize Bangladesh, but there was resisting pressure from opposition parties. Bhutto was under severe criticism for being one of the characters behind separation of East Pakistan. At the time of implementation of 1973 constitution the matter of recognition of Bangladesh was pending with Supreme Court. Later on, on the eve of second Islamic Summit at Lahore in February 1974, Pakistan had to recognize Bangladesh under the pressure of King Faisal of Saudi Arabia, Col, Qaddafi of Libya and others. It had become a separate entity till that time. There was no other chance of its re-merger into Pakistan. As a result of recognizing Bangladesh the amendment in constitution of Pakistan was necessity. Therefore, the article 1 of the constitution was amended under the first amendment, under the clause 2 which was about the representation of East Pakistan in the federation of Pakistan.⁸

The second amendment was regarding declaration of Ahmadies as non-Muslims. Anti Ahmadi movement started in Pakistan back in early 1950. The situation became worse and agitation led to the martial law at Lahore during March 1953. It led to the dissolution of Daultana Ministry at Punjab and severe problems for Nazimuddin Ministry at centre. During Bhutto rule same type agitation spread in 1974. It was based on the clash between students and Ahmadies at Rabwa Railway Station.⁹ The news of this incident spread countrywide causing anti Ahmadi processions and public meetings under political parties especially Jamiat Ulema-i-Pakistan, Jamiat Ulema-i-Islam, Jamat-i-Islami and others. It was unanimous demand of people to declare Ahmadies as non-Muslims. Finally Prime Minister Bhutto referred the issue to National Assembly. After detailed deliberations and debates the National Assembly unanimously approved the second amendment bill in the constitution. According to it clause (3) was added to article 260 which was explaining that who was a Muslim. The new clause was added which stated that

...a person who does not believe in the absolute and unqualified finality of the Prophet Muhammad (Peace be upon Him) as the last of the prophets or claims to be a prophet in any sense of the word or of any description what so ever, after Muhammad (Peace be upon Him) or recognizes such a claimant as a prophet or a religious reformer is not a Muslim.¹⁰

The third amendment in the constitution was made on February 18, 1975.¹¹ It was introduced to curtail the rights of prisoner detained under law for preventive detention, hence extending the powers of detaining authority.¹² It is quite clear that third amendment limited the rights of political prisoners and resultantly the powers of government were increased. Under the amendment government got powers to keep political opponents under detention for indefinite time by assuring them involve in anti state activities. Bhutto government during the period 1974-75 had become much authoritative and intolerant. He wanted to teach a lesson to his political opponents. When some political opponents consulted courts, due to lack of high moral the judgments were mostly in the favour of government and rarely

some relief was granted to political opponents. Such type of limited relaxations under judicial authority was not supported and favoured by Bhutto and his colleagues. Therefore the policy of curtailment of powers of judiciary was planned. This amendment was based on ill intentions under which the political victims especially NAP leadership was already under trail was dealt harshly. This amendment extended the powers of president regarding extension in the period of emergency which was maximum six months after the recommendations of joint session of parliament.¹³ This amendment provided a clause to continue emergency for unlimited period of time. It reflected the autocratic style of governance.

The fourth amendment was approved by the National Assembly on November 21, 1975.¹⁴ It was the aim of PPP to limit the power and jurisdictions of courts especially grants related to political opponents under article 199. In the wake of dictatorship and authoritative rule Bhutto de-shape the constitution of 1973 himself. The High Courts were deprived from the powers of granting bails to the favour under preventive detention. In the way High Courts became helpless to provide justice to political victims. Under the amendment minorities were allocated six special seats in National Assembly and increase of seats in Punjab Assembly from three to five. The codal procedure for the approval of fourth amendment was not adopted. The opposition members of National Assembly wanted to have discussion on the pros and cons of amendment regarding the reduction of High Court's powers. They were not allowed to speak and were maltreated on the floor of assembly by security staff. Some of them were physically thrown out of assembly by security staff. It was managed to get the amendment approved during the absence of opposition members. It was ridiculous because PPP hold 2/3 majority requisite for approval of any bill. The way adopted by Bhutto Government with opposition was humiliating.

The 5th amendment was approved by the National Assembly on September 5, 1976. According to official version it was introduced to curtail the tress passing of judiciary in to executive sphere. There had been certain repeated decisions under judiciary which effected executive. Initially, provision of separate High Courts for Sindh and Balochistan was granted and the extending the period of separation of judiciary from executive, fixation of term of Chief Justices of Supreme Court and High Courts and compulsory transfer of judges from one court to the other, process of punishment of contempt of court and restriction of the jurisdiction of High Court to grant Bail.¹⁵

The judiciary was severely criticized when the Bill was debated in the National Assembly. Abdul Hafeez Pirzada blamed that the Judiciary was interrupting in to the affairs of Legislature and Executive. He was of the view that there was confusion about the power limits of the Judiciary and only the Legislature could decide about that. The Judiciary got power from constitution and it could impart its decision within the prescribed jurisdiction. Any decision beyond the limits of power jurisdiction would be considered as subversive and high treason. While giving his postulates he proposed about the fixation of tenures of the chief justices of the Supreme Court and High Courts like President, Prime Minister, Governors and Member Parliaments. He said that if the Judges of High Court would not accept appointment at Supreme Court his retirement would be justified. In the case of Justice Sardar Iqbal and Justice Maulvi Mushtaq Hussain when both of them

had not accepted the post of Judge at the Supreme Court and opted to stay at Lahore High Court, two rival groups emerged soon after. The Judiciary was divided from court to Bar level which damaged the cause of Judiciary. Bhutto in his concluding speech at the approval of 5th amendment stated, "Government wanted harmonious co-existence of all the organs of state, legislature, executive and the judiciary and none of them transgressing into sphere of others".¹⁶

The sixth amendment in the constitution was made in haste. It was presented and approved during the last session of Assembly before its dissolution for the conduct of upcoming elections 1977. The main content of the amendment was about extension in the terms of the Chief Justices of Supreme Court and High Courts beyond the retirement age. It was proposed that Chief Justice of Supreme Court who had reached at the age of retirement, i.e. sixty five years and Chief Justice of High Court at the retirement age of sixty two years and had not completed the term in office for five and four years respectively would continue to hold a post until the completion of respective term of office.¹⁷

This amendment in constitution reflects the authoritarian styles of governance of Bhutto. Firstly the chief justices were forced to retire before reaching at retirement age and secondly they were allowed to continue under the 6th amendment. It is also a unique example in the constitutional history of Pakistan that the amendment was made to accommodate chief justice of supreme court Yaqoob Ali Khan who was going to be retired in the mid of 1977 and had served only for two years as Chief Justice. He was a close friend of Bhutto for whom the constitution of Pakistan was amended.

Seventh amendment in constitution was approved on May 16, 1977. Under this amendment the elected Prime Minister was enabled to hold national referendum.¹⁸ Due to deadlock in dialogues between PPP and PNA Bhutto proposed a solution under which the joint session of parliament would pass an amendment to hold a referendum. The referendum had to be materialized under a law made by the President. Under this provision if the Prime Minister fails to get majority then he would have to resign from office. This amendment was unusual and disgraceful for parliamentary system according to some parliamentarians. Under settled norms the vote of confidence is obtained through parliament not through referendum. Due to insincerity and lack of time no arrangements could be made to hold referendum. It was necessary to setup referendum commission and to propagate the cause of referendum before masses which could not be materialized.

Conclusion

The constitutional amendments during Bhutto rule revealed the dictatorial setup of his government.¹⁹ If Bhutto had the temperament to bear opposition, then he might be the elected leader and could enjoy power without taking strict measures against opposition. He was sure like Ayub Khana that political solidarity and national unity could be achieved through 'Strong Centre'. Moreover it was also necessary to materialize Bhutto's preference of political and economic power through centre. He also wanted to keep political and economic power of Punjab under certain limits. Uptill July 5, 1977 about 30 articles of constitution were amended more or less. If the last amendment would have been enacted the condition would be

different. If the PNA would have agreed with the proposal of holding referendum the assembly could be saved in either conditions.

The constitutional history of Pakistan is a nightmare and regretful also. After the Provisional Constitution of 1947 about 6 different constitutional drafts were prepared, out of which three remained successful for implementation i.e. 1956, 1962 and 1973. The constitutions of 1956 and 1962 were abrogated while 1973 is still functional with about 21 amendments. It is questionable that why certain regimes amended constitution under their own vested interests. The constitutional provisions were utilized for the benefit of government. The upper political hierarchy is the beneficiary of such amendments, the general masses are least benefited. Evenly the apex constitutional institutions are helpless to interpret and implement the constitution of 1973 in letter and spirit.

Parliamentary democracy is actually a national government and mostly the feudals get elected under parliamentary democracy. There is a large contradiction between parliamentary democracy and feudalism. The exertion of authority through rule of power is nature of feudalism and there is no tolerance or difference of opinion under this system. Unfortunately until the feudalism could be occupant over national politics the pattern of governance will be adversely effected.

Notes & References

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- ¹ A. H. Kardar, *Pakistan's Soldiers of Fortune* (Lahore : Ferozsons Pvt. Ltd, 1988), p.16
- ² In fact it was temporary arrangement and Government of India Act 1935 was adopted with some changes and called as Interim Constitution, 1947.
- ³ The document was designed on the basis the recommendations of the leading Ulema of Pakistan who initiated famous 22 points, prominent among them were Maulana Shabbir Ahmad Usmani and Maulana Syed Abul Aala Maudoodi.
- ⁴ The committees were formed to create consensus on the grounds for future constitution of Pakistan but the target did not achieve.
- ⁵ Muhammad Ali Bogra the then Prime Minister presented his formula on October 7, 1953 which was aimed primarily to curtail the powers of Governor General.
- ⁶ The constitution did not provide any clarification about the nature of elections and distribution of power.
- ⁷ Syed Noor Ahmad in his work *Marital law to Martial Law* has thrown light on the causes culminated into the first Martial law in Pakistan which subsequently brought the constitution 1962.
- ⁸ The Constitution of Pakistan (First Amendment), Act, 1974, Act XXXIII of 1974.
- ⁹ The students of Nishtar Medical College Multan were on a trip to Peshawar. They had a petty quarrel at Rabwa Railway Station while going towards Peshawar. On return, they were attacked by Ahmadies under a plan giving it colour of religious conflict.
- ¹⁰ The Constitution of Pakistan (Second Amendment), Act 1974, XLIX of 1974 PLD.
- ¹¹ The Constitution of Pakistan (Third Amendment), Act 1974, XXII of 1975 PLD.
- ¹² Article 10 of the constitution, 1973, provided certain safeguards against preventive detention.
- ¹³ The Constitution of Pakistan, Article 232.
- ¹⁴ The Constitution of Pakistan (Fourth Amendment), Act 1975, LXXI of 1975 PLD.
- ¹⁵ *Dawn*, Karachi, September 2, 1976.
- ¹⁶ *Ibid*.6, 1976.
- ¹⁷ The Constitution of Pakistan (sixth Amendment), Act 1976, act LXXXIV of 1976 PLD.
- ¹⁸ *Dawn*, Karachi, February 3, 1978.
- ¹⁹ Mehrunisa Ali, "*Pakistan; aftermath of the March 1977 election*, Pakistan Horizon (Karachi; Vol. 13 issue No. 3,4, 1977) pp. 77-102