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FOR PAKISTANI PARLIAMENTARIANS

Strengthening National and Provincial Legislative Governance

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Prepared By

Pakistan Institute of Legislative Development And
Transparency - PILDAT



As a Part of
Pakistan Legislative Strengthening
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Abbreviations and Acronyms

BPC	Basic Principle Committee
CCI	Council of Common Interests
CDNS	Council of Defense and National Security
CII	Council of Islamic Ideology
FATA	Federally Administered Tribal Areas
LFO	Legal Framework Order
MMA	Muttahida Majlis-i-Amal
NSC	National Security Council
PCO	Provisional Constitution Order
US	United States

FOREWORD

The Constitution of Pakistan has come under several influences over the period of time, including extra-constitutional ones. The nature and evolution of the Constitution over the years needs to be examined in detail if the role of this basic document in the Legislature, Executive and Judiciary of the country is to be understood fully. An overview of the 1973 Constitution as it evolved over the years is also required to understand how the Centre-province relationship is affected by, and impacts, the Constitution; how the civil-military balance is reflected in the constitutional amendments made over the years; and how the Constitution addresses the issues of fundamental rights, principles of policy and state ideology.

“**Overview of the Constitution**”, a Briefing Paper by PILDAT, is an effort in this regard. It aims to orient the Parliamentarians and parliamentary staff with the Constitution of Pakistan as a document that guides the state and its people, as well as to aid them in understanding the key features of the Constitution as it affects the roles and powers of legislatures. The paper is authored by **Dr. Syed Jaffar Ahmed**, a Professor of Politics and History and Director of the Pakistan Study Centre at the Karachi University. It is developed by PILDAT as a part of Pakistan Legislative Strengthening Consortium - PLSC and funded by USAID.

The author and PILDAT have made significant efforts to ensure the accuracy of the contents of this paper. We however, do not accept any responsibility of any omission or error, as it is not deliberate.

The views expressed in this paper belong to the author and are not necessarily shared by PILDAT, PLSC or USAID.

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PROFILE OF THE AUTHOR



Dr. Syed Jaffar Ahmed is Professor of Politics, History and Research Methodology, and Director of the Pakistan Study Centre, University of Karachi. Dr. Ahmed did his M.A and M.Phil from the University of Karachi in Political Science and Pakistan Studies respectively. Later, in 1993, he did his Ph.D. in Social and Political Sciences from the University of Cambridge, UK.

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He has traveled widely and has presented papers in conferences in UK, France, Austria, Nepal, Singapore, Sri Lanka etc. Apart from his teaching and research assignments, Dr. Ahmed is involved with various civil society organizations working for peace, human rights and democratisation of society.

1. INTRODUCTION

'Constitution', as it has come to mean in politics and statecraft, is a full-fledged system of interrelated and mutually coherent basic laws under which a country is governed. The beginning of laws itself had started right from the time when man first accepted to live an organised life, with individuals having their respective rights and obligations. Laws facilitated organisation in the society, bringing to it harmony, peace and progress. With the passage of time the laws expanded as a consequence of the increase in the avenues and complexities of life. With the rise of state, which itself owed its emergence to the growing needs of bringing order and discipline in the society, there arose the need of bringing about a set of laws which could fulfill the said purpose, and to which those on whom they were applied, reposed their trust. Thus there came into being the Constitution. Today Constitution has acquired a pivotal role in regulating societies. It is the fundamental law of the state. Its ambit has enlarged to cover all spheres of life and society, encompassing all of its functions - legislative, executive, judicial, etc. Moreover, Constitution has also come to determine the level of societies' civilised character. The civilised societies, hence, are also the societies where Constitutions are respected and followed, while the societies with no respect for law and a lack of concern about constitutional regulation of life are the ones which have yet to acquire the traits of civility.

2. Pakistan's Search for a Viable Constitution

It is a historical fact that Pakistan was created through constitutional and legal means. In fact it is a unique aspect of Pakistan's freedom that it was realised without taking recourse to extra-legal methods. The founding fathers had no doubt about the fact that the country they were striving for would emerge as a bastion of constitutional governance and rule of law. Those who were struggling for a separate Muslim homeland based on the ideals of social justice and respect for the individual's rights would not have imagined in their wildest dreams that the country they were striving for would have to experience decades of an unstable constitutional system.

Pakistan's constitutional history constitutes a difficult terrain, a survey of which is a complex task as it not only involves informed discussion of complex issues but also necessitates the understanding of extra-constitutional influences which have compounded with the passage of time. In this paper an attempt is made to provide a brief survey of the country's constitutional development, and to examine the 1973 Constitution in particular. An effort is also made to analyse the numerous changes made to the Constitution.

Before the creation of the country, there had been a consensus among the leadership of the Muslim League that Pakistan's Constitution would ensure a federal and a parliamentary form of government, with all of those fundamental rights available to its citizens, which were embodied in the constitutions of other democratic countries. Though the Muslim League had not spelt out a detailed blueprint of the future Constitution - the hectic political events prior to the creation of Pakistan, perhaps, did not allow time for it but there existed no doubt in the minds of the architects of the country about the essentials of the future Constitution. However, after independence, constitution making became an uphill task. With the passage of time, it appeared that the sustenance of a constitutional order itself was no less difficult a problem. By 1969, Pakistan was proclaimed by G.W. Choudhury as a 'laboratory of constitutions' (*Constitutional Development in Pakistan, Longman, 1969*). In fact, by that time, the country had not yet seen a major portion of the constitutional engineering that it witnessed later.

Pakistan's first Constituent Assembly came into being on July 26, 1947 and its inaugural session was held on August 10, 1947. Two days later, the Assembly appointed a Constitutional Committee on Fundamental Rights of Citizens and Rights of Minorities, signifying the importance attached by the Assembly to these two areas. Overtaken by the urgent and gigantic issues of partition and its aftermath, the Assembly could not devote much attention to its task of constitution making in the first one and a half years. On March 12, 1949, the Constituent Assembly adopted the Objectives Resolution, enumerating the ideals on which the future Constitution had to be formulated. The Assembly also appointed on the same date a Basic Principle Committee (BPC) to work out the principles on which the Constitution was to be drafted. The BPC appointed a steering sub-committee to devise the scope, functions and procedure of the committee. Three sub-committees were assigned the task to advise the steering committee on three different matters: federal and provincial areas of jurisdiction and distribution of powers between the centre and the provinces; franchise; and judiciary. While the two latter sub-committees could not finish their work, the first submitted its report to the BPC on July 11, 1950. Thus an interim report of the BPC was submitted to the Constituent Assembly on September 28, 1950. The report was not only inconclusive, but also attracted criticism on different counts; its consideration was postponed as a result. A second draft of the BPC was presented to the Constituent Assembly on December 22, 1952 by the then Prime Minister, Khawaja Nazimuddin. This report also became a centre of controversy. The ensuing deadlock was broken when on October 07, 1953, Nazimuddin's successor, Mohammad Ali Bogra, presented his package popularly known as the 'Bogra Formula'. The Bogra Formula was discussed in detail and was approved by the Assembly but before it could be written down in the form of constitution, the Constituent Assembly was dissolved by the then Governor general, Ghulam Muhammad, on October 24, 1954.

On May 25, 1955, the second Constituent Assembly was elected indirectly through the electoral college of the provincial assemblies, following a federal court's decision that the governor general who had been issuing orders in the absence of the assembly could not act as the legislature. On February 29, 1956, the second Constituent

Assembly passed the Constitution based on arbitrarily made compromises. Consequently, the Constitution could not ensure stability. The most adverse implication was its decision to vest extra-ordinary powers in the President despite the claim of the Constitution to be a parliamentary one. The Constitution also could not resolve the issue of the electorate. Moreover, it created an artificial parity between East and West Pakistan by merging the provinces, states and others administrative units of the western wing of the country into One Unit, in order to neutralise the numerical majority of East Pakistan. These aspects of the Constitution paved the way for subsequent crises and swift changes in the governments with four prime ministers coming to office between 1956 and 1958.

On October 07, 1958, President Iskander Mirza imposed Martial Law in the country, abrogated the Constitution and appointed General Ayub Khan as the Chief Martial Law Administrator. Twenty days later, on October 27, 1958, Ayub Khan overthrew Mirza and assumed the office of the President as well. A year later, on October 27, 1959, Ayub Khan introduced the Basic Democracies Order, creating 80,000 BD members who had to serve as the electoral college later. Through this electoral college, Ayub got elected as President in a referendum on February 14, 1960. Two years later on March 01, 1962, Ayub Khan gave the second Constitution to the country. Discarding the parliamentary system, the Constitution adopted the presidential form of government but without the system of checks and balances which is enshrined in democratic presidential systems in other countries.

Moreover, the Constitution gave overwhelming powers to the President who dominated the entire constitutional system. Ayub's Constitution lasted as long as he survived in office. With his departure his system was also folded. In fact Ayub himself announced the imposition of Martial Law on March 25, 1969. The new Chief Martial Law Administrator General Yahya Khan, soon after the taking-over, announced that he would hold elections for the constituent assembly at an appropriate time. Before the elections that were held in December 1970, General Yahya dissolved One Unit and restored the former provinces along with the creation of the province of Baluchistan in the western part of the country. He also announced the Legal Framework Order (LFO) highlighting the principles on which

the future elections had to be held and the Constitution had to be made. The LFO brought an end to parity between East and West Pakistan, accepting the numerical majority of the eastern wing. It also gave up the indirect elections as had been introduced by Ayub Khan. The 1970 elections, thus, were the first general elections in the country to be held on the basis of adult franchise. However, the election results that brought Sheikh Mujib-ur-Rehman's provincial autonomist Awami League as the majority party in the National Assembly could not be reconciled by the military regime. The failure of dialogue between the regime, the Awami League and the Pakistan People's Party, which had emerged as the majority party in two provinces of West Pakistan - the Punjab and Sindh - paved the way for a crisis which the military regime tried to resolve by force. East Pakistan was subjected to military action on March 25, 1971. The military regime's failure in crisis management led to its intensification and culminated in the separation of East Pakistan on December 16, 1971. On December 20, 1971, General Yahya Khan resigned and handed power to the leader of the Pakistan People's Party, Zulfikar Ali Bhutto who took charge as President as well as Chief Martial Law Administrator. Bhutto lifted Martial Law in April 1972 after he got the approval of the Opposition for his interim Constitution to govern the country as long as the permanent Constitution was not made. Meanwhile, a Constitution Committee was formed, comprising members of the Government and the Opposition. The draft report of Constitution was presented in the Assembly on December 21, 1972. The Constitution was passed on April 10, 1973 after hectic debate and parleys between the Government and the Opposition. After being assented to by the President on April 12, the Constitution was enforced on August 14, 1973.

Since 1973, the Constitution has been suspended or held in abeyance on two occasions; first, when the Martial Law was imposed on July 05, 1977, and, later, when the fourth military coup took place on October 12, 1999. Since its adoption, seventeen amendments have been sought in the Constitution of which three (the ninth, the eleventh, and the fifteenth amendment bills) could not become the Act of the Parliament due to one reason or the other. In other words, a total of fourteen amendments have been made in the Constitution which have drastically changed the original character of the fundamental law.

3. The Constitution of 1973: Essential Features

The Constitution of 1973 is the first Constitution of Pakistan made by a constituent assembly elected directly by the people on the basis of adult franchise. As all the political parties with membership in the Constituent Assembly voted for the Constitution, it could also be described as a unanimous Constitution. Moreover, as the political parties having representation from all the four provinces agreed to the Constitution, it could also be characterised as representing a federal contract.

The following sections examine the essential features of the Constitution, as well as how they stood in the original Constitution and what shape they took following the amendments.

3.1 Functional Distribution of Powers, Rights and Responsibilities Among the Parliament, Executive and Judiciary

3.1.1 *The Parliament*

The Constitution had adopted the parliamentary form of government for Pakistan. The essence of a parliamentary system is the responsibility and the answerability of the Executive before the Legislature. As the Parliament is elected directly by the people, whose representatives elect from among themselves the Executive which is answerable to the Legislature, this makes the Parliament a supreme body. The organic linkages between the Legislature and the Executive, facilitated and strengthened by the parliamentary committees - where the legislators and the Government ministers deliberate on the policies proposed and pursued by the Government - serve as a source of Parliament's monitoring of the Executive functions.

The Parliament in Pakistan comprises two houses, the National Assembly and the Senate. The Eighth Constitutional Amendment, which introduced new nomenclature, designating it as *Majlis-i-Shoora*, made the President a part of the Parliament (Article 50). The Parliament thus comprises three constituents, the two houses and the President.

The National Assembly originally had 200 general members. The Fourth Amendment Act 1975, added six

seats for the non-Muslims. The Eighth Amendment Act 1985, increased the number of Muslim seats to 207, while the seats reserved for the non-Muslims were increased to 10. The Legal Framework Order 2002, which was later incorporated in the Constitution, increased the number of seats to 342, with 10 seats reserved for the non-Muslims, while 60 seats reserved for women. In the 1973 Constitution, there were ten seats reserved for women for a period of ten years from the commencing day or the holding of the second general election to the National Assembly, whichever occurred later. The Eighth Amendment increased the number of these seats to 20, and this was done until the expiration of a period of 10 years from the commencing day or the holding of the second general election, whichever occurred later.

The voter's age was set to be eighteen years in 1973. The Eighth Amendment raised it to 21 years.

An important aspect of the Constitution of 1973 was the sustainability of the National Assembly, which was elected for the duration of five years and could be dissolved by the President only on the advice of the Prime Minister. This was a normal parliamentary practice that was incorporated in the Constitution. In order to further strengthen the parliament, it was laid down that a Prime Minister against whom a resolution for a vote of no-confidence had been moved in the National Assembly, but had not been yet voted upon, or against whom such a resolution had been passed, or who was continuing in office after his resignation, could not recommend the dissolution of the National Assembly to the President.

The Eighth Constitutional Amendment added a clause to the Article 58 giving to the President the power to dissolve the National Assembly in his discretion where, in his opinion, an appeal to the electorate was necessary. This clause had far reaching implications not only in making the assembly dependent and subservient to the President, but also drastically changing the parliamentary character of the Constitution, tilting it towards a presidential one. After being inducted in the Constitution, this clause was invoked by the President on four occasions in a short span of nine years between 1988 and 1996. This clause was repealed in the Thirteenth Constitutional Amendment passed on April 04, 1997. The Eighth Amendment had given similar power to

the governors with respect to the provincial assemblies. The Thirteenth Amendment did away with this as well. The parliamentary character of the Constitution was restored as a result of the Thirteenth Amendment, which also accompanied the restoration of the prime ministerial advice as being binding for the President with respect to the appointment of governors and taking away of the discretionary powers of the President to appoint the three chiefs of the armed forces. However, the Seventeenth Amendment once again shifted the pendulum to the side of the President. The President can now once again dissolve the National Assembly at his discretion.

The Senate is the second chamber of Parliament, first introduced in the Constitution of 1973. As a federal constitution acknowledges the equality of federating units, a separate chamber is established with equal representation for the federating units. In the case of Pakistan, prior to 1973, this aspect of a federal constitution was not accepted by the previous constitutions, which instead relied on reducing the number of federating units to two provinces: East and West Pakistan. As mentioned earlier, the province of West Pakistan was created in 1955 in order to neutralise the numerical majority of East Pakistan, thereby avoiding a genuine federal arrangement, which would have demanded a more equitable representation to the units. The Senate of 1973 Constitution was, therefore, a departure from the past as well as a positive development in the annals of constitution making in Pakistan. However, the Senate lacked the stature enjoyed by the upper houses in some of the more advanced federal systems, the most prominent being the US Senate.

According to the original Constitution, the Senate had 63 members, of which 14 were elected from each province, 5 were elected from the Federally Administered Tribal Areas (FATA) and 2 were chosen from the Federal Capital. The Eighth Amendment had raised the number of senators to 87. These included 14 each from the 4 provinces, 8 from the FATA, 3 from the Federal Capital, and 5 each from 4 provinces representing the technocrats, *ulema* and professionals. The composition of the Senate has further changed with the incorporation of the Seventeenth Amendment in the Constitution. The Senate now has a strength of 100 members. Of these, 14 are elected from each provincial assembly, 8 are elected from the FATA, 4

from the Federal Capital, 4 women elected by each provincial assembly and 4 technocrats including *ulema*, elected by each provincial assembly.

The Senate is a permanent institution which is not subject to dissolution. However, since the Constitution was suspended or held in abeyance twice since its inception, the Senate has also been non-existent for a considerable period of time.

As regards the legislative powers of the Senate, a bill with respect to any matter in the federal or the concurrent legislative list may originate in either house and after being passed by the house in which it is originated, it is transmitted to the other house for being passed. It is only after a bill is passed in both the houses that it is presented to the President for assent. Moreover, if a bill transmitted to a house, after being passed in the house in which it originated, is rejected or is not passed within 90 days of its receipt, or is passed with amendment, the bill is considered by a Mediation Committee consisting of members from both houses of the Parliament at the request of the house in which it was originated (Articles 70 & 71).

The original Constitution did not recognise a role of the Senate with regard to the money bills, which could originate only in the National Assembly, and were presented to the President for assent without being transmitted to the Senate. However, the Seventeenth Amendment has allowed a role to the Senate with respect to the money bills to the extent that a copy of such a bill is sent to the Senate at the time of its origination in the National Assembly. The Senate can make its recommendations on it and can pass it to the National Assembly within 7 days. The recommendations of the Senate are not binding on the National Assembly, which can incorporate the Senate's recommendations or can simply ignore them fully or partially.

3.1.2 Executive

Over the years the nature of the executive authority in Pakistan has undergone numerous changes. The balance of power has shifted between the President and the Prime Minister during these years. The original 1973 Constitution vested the executive authority of the federation in the federal government consisting of the Prime Minister and federal ministers acting through the Prime Minister who was the

Chief Executive of the federation. The executive authority was, however, exercised in the name of the President. The Eighth Constitutional Amendment, through Article 90, vested the executive authority in the President who could exercise it either directly or through the officers subordinate to him. Article 91 under the Eighth Amendment laid down that the Cabinet of ministers, with the Prime Minister at its head, was there to aid and advise the President in the exercise of his functions.

Similarly, in the original Constitution it was the National Assembly which elected one of its Muslim members as Prime Minister by the votes of the majority of the total membership of the National Assembly. The Eighth Amendment deprived the Assembly of this right, and instead gave the President the power to appoint, in his discretion, from the members of the National Assembly a Prime Minister who, in the President's opinion, was most likely to command the confidence of the majority of the members of the National Assembly. A Prime Minister so appointed had to obtain, within 60 days of his appointment, a vote of confidence from the National Assembly. The Amendment further decided that the Cabinet, together with the ministers of state, should be collectively responsible to the National Assembly. Thus, while the executive authority was vested in the President, it was the Cabinet alone which was made responsible to the Legislature. Furthermore, the Prime Minister could hold office during the pleasure of the President who could remove him if he was satisfied that the Prime Minister did not command the confidence of the majority of the National Assembly.

Another characteristic change within the domain of President-Prime Minister relationship related to the appointment of the federal ministers. The 1973 Constitution gave the power of appointment of federal ministers and ministers of state, from amongst the members of parliament, to the Prime Minister, which is a normal parliamentary practice. The Eighth Amendment shifted the power of appointment of federal ministers and ministers of state to the President who had to exercise this power on the advice of the Prime Minister. Similarly, in the original Constitution, a cabinet member could resign his office by tendering his resignation to the Prime Minister, or the Prime Minister could himself remove a minister from office. The Eighth Constitutional Amendment placed in the President

the authority to receive the resignation of a minister or to remove a minister on the advice of the Prime Minister.

The above changes in the Constitution brought about by the Eighth Amendment transformed the parliamentary system into the presidential form of government, except that the Cabinet was made responsible to the Legislature, a point referred to earlier.

Here it is important to mention that the Constitution of 1973 had gone an extra mile in strengthening the office of the Prime Minister. Therefore, removal of a Prime Minister through a no-confidence motion was made difficult on the assumption that it would bring stability to the system. Hence, it was laid down that a resolution for a vote of no-confidence against the Prime Minister could not be moved in the National Assembly unless by the same resolution the name of his successor was given. In addition to this, a resolution of no-confidence could not be moved while the National Assembly was considering demands for grants submitted to it in the annual budget session. An extraordinary safeguard provided to the Prime Minister was the provision that for a period of ten years from the commencing day or the holding of the second general election to the National Assembly, whichever occurred later, the vote of a member, elected to the National Assembly as a candidate or nominee of a political party, cast in support of a resolution for a vote of no-confidence should be disregarded if the majority of the members of that political party in the National Assembly had cast its votes against the passing of such resolution. In order to further consolidate the position of the Prime Minister it was laid down that if a resolution pertaining to a vote of no-confidence was not passed, another such resolution could not be moved until a period of six months had elapsed. The Eighth Amendment removed from the Constitution all these safeguards provided to the Prime Minister against the prospects of a vote of no-confidence.

The Thirteenth Constitutional Amendment did away with the presidential power of dissolving the assembly, thereby indirectly benefiting the Prime Minister. Moreover, it was laid down that the President would exercise his power to appoint the governors on the advice of the Prime Minister, which was binding. Earlier, through the Eighth Amendment, the President made the appointments simply in consultation

with the Prime Minister. The Seventeenth Amendment restored the presidential power to appoint the governors in consultation with the Prime Minister.

The above discussion shows that the parliamentary form of government with regard to the Executive has undergone important shifts with the locus of power oscillating between the President and the Prime Minister. The Constitution of 1973 had made the Prime Minister powerful with excessive safeguards while the Eighth Amendment made the President much more powerful. Some of his powers were taken back by the Thirteenth Amendment, but were restored to him by the Seventeenth Amendment.

3.1.3 Judiciary

Judiciary is the third pillar of the state. It ensures the proper functioning of the Constitution and oversees the implementation of the laws. A vigilant and active judiciary ensures the continuity of the constitutional system and defends citizens' rights against all types of encroachment. When informed of the devastation the British institutions were suffering from amidst the crisis brought about by the World War, Prime Minister Winston Churchill is reported to have asked: 'Is the Judiciary functioning well?' Upon being told that it was functioning normally, Churchill claimed that then there was no danger to the country. Churchill was right, as the Judiciary is the custodian of rights and the guardian of liberties, the continuity of which ensures the continued allegiance of the citizens to the state.

In Pakistan, the Judiciary has, by and large, remained weak vis-à-vis the Executive; it has been undermined, influenced and manipulated by the Executive since independence. Some of the causes of the Judiciary's weaknesses were addressed in the Constitution when it was first made in 1973, but later through amendments, its powers were trimmed to suit the Executive. For example, the separation of the Judiciary and Executive was identified by the 1973 Constitution as being necessary for the independence of the former. For this, a period of five years was set, which was extended to fourteen years by the Eighth Constitutional Amendment. Earlier, the Fourth Constitutional Amendment, passed on November 25, 1975, reduced the powers of the High Courts regarding the granting of bail to the detained. The Fifth Constitutional Amendment further curtailed the powers of the Supreme Court and the High Courts

regarding the passing of the orders in the cases of preventive detention, releasing on bail of any person, etc. The amendment further laid down that a High Court judge could be transferred to another High Court without his consent and without consulting the chief justices of the courts concerned. A judge who was transferred from the High Court to the Supreme Court was bound to accept the transfer; otherwise he had to retire.

In the last three decades, the Judiciary was subjected to reconcile with 'extra-constitutional' measures like the PCOs, promulgated after every military takeover. Judges were asked to take oath on these orders or else relinquish their offices.

3.2 Territorial Classification of the Legislative Powers between the Centre and the Provinces

With its cultural, ethnic and linguistic diversities, Pakistani society can be described as an essentially plural and federal society. In such a society only a federal constitution, evolved through the consensus of the federating units, can ensure stability and harmony. It is this fact which, even before the creation of Pakistan, had compelled the Muslim leadership striving for a separate country to declare that Pakistan would be a federation, ensuring maximum provincial autonomy to its constituent units. However, despite this firm conviction of the founding fathers, the development of a viable federal arrangement proved an uphill task in the post-independence years. The question of representation of different units, primarily the issue of East-West disequilibrium dominated the constitutional debates. Attached to this issue were the questions of division of resources and allocation of jobs, etc. The respective areas of competence of the centre and the provinces also proved to be an important issue, which could not be resolved amicably. The 1956 Constitution was realised only through political manipulation and compromises, which could not last very long. The 1962 Constitution, except for its preamble, did not even mention the word 'federal' in its text. The 1973 Constitution provided a federal framework even though there was much room in it for improvement as regards the imperatives of a genuine federal system.

It has already been mentioned that the Constitution was approved by all of the political parties, with majority in

different provinces, giving the Constitution the status of being a 'federal contract'.

The federal character of a constitution can be adjudged along at least five basic criteria: 1) the division of power; 2) the nature of the Legislature; 3) the role of the Judiciary; 4) the role of the federating units role in the process of the amendment of the Constitution; and 5) the nature of the emergency provisions and their impact on the legislative and executive functions of the federating units.

Seen in this context, the Constitution of 1973 divided the legislative powers between the Centre and the provinces by delineating two legislative lists. In the Federal List, there were enumerated subjects on which the Federal Centre alone could legislate. This list comprised two parts, which had 67 items. The second legislative list, designated as the Concurrent List, had 47 items. On these items, both the Centre and the provinces were entitled to legislate, but it was also laid down in the Constitution that in case of conflict between the laws made by the Centre and a province with respect to a subject in the Concurrent List, it was the federal law which was to prevail, no matter which of the two laws were made first. This means that the Centre had actual competence not only over the subjects specifically reserved for it, but also over those mentioned in the Concurrent Legislative List. This provided a very large ambit of legislative powers to the Centre which is in fact wider than the ones presented in the previous constitutions, including the Government of India Act 1935, which served as the interim Constitution after independence till 1956.

The residuary powers, which do not signify much, were left to the competence of the provinces. In 1973, the leadership of the smaller provinces, particularly the NWFP and Baluchistan, was reportedly assured by the then President Zulfikar Ali Bhutto (learned by the author in an interview with Mir Ghous Bakhsh Bizenjo who claimed that the information had been personally relayed to him by Bhutto) that the Concurrent Legislative List would be abolished after 10 years, implying that the subjects enumerated in it would also eventually be left for the provinces. However, this was a verbal commitment and was not written down in the Constitution itself.

In order to fulfill the requirements of a federal system, the

Constitution created a bi-cameral legislature. The National Assembly represents the principle of democracy and allocates seats to the provinces according to their population. But, as the principle of democracy may allow a permanent majority to a particular federating unit relegating the other units to a status of a permanent minority, a federal system creates a second chamber on the basis of the principle of the equality of units, giving them equal representation. The Senate of Pakistan fulfills this important need of the federal system.

The original composition of the Senate, and the changes brought in it through the Seventeenth Amendment, has already been discussed in the previous section. Here it is pertinent to mention that there have been demands made by certain political segments in the country to increase the powers and role of the Senate. It has particularly been asked that the Senate should have a meaningful role with regard to the money bills. It is also suggested that the Senate should be made more representative and be elected directly by the people instead of the electoral college comprising the provincial assemblies.

As regards the role of the provinces in the amendment of the Constitution, Pakistan's federal system does not recognise this role even though a number of federal constitutions attach great importance to it. A number of constitutional authorities have argued, stated that if a federal constitution is a contract between the federating units, an amendment in this contract necessitates the approval of the contracting parties.

The Judiciary plays the role of the guardian in a federal Constitution. Again, if the federal constitution is a contract, there should be a body to oversee the proper functioning of this contract. In case a contracting party violates the terms of the contract, the said body should interfere to redress the situation, thereby ensuring the continuity of the federal bargain. The Constitution of 1973 provides a Supreme Court with its jurisdiction over the entire country and a High Court for each province. The Supreme Court has the power of original jurisdiction in any dispute between any two or more governments. In the exercise of this jurisdiction, the Supreme Court can pronounce a declaratory judgment only. Apart from this, the Supreme Court also has powers of appellate jurisdiction whereby it can hear and determine

appeals from judgments, decrees, final orders, or sentences of High Court.

The Constitution also gives to the Supreme Court the power of advisory jurisdiction, implying that if the President considers that the opinion of the Supreme Court on any question of law of public importance should be sought, he may refer the question to the Supreme Court which may offer its opinion to the President.

The emergency provisions of the Constitution have far-reaching implications for the provinces. According to the Constitution, if the President is satisfied that a great emergency exists in which the security of the country, or any part of it is threatened by war or external aggression, or by internal disturbance, which is beyond the powers of the provincial government to control, he may issue a proclamation of emergency. While emergency is in force in a province, the federal Parliament takes to it the powers to make laws for the concerned province with respect to the matters not enumerated in the Federal or the Concurrent Legislative Lists. Moreover, during an emergency the executive authority of the federation is extended to the giving of direction to a province as to the manner in which the executive authority of that province is to be exercised. Not only this, but the proclamation of emergency also entitles the federal government to assume to itself, or direct the governor of the province to assume on behalf of the federal government, all or any of the function of the government of the province. These emergency provisions have the effect of curtailing the provincial autonomy on the pretexts in the determination of which the provinces have no role.

3.2.1 The Council of Common Interests

In order to enhance cooperation and cause harmony among the provinces, the Constitution of 1973 established the Council of Common Interests (CCI), comprising the chief ministers of the provinces, and an equal number of members from the federal government to be nominated by the Prime Minister. The Prime Minister may serve as the chairman of the council, but if at any time he is not a member of the council, the President may nominate a federal minister, who is a member of the council to be its chairman.

The council is responsible to the parliament and has the responsibility to formulate and regulate policies in relation to matters in part II of the Federal Legislative List (Part I of the Federal Legislative List contains 59 items requiring no consultation with the federating units. Part II of the list contains 8 items including Railways, Natural Gas, Minerals, etc. that require consultation with the provinces during policy making).

3.2.2 The National Finance Commission

The Constitution of 1973 has created another body called the National Finance Commission, consisting of the minister of finance of the federal government, the provincial finance ministers and such other persons as may be appointed by the President after consultation with the governors of the provinces. The commission has important functions to perform, including making recommendations to the President about:

- (a) the distribution between the federation and the provinces of the proceeds of the taxes;
- (b) the grants-in-aid by the federal government to the provincial governments;
- (c) the exercise by the federal government and the provincial governments of the borrowing powers conferred by the Constitution; and
- (d) any other matter relating to finance referred to the commission by the President.

3.3 Civil-Military Equation

Pakistan's political history has been marred with recurrent events of the military take-over. Of the 57 years of its history, almost half of the period has been governed by direct military rule. The military take-overs have their backgrounds and a lot has been written in this respect explaining the pre-eminence of the Military. Mere constitutional provisions cannot be of much help in preventing the Military from taking power in its hands. What at best could be done by a constitution, was done by the Constitution of 1973, which in its Article 6, had laid it down that any person who abrogated or attempted, or conspired to abrogate, or subvert the Constitution by use of force, or

by other unconstitutional means, would be guilty of high treason. Despite this article, the Constitution was suspended and held in abeyance by two subsequent military regimes. The reasons of the Military's dominance over the polity of the country are rooted in the sociological make-up of the society, the geopolitical features, and the imbalance of civil-military forces in the country. Efforts have, of late, been underway to regularise the military's role in politics and political decision-making. The National Security Council is the outcome of this idea which has materialised only recently but which had actually originated during the time of General Zia-ul-Haq who had proposed that a body comprising the President, the Prime Minister, the Senate chairman, the chairman of the Joint Chiefs of Staff Committee and the chief ministers, should be created to make recommendations related to the proclamation of an emergency, the security of Pakistan, and other matters of national importance. This proposal was withdrawn later at the time of the passage of the Eighth Amendment.

In 1996, President Farooq Leghari, after dismissing the government of Benazir Bhutto, established a Council of Defense and National Security (CDNS) by amending the Rules of Business. The CDNS had the President, the Prime Minister, four federal ministers, the chairman of the Joint Chiefs of Staff Committee, and the three services chiefs as its members. The CDNS was concerned, primarily, with security-related issues. However, it came to an early end in January 1997.

In October 1999, General Pervez Musharraf established the National Security Council (NSC) to discuss and tender advice to the Executive on a number of matters such as foreign affairs, law & order, corruption, accountability, finance, etc. General Musharraf re-constituted the NSC on August 07, 2001. It was later incorporated in the Seventeenth Amendment, but was objected to by the Opposition. When the Seventeenth Amendment was being introduced, the NSC was taken out of the Seventeenth Amendment as a result of an understanding between the Government and the opposition's Muttahida Majlis-i-Amal (MMA), and was later created through a law passed by the Legislature.

3.4 Fundamental Rights and Principles of Policy

The essential function of a constitution is to mediate between the state and society. It ensures the rights and privileges of the citizens and provides an institutional structure to fulfill its commitment to the citizens. The state is the collective embodiment of these institutions. In almost all constitutions, therefore, the details of this institutional set up and the functions and duties of these institutions are preceded by the very corpus of the rights that the institutions of state are obliged to safeguard. The 1973 Constitution of Pakistan devotes two separate chapters to the fundamental rights and the principles of policy. The fairly long chapter on fundamental rights includes the rights pertaining to security of the person; safeguards as to the arrest and detention; prohibition of slavery and forced labour, etc.; the protection against retrospective punishment, and double punishment; the safeguarding of inviolability of the dignity of the individual; freedom of movement, assembly, and association; pursuing of trade; speech; professing of a religion; protection of property; equality of citizens; non-discrimination in respect of public places; safeguards against discrimination in services; etc.

The 'Principles of Policy' lays down those fundamental ideals to which the state of Pakistan is committed. These principles are: promotion of the ideals of Islam, discouragement of parochial and other prejudices, full participation of women in national life, protection of minorities, promotion of social justice and eradication of the social evils, promotion of local self-government, promotion of social and economic well-being of the people, participation of people in the armed forces, strengthening of bonds with the Muslim world, and the promotion of international peace

3.5 Islamic Provisions of the Constitution

The Constitution of 1973 declares Islam to be the state religion of Pakistan. The previous constitutions incorporated in them the Objectives Resolution as the preamble; so did the 1973 Constitution. But through the Eighth Amendment an article was added in the introductory part of the Constitution declaring that the principles and provisions set out in the Objectives Resolution would become a substantive part of the Constitution and would

have effect accordingly. The Objectives Resolution had declared that the sovereignty over the entire universe belongs to Almighty Allah alone, and that 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. The resolution further said that the Muslims would be enabled to order their lives in the individual and collective spheres, with the teachings and requirements of Islam as set out in the Holy Quran and the Sunnah. The resolution, in fact, was a compromise between the positions of the traditional *ulema* and the modernist elements. The resolution on the one hand acknowledged the sovereignty of the Almighty Allah, but also accepted the supremacy of the Parliament as regards the making of the laws in the light of the teachings of Islam.

The Constitution of 1973, in its chapter on 'Principles of Policies' made the state responsible for taking steps to enable the Muslims of Pakistan to order their lives in accordance with the fundamental principles and basic concepts of Islam, and to provide facilities to enable them to understand the meanings of life according to the Holy Quran and Sunnah. Teaching of the Holy Quran and Islamiyat was made compulsory and the encouragement and facilitating of the learning of Arabic language as well as to ensure the exact printing and publishing of the Holy Quran were also made the responsibility of the State. Promotion and observance of the Islamic moral standards and the proper organisation of *zakat*, *auqaf*, and mosques, were other responsibilities that the State was obliged to fulfill. The Eighth Amendment also added ushr's organisations in the list of State responsibilities. The Constitution of 1973 had set the conditions for the President and the Prime Minister to be Muslims.

The Constitution had created a body, the Council of Islamic Ideology (CII), comprising persons having knowledge of the principles and philosophy of Islam as enunciated in the Holy Quran and Sunnah, and having the understanding of the economy, political, legal and administrative problems of Pakistan. The Council comprises members belonging to various schools of religious thought. Each member of the council is appointed for a period of three years. The functions of the Islamic Council are quite wide; for example it makes recommendations to the Parliament and the provincial assemblies, as to the ways and means of

enabling and encouraging the Muslims of Pakistan to order their lives individually and collectively in all respects in accordance with the principles and concepts of Islam. The council also advises the Parliament or a provincial assembly, the President or a governor, on any proposed law as to whether it is, or is not, repugnant to the injunctions of Islam.

Under Article 229 of the Constitution, a question may be referred by a house of Parliament, a provincial assembly, the President, or a governor, to the CII for advice. In case the CII declares a law to be repugnant to the injunctions of Islam, the house of the Parliament, the provincial assembly, the President, or the governor, as the case may be, reconsiders the law.

The Eighth Constitutional Amendment created a new institution of the Federal Shari'at Court, which was given the power to examine and decide whether or not any law or provision of law was repugnant to Islam, as laid down in the Holy Quran and Sunnah of the Holy Prophet. In case the court finds a law to be repugnant to the Islamic injunctions, it may ask the concerned government to have its point of view placed before the court. In case a law or a provision of a law is held by the court to be repugnant to the injunctions of Islam, the President or the governor, as the case may be, takes steps to amend the law so as to bring it into conformity with the injunctions of Islam.

4. Conclusion

The preceding survey of Pakistan's Constitution and the successive changes brought about in it may help realise a few major points. The most noticeable fact is that the Constitution has faced the challenge of survival, which has been threatened many a time in the past. Once the Constitution was abrogated and later it was held in abeyance. Whenever the Constitution was restored it was done so along with changes and amendments, which characteristically altered its earlier status. Therefore, what we identify today as the Constitution, is drastically different from its shape when it was adopted in 1973. Change in the Constitution is not something which in itself can be opposed. A living constitution always responds to the changing conditions and the new requirements of the society. It is this fact that has compelled even the most

democratic societies to adjust their constitutions to their changing conditions. But in the case of Pakistan, the Constitution was altered not as much for the sake of the society, or the improvement of the country's polity, as it was done to suit the interests of the individuals and institutions, which happened to be in power. This has affected the sanctity of the Constitution and reduced its efficacy apart from making it a document with mutually incoherent clauses.

The constitutional history of Pakistan, particularly the years following the adoption of the 1973 Constitution, brings to bear that there have been some recurrent issues which have resurfaced time and again. The centre-province relationship which was apparently settled with the understanding that with the passage of time the space for provincial action and rights will spread to the full satisfaction of the provinces, could not move in the expected direction. As a result of this, while the Centre has mustered more strength, the provinces, particularly the smaller ones, feel themselves on the losing side. There is, therefore, need for fresh thinking to create better and harmonious relationship between the two.

The question of the balance of power between the President and Prime Minister is another issue of great importance; it has created difficulties in the past and has rendered the system unstable. Pakistan needs to decide once and forever, what system suits it more, parliamentary system or the presidential. Going by the vision of the founding fathers of the country, the nature and character of the Pakistani society and the constitutional consensus reached in 1973, it is the parliamentary system which might serve the political needs of the country best. And if the parliamentary system is adopted, it should be done in both letter and spirit. In this case it will have to be realised that the President can serve only as the head of the State without having any significant role in the executive authority of the State. This, however, does not mean that the Prime Minister must be made omnipotent. The very debate of balance of power between the President and the Prime Minister has been a misleading venture in Pakistan. The actual issue to be resolved is the balance of power between the Prime Minister and the Parliament. There is a need to make the Parliament supreme in the real sense, making the Executive truly responsible and answerable to the Legislature.

Being a federal country, Pakistan's Constitution must be accepted as having the sovereignty without which the federal contract cannot be ensured for good. To ensure the sovereignty of the Constitution it is imperative that its amending procedure should be looked into afresh allowing a role to the federating units in it.

Finally, there is the most important question of the inviolability of the Constitution and its very survival. Pakistan's political system has broken down time and again with the result that the Constitution itself has fallen victim to the ambitions of the extra-political forces. But the redress of this situation does not lie in the Constitution, no matter how strict the articles that are incorporated in it to secure its continuity. The military take-overs do not happen keeping the constitutional niceties in view. They have their own reasons, their own means, and their own post-take over arguments which acquire legality on the strength of their success. The correction of this situation lies with a powerful, conscientious and politically alive civil society, which alone can bear the torch of democracy in the country. It is this society on which the future of democracy and the supremacy of the Constitution depends. Today, the civil society may not appear to be strong enough to fulfill this onerous task. But one hopes that it will not take too long to rise to the occasion.



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