Constitution Making: The Development of Federalism in Pakistan
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"Pakistan shall be a Federal Republic to be known as the Islamic Republic of Pakistan..." So, in part, reads the first article of the Constitution of 1973. So indeed read the first article of the Constitution of 1956, but the Ayubian Constitution of 1962 omitted reference both to a federation of Pakistan and to the nation's status as an Islamic state (this was partly remedied by an early amendment adding the description "Islamic"). In this short phrase, contained in each of the two constitutions of Pakistan enacted by representative bodies, is summed two of the principal controversies of constitution making in that country: federalism vs. a unitary system and an Islamic vs. a secular state. Both the 1956 and the 1973 constitutions also agree on the parliamentary form of government rather than the presidential which was "enacted" by Ayub Khan in 1962. Mere agreement on broad principles in 1956 and 1973, however, tends to obscure both important differences between the two basic laws and the debate which led to the present refinement of the meaning of each principle.

The prolonged eight and one half year period of independence before the proclamation of the 1956 constitution served to set the terms of at least one of the principles, that of an Islamic state, so that further debate was not extensive during 1972 and 1973. On the two basic elements there was substantial disagreement. However, the most strenuous battle was over the extent of the powers of the provinces and of the federation. In a nation which was framing a new constitution immediately after the loss of one province on the question of provincial autonomy the continuation of this debate was one of great concern to the president and his associates.

Federalism

Provincial autonomy and federalism have been political catchwords in the sub-continent for the better part of this century. Bhutto elaborated on this in a long address to the nation on March 29, 1973. He said, in part, "Autonomy has been the problem from the beginning, since the days when

*The views expressed herein are those of the writer and not of the U.S. Department of State or the Foreign Service.

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the British came into the subcontinent.” He described the reforms of 1919 and 1935 and went on to say, “Even the concept of Pakistan is based on autonomy,” referring to the demand of the Muslims of the sub-continent to be free from the domination of a Hindu-controlled central government. He also noted that “our tragic division between East and West Pakistan was over autonomy.” The subject of provincial autonomy and federalism, therefore, deserves more attention here than either the nature of an Islamic state or the ground rules of the new parliamentary system.

Federal systems, in broad definition, are two-tier governments in which the powers of the federal and of the provincial or state levels are defined in a constitutional document. The more successful examples are those in which independent units federate voluntarily—as in the United States, Switzerland and Australia—in a yielding of some, but not all, powers to a central government overarching the constituents. In most cases the powers ceded are clearly indicated and those not assigned to the central government are specifically reserved for the federating units. A key to success is that the federal government obtains financial and administrative capabilities with which to carry out the responsibilities assigned to it.

The case of federalism in British India is in diametric opposition to those of the type described above. Rather than independent units coming together and ceding powers to a federal government, in India an all powerful central government devolved powers on subordinate provincial units. In none of the basic laws (1919, 1935, 1950 for India and 1956 and 1973 for Pakistan) did the provincial units as such combine to cede power to the center. Devolution of power to provincial governments was a deliberate policy of the British in implementing (or delaying implementation, depending upon one’s point of view) the declaration by Secretary of State Montagu in 1917 that British policy was “the increasing association of Indians in every branch of administration and the gradual development of self-governing institutions with a view to the progressive realization of responsible government in India as an integral part of the British Empire.” The key words are “gradual” and “progressive” and Montagu added that “this policy can only be achieved by successive stages.” The dyarchical system of the 1919 Act and the provincial autonomy of the 1935 Act were “successive stages.” Representative provincial bodies were consulted by the Simon Commission and other official bodies created to study Indian affairs prior to the passing of the 1935 Act and their views were given consideration, but it would not be correct to suggest that voluntary association was part of the 1935 package.

By Section 5, the Act of 1935 provided for the setting up of what is called a “federation of India,” but this was never implemented as the requirement of the accession of a specified number of princely states was not met. Thus the central government level in India continued to operate under the Act of 1919 until power was transferred in 1947. At the provincial level, however, substantial changes were made immediately upon the coming into force of the Act. Nonetheless, only a cursory look at the Act is required to see that
the powers, described as "provincial autonomy," were closely circumscribed by the wording of the law notwithstanding the fact that the limiting powers were seldom used. Among the powers held jointly or separately by the governor general and the provincial governors were the safeguarding of the financial standing of the government, the protection of minorities, the prevention of serious disturbance to law and order and the assumption of full authority should the constitutional machinery of the province break down (as it did when the Congress Party ministries resigned in seven provinces in 1939). The delineation of power between the central and provincial levels was contained in the Seventh Schedule of the Act, which displayed considerable ingenuity in attempting to catalog all conceivable areas of government and to separate these into "federal," "provincial" and "concurrent" lists. The third category contained the potential of conflict between the two levels of government. This listing (e.g., marriage and divorce, printing presses, trade disputes, quarantine) includes matters which generally relate to provincial or local issues, but on which regulation which is uniform from province to province is desirable. The Act provided that provincial governments could legislate in these fields but legislation could not be in conflict with previously passed federal law and subsequently passed federal law would supersede any portion of provincial law with which it disagreed. Although the Act attempted to make the provisions clear it was evident that the Federal Court would become involved in determining the extent, if any, of repugnancy or supercession, had the federal portions of the Act come into force. In what seems to have been a recognition of fallibility, the drafters of the Act noted that the lists might not include everything and left it to the governor general, in his discretion, to assign "any matter not enumerated" to one or the other of the levels of government (Section 104).

With the failure of the Cabinet Mission plan of 1946 for the transfer of power to a single successor government in the sub-continent, it was only possible for the transfer to be made to two successors to the Crown. As noted earlier the Cabinet Mission plan might have led to a process by which the "federating" provinces and states would have determined a portion of the powers of the central government. Under the plan (paragraph 15) the union government would have the power to deal with foreign affairs, defense and communications and "the Powers necessary to raise the finances required for the above subjects." It would also have an executive to carry out decisions and to implement law enacted by the union legislature. The paragraph went on to say that "all subjects other than the union subjects and all residuary powers shall vest in the provinces" but implied that it would be possible for the provinces to cede additional powers to the union government and arranged the provinces into sections (or "zones") which would create zonal governments whose powers would be those ceded by the provinces in each zone (paragraph 18). The Cabinet Mission plan failed for a number of reasons which need not be discussed here. Although there was some discussion of a transfer of power to individual provincial governments this was clearly
impractical and power was transferred to two separate central governments as represented by a constituent assembly and headed in the executive by a governor general. Thus, in both India and Pakistan federal or union systems would be paramount and the powers of the provinces would be devolved from the center to the subordinate level. The Indian Constitution of 1950 and the Pakistani of 1956 would follow the pattern of the Act of 1935 and not the principle of federating units coming together. Both of the new constitutions contained listings of federal (or union), provincial (or state) and concurrent legislative powers and in each case the delineation followed substantially that given in 1935 and contained essentially the same circumscriptions as that Act.

Federalism as an Election Issue

The abrogation of the 1956 constitution in Pakistan by a military-cum-presidential coup in 1958 and the eventual "enactment" by Ayub Khan of a strong presidential constitution in 1962 ended for the time being the federal nature of the political system of Pakistan. The impotence of the legislative bodies at the central and provincial levels, the lack of opportunity for direct political participation, dissatisfaction in East Pakistan with economic disparity and in West Pakistan with One Unit\(^1\) and the remoteness of decision making were among the factors which led to the downfall of the Ayub regime in 1969 and its replacement with a martial law administration under Yahya Khan. In the movement against Ayub a frequent call was for direct elections and a return to a parliamentary regime.

Yahya moved with some dispatch to meet the demands of those who opposed Ayub. He announced—although this is not untypical of a new military regime—that he considered himself a caretaker who would as soon as possible ascertain the views of the people through elections. He ended the One Unit system in West Pakistan and restored the former provinces of the Punjab, Sind, the Northwest Frontier and Baluchistain, adding to each the contiguous areas which had been separate prior to 1955. He ended the parity in parliamentary representation between the two wings which had been a feature of both the 1956 and 1962 constitutions and placed membership in the future National Assembly on a population basis, giving East Pakistan a majority of the seats. Furthermore, Yahya in a well reasoned if not entirely accepted document, the Legal Framework Order, set down his views on a future constitution. In paragraph 20 (4) he expressed support for maximum provincial autonomy and noted the central government's "responsibilities in relation to external and internal affairs and to preserve the independence and territorial integrity of the country." Taking a leaf from the Cabinet Mission plan, he added that "the Federal Government shall have adequate powers

\(^1\)One Unit—the fusion of the provinces and other units of the western wing of Pakistan into a single province of West Pakistan—occurred in 1955 as a prelude to the Constitution of 1956. The action was not a popular one and was accepted only with considerable pressure from the center. See G. W. Choudhury, Democracy in Pakistan, Dacca, Green Book House, 1963, pp. 60-64, for a brief summary of the political activity surrounding the imposition of One Unit.
including legislative, administrative and financial powers to discharge its responsibilities.\textsuperscript{22}

The party which entered the election with views most strongly opposed to Yahya’s was the Awami League. It advocated complete autonomy for the provinces, with only defense and foreign affairs being the prerogatives of the federal government and with all powers of taxation being reserved to the provinces. These were expressed in the Six Points announced by Sheikh Mujibur Rahman at a meeting of opposition leaders in Lahore in 1966.\textsuperscript{3}

For reasons which need no description or explanation here the Awami League was not involved in the constitution making process in Pakistan in 1972 and 1973.\textsuperscript{4}

It is, however, often overlooked that the National Awami Party (NAP) held views on the degree of provincial autonomy which were almost identical with those of the Awami League. The NAP in East Pakistan was an offshoot of the Awami League, while in West Pakistan it was an agglomeration of regionally oriented groups in the Frontier, Baluchistan and Sind granted on to the Azad Pakistan Party, a leftist party led by Mian Iftikharuddin and Mian Mahmud Ali Qasuri. The 1970 election platform of the faction of the NAP led by Kahn Abdul Wali Khan called for “complete provincial autonomy, leaving only three subjects, namely, defence, foreign affairs and currency, with the center.”\textsuperscript{5} The NAP (Wali faction) polled strongly in the Frontier and Baluchistan, winning a plurality of the provincial assembly seats in each province. It was able, in coalition with the Jamiat-ul-Ulema-i-Islam (Hazarvi group) (JUI), to form governments in both provinces.

The three distinct factions of the Muslim League held varying views on center-provincial relations. That headed by Khan Abdul Qayyum Khan, who joined the Bhutto cabinet as Home Minister, advocated a strong center to “safeguard the country’s solidarity and economic stability.” The faction which was a successor to that led by Ayub Khan favored a “strong center in addition to a guarantee of full autonomy to the provinces,” an unexplained contradiction in terms. The Council Muslim League, headed by Mian Mumtaz Muhammad Khan Daultana (currently Pakistan’s Ambassador in London) agreed with the stand of the Awami League and the NAP with a restricted central government and “full autonomy” for the provinces.\textsuperscript{6}

The position of the People’s Party of Pakistan (PPP) is more difficult to determine. The party manifesto states that the PPP favors a democratic, parliamentary, federal system but does not enter into a discussion of the division of powers between the two levels of government. A party theoreti-
cian, J. A. Rahim, is little more explicit in a pamphlet entitled "Outline of a Federal Constitution for Pakistan," other than proposing a bicameral legislature in which one house would be representative of the provinces and the other of the people. However, Bhutto in his initial address to the National Assembly on April 14, 1972, said, "The People's Party rejected the Six Points ... it was indeed a unique constitutional proposal ... We, too, stood for maximum provincial autonomy, but at the same time desired a viable center." The president noted that there was "a thin line indeed between maximum autonomy and secession." He seemed to favor the abortive 1954 constitutional draft which "would have reflected the realities of the situation between the east and west wings" and "proposed a federal structure." The 1954 draft, which was abandoned after the dissolution of the First Constituent Assembly by Governor General Ghulam Muhammad (an action later held ultra vires), would have provided a parliamentary, bicameral system but with a larger measure of power to the president than has been provided in the 1973 document.

Federalism in the Assembly and in the Constitution

Three days following Bhutto's address, the National Assembly passed an "interim constitution" which came into force on April 21, 1972. The temporary document was described as being based on the Government of India Act of 1935 and the India Independence Act of 1947 with "consequential amendments." These latter were mainly those pertaining to the Islamic nature of the state. The objectives resolution, passed in 1949 and included in the constitutions of 1956 and 1973, was prefixed as well to the interim constitution. Coincident with the new constitution's coming into force, martial law which had been proclaimed by Yahya Khan on his assumption of power on March 25, 1969 was discontinued. Emergency powers, however, remained in force. On May 1, new governors were appointed in the provinces and ministries enjoying the confidence of the majority of the members of the provincial assemblies took office. Bhutto accepted the demand of the NAP that governors should be appointed from the provincial majority party and designated NAP members to fill those posts in the Frontier and Baluchistan. In his March 29, 1973 address, the president said that this was unique in the history of those nations following British custom. When he dismissed the two governors on February 15, 1973, he said in the letters of dismissal that "a governor under the constitution holds office during the president's pleasure and is his agent in the province." The dismissals followed the strange incident of the arms cache found in the Iraqi Embassy and the allegations of a "London Plan" for the further dismemberment of Pakistan.

7A "presidential" (viceregal) system at the center and responsible ministries in the provinces was in accord with the Act of 1935. The ministers appointed at the center (by the Viceroy and by Bhutto) were responsible to the chief executive and were his advisers.

8This also follows from the Act of 1935 (Section 56).

A constitution committee was appointed from among the members of the National Assembly under the chairmanship of Law Minister Qasuri and representing all parties in the Assembly. The tripartite agreement among the PPP, NAP and JUI evident in the arrangements for gubernatorial appointments was continued in the Assembly. The Qayyum faction of the Muslim League was in coalition with the PPP and the other parties seemed ready to go forward rapidly with the drafting of the basic law. On October 20, it was announced that all parties had agreed on the framework of the constitution, the announcement being made by the new Law Minister Abdul Hafiz Pirzada, who had replaced Qasuri under circumstances which will be noted below. The basic elements of this agreement would be included in the approved constitution but much last minute haggling would precede the final vote.

In the division of legislative powers among the center and the provinces an important symbolic move toward "maximum" provincial autonomy was made. The lists given in the Fourth Schedule contain only enumerations of federal and of concurrent powers, while by Article 142(c) "a Provincial Assembly shall, and Parliament shall not, have power to make laws with respect to any matter not enumerated in either the Federal Legislative List or the Concurrent Legislative List." This implements the agreement of October 20 in which it was stipulated that residuary powers would be vested in the provinces. While both federal and provincial legislatures may act on the subjects in the concurrent list the federal law will take precedence in the event of conflict (Article 143). The two lists are themselves each divided into two parts. The first part lists matters generally concerned with defense, foreign affairs and financial subjects which are to be considered by the popularly elected National Assembly, and any law resulting is subject only to temporary suspension by the Senate (see below). Those subjects given in Part II are more general matters, such as railways and industrial development, on which national standards are desirable and for which the National Assembly and the Senate have equal legislative powers with differences being resolved at a joint sitting. The federal list itself goes somewhat beyond the narrow confines of "defense, foreign affairs and currency" desired by the NAP and some other parties and includes matters which might, in American terms, be included under the rubric of interstate commerce, and others which carry out the Legal Framework Order design of adequate financial and administrative powers. In this latter connection, Article 149 provides that the executive authority of the Federation may instruct the similar authority in the provinces to perform functions to carry out federal law.

A federal system in Pakistan is at once a difficult device and a potential for unification around those symbols and within those areas of government which can most efficiently be carried out by a central administration. The compromises spelled out in the final document were, undoubtedly, not responsive fully to the demands of all parties—some at one extreme would

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10 The Government of India Act of 1935, the Indian Constitution of 1950 and the Pakistani Constitution of 1956 all contained three lists, adding provincial (or State, in India) subjects to the two lists given in the present Constitution of Pakistan.
have favored the abolition of provinces and a unitary system, while others might prefer an even looser confederal form. The latter could possibly have served a physically divided Pakistan, but after 1971 the interdependence of the provinces, if only in geographic contiguity, required that some powers be held by a central government beyond the three subjects listed by the Awami League and the NAP. An example is that of railways, a situation recognized as early as the 1935 Act when a Federal Railway Authority was established with powers over means of interprovincial transport beyond simply railways. The reservation of a wide range of powers to the provinces in the 1973 constitution should give Pakistan the opportunity to exercise that "unity in diversity" of which Nehru spoke so frequently with regard to India. The question is: will the opportunity be taken?

Parliamentary Government and Bicameralism

Related to federalism is the provision in the constitution for an upper house of Parliament, the Senate. In this house the four provinces will be represented equally, initially by ten members each and, following the first general election under the new constitution, by fourteen. These members will be chosen by a system of proportional representation by the members of the provincial assemblies. They will be joined by three (later five) members from the federally administered tribal areas and by two (not to be increased) from the federal capital territory of Islamabad. The powers of the Senate are limited, as noted above, as it will have the power to initiate legislation only on those subjects given in the second part of the federal and concurrent lists, will have only temporary power to suspend, and not defeat, bills, and will not take part in votes of confidence. The Senate, however, is not subject to dissolution (half of the membership will retire every two years, the terms being set at four years), and could, in a changing political situation, be a bastion of a declining political party. The never-enacted constitutional draft of 1954, which was commended by Bhutto in his April 14, 1972 speech, included a provision for an upper house, and there was little disagreement on the proposal made in 1972.

The lower, popularly elected house, the National Assembly, will, as in most systems derived from the British example, be the body with the greatest powers, both legislative and supportive of the prime minister and his cabinet. The existing National Assembly will continue in office until April 14, 1977, unless sooner dissolved, a date five years after its first meeting (it had been elected in December 1970, but was not summoned by Yahya Khan). At the first election under the new constitution, its membership will be expanded from its present 147\(^{11}\) to 210, of whom 200 will be elected from single member constituencies delimited according to population and ten will be women

\(^{11}\)The present assembly includes those elected from West Pakistan in December 1970, together with three representatives of East Pakistan who chose to join the Islamabad National Assembly.
elected indirectly by those who had been elected from territorial constituencies, voting separately by province.12

The legislative powers of the National Assembly are specified in two ways. Article 70 gives the body the exclusive right to initiate legislation in the first part of the two legislative lists. A bill passed by the National Assembly is transmitted to the Senate which may act within 90 days to pass the bill, with or without amendment, or to reject it. If it is passed by the Senate, or if the Senate fails to act within 90 days, the bill is presented to the president for his assent and it becomes law. Should the Senate amend or reject the bill, the National Assembly may pass the bill again, accepting or rejecting any amendments as it sees fit, and with the second passing the bill is presented to the president for assent and becomes law. Thus the powers of the Senate on Part I bills is limited to a ninety day delay, with or without the suggestion of amendments. Bills under Part II may be introduced in either house. If the versions passed by the two houses differ, a joint session may be held and the result of that meeting shall be presented to the president for his assent.

The second constitutional division of power between the two houses is contained in Article 73. It states that “notwithstanding anything contained in Article 70 or Article 71” (the two articles described in the preceding paragraph), “a money bill shall originate in the National Assembly and after it has been passed by the Assembly it shall, without being transmitted to the Senate, be presented to the President for assent.” Thus the Senate has no powers with regard to money bills, whether they originate under Part I or II of the legislative lists. On the matter of presidential assent, the constitution leaves no room for presidential refusal or veto. Article 75 states clearly that the president “shall assent” within seven days and if he does not do so “he shall be deemed to have assented.”

The constitution does not provide for the establishment of several of the standing committees which are common to nations following the British pattern. This was one of the subjects contained in the rejoinder of the United Democratic Front (UDF) on April 9, 1973, to Bhutto’s aide memoir on his discussions with opposition leaders, issued on April 4. The committees referred to by the UDF apparently were the Committee on Estimates and the Committee on Public Accounts. It would seem that the UDF did not study carefully the constitution of neighboring India nor did it look at Article 67 of the new constitution of Pakistan. Both documents state that Parliament shall make rules for the conduct of its business, and it is under this general provision that the Indian parliament (Article 118 of 1950) created the two committees and another with power to look at public undertakings, as subject also of the UDF rejoinder. The UDF demand that treaties and other documents be laid on the table of the house seems also to be within the scope of Article 67 and in a parliamentary system would be expected to be followed.

12Women, of course, might also contest the territorial constituencies. The reservation is limited to ten years or to the second assembly chosen under the 1973 constitution.
PRESIDENTIAL OR PARLIAMENTARY SYSTEM

Having described the powers of the legislatures under the new constitution, it is necessary to go back and look at one of the most controversial of the provisions of the document: the special protection given to the prime minister (and to the provincial chief ministers). This can best be introduced by quoting from Bhutto’s long address on March 29, 1973. The then president said: “I wanted a presidential system and they [the opposition leaders during the negotiations leading to the October agreement] said we will never have a presidential system. I said all right. . . . Then they said we will have a system of parliamentary democracy where the powers lies with the prime minister. I said all right. They said that the prime minister cannot be removed under certain circumstances. I said all right, I accept your formula. Now they go back and say the president must have certain powers.”

Bhutto stated that he preferred the presidential system, although the PPP Manifesto called for a federal, parliamentary system. The controversy involved not only the opposition but also leading members of his own party, and led to the resignation of Law Minister Qasuri prior to the October 20 agreement among the parties. In a letter the following day, Qasuri wrote to Bhutto that the people are “waiting to hear from you on reiteration of the pledge to introduce a federal parliamentary form of government which clearly implies that the executive is answerable to the legislature, the executive power vests in the Prime Minister and his Cabinet and where the executive is also removable by the legislature.” Following the October agreement, Qasuri criticized the special protection given to the prime minister. The agreement, which called for a federal parliamentary system and gave all executive powers to the prime minister, said that for a period of fifteen years a vote of no confidence would not be carried against the prime minister unless two-thirds of the total membership of the National Assembly voted for the motion. The opposition soon repented of its agreement to this provision and the final document contains a different formula, accepted apparently at informal consultations between the PPP and the NAP during January. On January 3, Bhutto in a speech in Karachi said the opposition was trying to “wiggle” out of the agreement, threatened a unilateral PPP constitution, but agreed to further meetings, which were held.

The prime minister (or chief minister) is to be elected by a majority of the total membership of the assembly. He may be removed by a vote of no confidence. However, a motion of no confidence must include within the text the name of a successor. Such a motion may also not be moved during the period in which the assembly is considering the budget and, if a motion is unsuccessful, another motion cannot be moved for six months. The two-thirds provision was dropped but in its place was put: “. . . for a period of

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13 This and other quotations are from the transcript of the address carried in FBIS, April 2 and 3, 1973.
14 Dawn, October 8, 1972.
16 The text of the agreement is in Dawn, October 21, 1972.
ten years from the commencing day or the holding of the second general election, whichever occurs 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 shall be disregarded if the majority of the members of that political party in the National Assembly has cast its votes against the passing of such resolution" [Article 96 (5)]. The prime minister is thus provided security against minor dissidence within his own party and his coalition partners, if any, by the clause just quoted and is safe from willy nilly motions by the opposition who must agree firmly on a successor before moving a resolution. It is not an import from Westminster by any means, but the parties of Pakistan are not as institutionalized or as disciplined as those in Britain, nor is there a strong two party system which can provide a shadow cabinet prepared to take over the administration at short notice.

The powers of the president are minimal. He is elected by a joint session of Parliament and holds office for five years. There is no vice president and a vacancy in the office is to be filled by a new election. The key to his powers are in Article 48: "In the performance of his functions, the President shall act on and in accordance with the advice of the Prime Minister and such advice shall be binding on him." The clear intent of the constitution is that there is no area in which the president acts in his own discretion.

**Islamic Provisions**

In his March 29 address, Bhutto said that the Islamic provisions were stronger than those contained in the 1956 constitution. The republic, as in 1956, is again denominated the "Islamic Republic of Pakistan," but for the first time Islam is made the state religion (Article 2). Among the directive principles, which are not enforceable in the courts but which are to serve as a guide to legislation, is one which states that "steps shall be taken to enable the Muslims of Pakistan, individually and collectively, to order their lives in accordance with the fundamental principles and basic concepts of Islam" (Article 31), and another which enjoins cooperation with other Muslim nations (Article 40). A manifestation of the latter was seen in the Lahore conference of the heads of Muslim states in February, 1974, a meeting which also resulted in Pakistani recognition of Bangladesh.

The specifically described Islamic provisions of the constitution are contained in Part IX. Although there are some variations from those contained in the 1956 and 1962 constitutions, the effect is likely to be similar. It is stated that all laws shall be brought into accord with the Quran and Sunnah and that no new laws shall be passed which are repugnant to them. At the same time the personal law of non-Muslims is to be preserved. An Islamic Council is to be set up with the membership drawn from "persons having knowledge of the principles and philosophy of Islam . . . or understanding of the economic, political, legal or administrative problems of Pakistan."17

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17A similar statement was contained in the 1962 Constitution, Article 201 (2).
In other words, the Council is not to be populated solely by mullahs but is to include as well persons who have experience in government. The representation is further defined as containing members from "various schools of thought" in Islam, members who have served at the highest judicial levels (one of whom is to be chairman) and at least one female member, an innovation to say the least (Article 228). The functions of the Council are advisory. Should the president, a governor or 40% of the membership of the National Assembly, the Senate or a provincial assembly so request, the Council is to advise the requester as to the adherence of a law, proposed or already enacted, to the injunctions of Islam. The requester may or may not accept the advice, although public opinion might well make rejection difficult and, hence, reference infrequent. The Council is also to study existing law and report, within seven years, on the conformity of that law with Islam. Again the legislatures shall consider the reports but no legislative action is specifically required.

Pakistan is not in the strictest sense an Islamic state, as the opposition leaders implied in their rejoinder to Bhutto on April 9, 1973.18 The UDF claimed that the "first, fundamental right of a Muslim is to be ruled in accordance with Islam." The group would also have preferred the advice of the Islamic Council to be binding and the legislative action of the assemblies to be stayed until an opinion was received from the Council.19 The conflict which began as soon as Pakistan became independent continued to be played as modernists and traditionalists in Islam (and a few almost silent secularists) vied over the role of Islam in the state. As has been the case in 1956 and 1962, the modernists again won out, but the traditionalists can be expected to continue to press for their interpretation.  

A Constitution for Pakistan

There are a number of other features of the Constitution of 1973 which would be worthy of comment were space available. However, the three issues mentioned: federalism and provincial autonomy, the parliamentary system (including the safeguards for the prime minister), and the Islamic nature of the state are those over which the greatest controversy was aroused.

Constitutions can be simply words printed on paper, or they can be "cornerstones of a nation," embodying within the words the philosophy, and a plan of action to carry out that philosophy, of a group of people organized for political purposes into a nation-state. The proof of the latter can only be found in time, time in which the people at large and their representatives in the government and the opposition adhere to the spirit as well as the letter and cooperate to work for the nation under the rules of the game laid out in the basic law.

18For an excellent differentiation between an "Islamic state" and a "Muslim state" and Pakistan's struggle with the two, see Donald E. Smith, "Secularism in Bangladesh," Worldview, April 1973, pp. 11-16.

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