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Source: *Asian Survey*, Vol. 2, No. 6 (Aug., 1962), pp. 15-23

Published by: [University of California Press](#)

Stable URL: <http://www.jstor.org/stable/3023614>

Accessed: 01/02/2015 14:46

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THE NEW CONSTITUTION OF PAKISTAN

D. P. SINGHAL

On March 1, 1962, just one day before General Ne Win seized power for the second time in Burma, Field Marshal Ayub Khan announced a new Constitution for Pakistan. By a strange coincidence in both Burma and Pakistan, civilian government had first given way to a military-dominated administration at approximately the same time, in October 1958. In each country, the military coup was in the nature of a political revolution, having developed out of the failure of party government rather than through any ideology of military supremacy. In Burma, General Ne Win relinquished the reins of government after eighteen months only to reassume power two years later. Democratic institutions in Pakistan have remained in suspension since 1958. During these years, however, President Ayub has continuously insisted on the interim nature of his military regime. The validity of democracy was never disputed nor was the illegality of military dictatorship seriously denied.

On assuming power in October 1958, Ayub condemned the politicians of Pakistan as self-seekers who had "ravaged the country or tried to barter it away for personal gains,"¹ and stated that the October revolution was aimed not against the institutions of democracy, but only against the manner in which these were functioning. However, he considered the prevalent forms of democracy too complex to be operated successfully by the simple and illiterate peoples of Pakistan, and too remote from ordinary life to attract their active participation. Consequently a new scheme to bring democracy to the doorstep of the ordinary man, commonly known as "basic democracy," was devised and introduced in 1959. Under this scheme, the two wings of the country were each divided into 40,000 constituencies with an average population of about 1,000. Ten such constituencies formed a village (union) council and became the basic unit or the lowest tier in the hierarchy of a multi-tiered administration.

The elected representatives of the people at the lowest level, and their delegates at the higher levels, were joined by members nominated by the government. These bodies were given limited authority exercised under the paternalistic guidance of the government officials who were designated as a "controlling authority" possessing unlimited power to suspend resolutions, prohibit decisions, or enforce directives. The implication was that the power of these bodies would be increased as they acquired political experience. This structure is reminiscent of the local self-government system of British India initiated in the nineteenth century. One of the

¹ Broadcast by President Ayub, Radio Pakistan, October 8, 1958.

objectives of this system was the training of Indians at an elementary level in public administration and politics so that a class of politically experienced men at the grass-roots would exist to facilitate the eventual operation of national representative institutions. The British motives in establishing this system were subjected to a variety of criticisms. However, no one seriously doubts the integrity of Ayub who is generally acknowledged to be making genuine efforts to revitalize the political life of Pakistan, employing shock treatment techniques. Convinced of Ayub's fundamentally democratic outlook, his scheme of "basic democracy," although open to substantial objections on various counts, was generally hailed by people and political observers everywhere as a move away from military dictatorship and as a step towards bigger and better democratic institutions.

The 80,000 members of the "basic democracy" units were constituted into an electoral college and in 1960 elected Field Marshal Ayub as President of Pakistan for a five-year term. The absence of a rival candidate in this case was indicative of Ayub's popularity rather than of a deliberate attempt to bar any opposition forces.

One of the first acts of the new President was to nominate a small Constitution Commission consisting of eminent judges, lawyers and others. The Commission was instructed to submit proposals for the institution of "a democracy adaptable to changing circumstances and based on the Islamic principles of justice, equality and tolerance . . ." ² Thus, while the national constitution was to be framed by a Commission appointed directly by the Government, it was promised that the procedure would be democratized either by submitting the constitutional recommendations to a plebiscite or having them voted on by an electoral college, indirectly elected.

One of President Ayub's stated reasons for the appointment of a small commission was his desire to expedite constitution making. Large elected bodies (i.e. a Constituent Assembly), he argued, take years to finish their work and Pakistan had waited long enough already. It was initially expected that the new constitution would be announced long before the end of 1960. However, it was not until March 1962 that the provisions were made public. This was in marked contrast to the efficiency displayed by other Commissions appointed by the Ayub Government which usually worked overtime. What happened behind the scenes to cause the delay has not yet been made public but it may well have a lasting effect on Pakistan's future course. The Commission, in fact, had submitted a draft some months earlier but the President withheld its publication. Evidently he did not fully approve of the Commission's recommendations and desired drastic alterations.

The points disapproved by the President are not known precisely. It has been reported, however, that the Commission recommended a parliamentary form of government and direct election through adult franchise, both of which were totally unacceptable to the President. Since the Com-

² Mohammad Ayub, "Pakistan's Perspective" *Foreign Affairs*, July, 1960, p. 553.

mission consisted of Ayub's hand-picked men, who were well aware of his distrust of a parliamentary system, it is significant that they found themselves compelled to recommend its adoption. Not unnaturally, reports of these disagreements and consequent postponements of the promulgation of the oft-promised constitution gave rise to some anxiety and political restiveness in Pakistan. The recent disturbances in East Pakistan, the internment of an ex-Prime Minister Suhrawardy, and the public meeting organized on February 18, 1962 by Pakistani students and residents in London protesting against the continuation of military dictatorship, may be indicative of growing political dissatisfaction. The latitude given President Ayub by the Pakistani people because of his stated objectives and his efficient administration could not survive indefinitely. Whether the apprehensions of the liberal element will now be quieted remains to be seen. The *Manchester Guardian Weekly* however, commented that ". . . the restiveness has been largely due to disapproval of what it was feared the Constitution would contain, and now at least—on the major points—President Ayub has shown those fears to be justified."³

The new Constitution is a unique assortment of political institutions, supposedly designed to accommodate local needs and traditions. It envisages a form of government which will be presidential, federal and unicameral in structure. Both parliamentary and political party systems remain suspect and are excluded for the time being. Nothing inherently wrong is found in the former by President Ayub except his belief that Pakistan is not sophisticated enough with its low level of "education, prosperity, public spirit and integrity" to operate parliamentarism successfully. Pakistan's last constitution, which lasted from March 1956 to October 1958, provided for a parliamentary form of government, and the amended version of the Government of India Act of 1935, under which Pakistan was governed before 1956, was also parliamentary in character. Confessing unequivocally his own utter distrust of political parties which only "divide and confuse the people" and lay them "open to exploitation by unscrupulous demagogues," Ayub Khan is nevertheless prepared to let them re-emerge by an Act of the National Assembly, now that that body has been constituted.* For the first elections, however, political parties were banned.

The federal parliament, called the National Assembly, comprises 156 members. Six seats are reserved for women while the rest are divided equally between the two provinces—West Pakistan and East Pakistan. The general members are elected by the 80,000 members of the "basic democracies" and the women by the two provincial assemblies, presumably on a

³ *The Manchester Guardian Weekly*, March 8, 1962.

* [Editorial note: In his inaugural address to the National Assembly, President Ayub reasserted his opposition to the political party system. However, sentiment in the Assembly was so strongly in favor of the party system that an official bill legalizing parties has been introduced.]

basis of parity. The Assembly will enjoy some legislative powers and will also have limited control over the budget. The normal life of legislatures will be five years though the first term of the National Assembly will be three years. Presumably this stipulation was made to synchronize the life span of the first Assembly with Ayub's present term of office which expires in 1965.

Executive authority is concentrated in the President of the Republic who is elected by the members of the "basic democracies." He appoints his Ministers from among persons qualified for election to the National Assembly but who are not actually members of the legislature, although they can attend its sessions in an ex-officio capacity. A member of the Assembly upon nomination to a ministerial position must resign his seat in the parliament. Parliamentary secretaries, however, are selected from among elected members of the Assembly.

The President's powers in the field of legislation are also substantial. He can invalidate a bill passed by the Assembly by withholding his assent and his veto of a bill can be reversed only by a two-thirds majority of the Assembly. When the Assembly is not in session the President has power to dissolve the Assembly during a period of crisis, but in that event he himself will have to seek re-election. The President remains the supreme commander of the armed forces and retains emergency powers. He can be removed from office for physical or mental incapacity or by impeachment for misconduct by the National Assembly by a three-quarters majority. He can be elected only for two terms unless specially authorized by a joint session of the national and provincial assemblies. To maintain some semblance of equality between the two provinces, a convention has been established to the effect that if the President comes from one province, the Speaker of the National Assembly, the second most important functionary (although a weak second), will be selected from the other province. No provision for a Vice-President has been made and the Speaker of the National Assembly will officiate for the President when he is absent or unable to function.

The judiciary has been given no review powers enabling it to rule on the legality of a law passed by the legislative bodies. The court cannot refuse to enforce an act on the ground that it is unconstitutional or ultra vires—a characteristic generally associated with a system based on parliamentary sovereignty rather than federalism.

Two-thirds of the National Assembly can amend the constitution with the concurrence of the President, and three-fourths without such concurrence. In the event of a Presidential veto having been over-ridden by the Assembly, the President can refer the matter to referendum by the electoral college or dissolve the Assembly and seek re-election himself.

The Government of each of the two provinces is a miniature of the central government in most respects. Both East and West Pakistan have Provincial Assemblies of their own consisting of 156 members, elected again by the "basic democracies" in their respective areas. The head of the provincial government is a Governor nominated by the President and

enjoying somewhat similar powers to the President in his province. He appoints Ministers and can issue ordinances while the Provincial Assembly is not in session. Conflicts between the Governor and the Provincial Assembly are referred to the National Assembly for a decision. If the decision is in favor of the Governor, the Provincial Assembly must be dissolved and new elections held.

While Pakistan is not designated as an Islamic state by the Constitution, the President must be a Muslim and the legislatures are charged with the responsibility of insuring that no law contrary to Islamic teachings is enacted. A Council of Islamic Ideology, comprising eminent theologians, jurists, scholars and others has been established to advise the legislature upon matters concerning religion and to make sure that laws conform to the Islamic spirit. What would ensue should the Assembly refuse to accept the advice of the Council has not been made clear. Disagreements would seem inevitable between the guardians of religion and of politics. The Constitution stipulates that the advice of the Council should be made public, which could mean that the Assembly may be compelled to give in under pressure of public opinion. Furthermore, it is also not clear as to what measures will be taken to safeguard the interests of the minorities, for instance of the Hindus in East Pakistan.

Sixteen principles of law-making and twenty-one of policy have been incorporated in the Constitution, insuring freedom of expression and association subject to considerations of security, morality and justice. All citizens will be equal before law and the Center will maintain parity between the two sections of the country in all spheres within bounds of practicability. Urdu and Bengali will be the national languages, though English will continue as the official language until 1972, when a Presidential Commission will examine the question of its replacement. Pakistan will now have two capital cities since Dacca in East Pakistan will be the principal seat of the National Assembly, and Islamabad in West Pakistan of the national government.

In view of President Ayub's frequently reiterated profession of faith in democracy, the new Constitution falls somewhat short of general expectations. It would appear to be based upon distrust of the people. Oft-repeated arguments implying incompetence or a lack of readiness on the part of the people to operate representative institutions can hardly justify the refusal to share the responsibilities of government. Across the borders, a people equally impoverished and simple have just concluded their third general elections, the largest ever staged in human history, with remarkable success.

Actually the complexities of democracy have been far too overrated. It is time that the myth of democracy being suitable only for educated and advanced societies is exploded. This theme has been overplayed already in Pakistan, and to continue its repetition could either lead to a popular uprising or reduce the general public to a state of permanent submissiveness, habitual acquiescence to authority and political apathy. Nothing is more harmful to democracy than an indifferent people; they are even more

damaging than petty politicians. A modicum of democracy is, however, better than none and the new Constitution will at least restore national dignity by terminating martial law. Apologists for British colonial policy on constitutional reforms in pre-independence India stated that what is given is more important than what is withheld. The same statement might apply to the new Pakistani Constitution. Indeed these proceedings are reminiscent of the attitude of British rulers in India who also reposed little faith in the competence of the Indo-Pakistani peoples to look after themselves unguided, and continued to give them a paternal, stern and efficient administration. But efficiency is a poor substitute for representation and the British, adhering to a policy based on the gradual release of power, lapsed into the habit of giving too little too late and finally lost an Empire.

The new Constitution also reflects President Ayub's utter distrust of the politicians of Pakistan. No doubt many of them were corrupt self-seekers and the case against certain individuals is overwhelming. But whether the evidence produced justifies wholesale denunciation of politicians as a class is very much open to question. What in fact Ayub has been denouncing is not the elected political leadership of the people but the relics of a historical process which vanished with the birth of Pakistan. The immediate post-independence leaders of Pakistan mostly came from areas that constituted part of India, such as Uttar Pradesh, Bombay and Bihar. Despite their national stature, they lacked a territorial basis of strength within the new country and thus their prospects in a general election were far from good. The story of the rapid collapse of the Muslim League, which spearheaded the movement for Pakistan, and the emergence of a completely new set of leaders in the provincial elections of East Pakistan in March 1954, illustrates this point. Fear of self-effacement from politics impelled the old-line politicians first to prolong the life of the Constituent Assembly, then to put off general elections which were never held in Pakistan, and if possible to amass wealth to compensate for the loss of political power. General elections meant political suicide to them. The political behavior of such leaders, therefore, cannot be considered as indicative of the integrity of Pakistani politicians in general. Nor does it reflect on the competence of the Pakistani people to choose their representatives. To plan the future of a country on the basis of an accident of history is erroneous. Indeed Pakistan's malaise was not democracy, but the attempts to block its institutionalization by repeated postponement of general elections. If Pakistan had gone to the polls and the real representatives of the country, unknown and inexperienced perhaps, been allowed to assume control of the governmental machinery, the course of events might well have been different. By outlawing general elections based on adult franchise, President Ayub has only continued a process that has already caused so much chaos.

By the same token, a continued ban on political parties would be of doubtful value. The ban on parties was imposed before the parties had had any real opportunity to assume an articulate form. The former parties, in disgrace now, were the inevitable product of the peculiar transitional phase in Pakistan's history to which we have referred earlier. Disad-

vantages of the party system are admittedly many, but it is the only method known to distinguish democracy from dictatorship. The role of the party system in arousing public opinion and articulating popular reaction should not be underestimated. In Pakistan not only have the parties been banned, but even political activities have been restricted. The press is already controlled by the government, and in the 1962 general elections, no meeting was permitted unless it was presided over by a government official—a non-party man.

Moreover, the elevation of the "basic democracies" from the lowest tier of administration to a position as final arbiters of national destiny is in direct contrast to the original intentions expressed by President Ayub. These units were to be the starting point for the political education of the Pakistani people. There was no intention to make them the basis of legal supremacy, giving them the power to elect the President and the legislatures and to pronounce verdicts on intricate, controversial matters. This may or may not perpetuate Ayub's personal rule, but it certainly will continue to exclude intelligent and educated men and women, who are invaluable for the smooth operation of a democratic machinery, from elective position. Normally concentrated in urban areas, the intellectuals are, as past experience shows, not well-disposed towards seeking election at the "basic democracies" level, even if they were entitled to contest and had a chance of success. The limited powers and functions of the "basic democracies" constitute little attraction for the energetic and the ambitious.

Apart from the accidents of history, much of Pakistan's political malaise has been caused by her geographical division into two halves—West Pakistan and East Pakistan—separated by India. The two provinces are different in many ways and from the very beginning, there has been friction between them. The danger of East Pakistan's secession, disrupting national unity, has always dominated the politics of Pakistan. In West Pakistan, the sentiment for Urdu in preference to their own regional languages—Sindhi, Punjabi and Pushtu—as a national language is much stronger than it is in East Pakistan, which insists on the adoption of Bengali. East Pakistan, ethnologically different from West Pakistan, comprises more than half the population of the country although it is much smaller in area than West Pakistan. It earns two-thirds of Pakistan's foreign exchange but the political power and economic benefits accrue to the Western section. Bengalis have always demanded a share in power and politics corresponding to the population and production. Acceptance of this principle would mean Bengali supremacy in Pakistan. On the contrary, for various reasons, mainly historical, East Pakistan has remained subordinate to West Pakistan and only as a result of agitation has it been raised to a position of theoretical equality with the West. In practice, it still suffers many disabilities. The vast physical distance between these two wings, moreover, has deprived the peoples of Pakistan of the usual opportunity to reinforce ties of national solidarity through continuous association and to give some real meaning to "national consciousness."

President Ayub and his military supporters are even less prepared to make concessions to East Pakistan than were the politicians, as the overwhelming majority of army officers are Punjabis and Pathans. East Pakistanis constitute only 5 per cent of the army. Fear that East Pakistan would vote against the West Pakistan-dominated army must have added to Ayub's reluctance to allow general elections. East Pakistan was much more politically conscious than the West and political parties had been more active there since the days of Bengal-Partition in 1905. Yet East Pakistan cannot be kept down permanently without risking a major upheaval. Hence, parity between the two provinces of Pakistan has been retained as an essential feature of the new Constitution. The significance of this provision is partially negated, however, by the removal of the legislature from Islamabad (the seat of the executive authority) to Dacca since this must necessarily lead to greater independence of the executive from legislative control. While both provinces have equal representation in the legislature, it is not clear whether this parity will also extend to the civil and military services as well as to the President's cabinet. These are the places where the principle of parity will receive its real test.

The new Constitution has been styled as prescribing a presidential form of government in Pakistan, but it would be misleading to compare it with the American system. Beyond vague similarities, there is very little in common between the two, for the American President is not nearly as powerful as his Pakistani counterpart. Nor can even President De Gaulle, under the Constitution of the Fifth Republic, match the Pakistani President's authority. Presidential appointments do not require endorsement by the National Assembly. Neither Presidential nor Cabinet actions can be subjected to questioning by the committees or other agencies of the legislatures. With his emergency powers, the President's powers come close to being all-embracing. The most distinctive features of the American Constitution—separation of power, the doctrine of judicial review and bicameralism—have not been incorporated into the new Pakistani Constitution. Actually it resembles more the British governmental system in pre-1947 India in which the rule of law was qualified by Viceroy's ordinances, the nominated members of the Executive Council could participate in Assembly proceedings but were responsible only to the Governor-General, the armed forces occupied a privileged position and the judiciary was subordinate to the executive.

The wide authority given to the President almost makes him a constitutional dictator. It is not easy to conceive that Ayub would willingly hand over so much power to a man other than himself. To be able to shoulder such a burden of power, the President must be a person of extraordinary abilities. If, by some cruel mischance, Ayub is removed, who will assume this extremely heavy mantle? The Constitution does not even provide an office which could be a stepping stone to the Presidency or a training ground for a successor. Distrust, thus, is the keynote of this document, distrust of the people, of politicians, of parties, of direct elections, of a Vice President and of the parliamentary system. Against Ayub's frequent and

stout defense of democracy, this would seem incomprehensible unless the President has acted either under fear of disruptive forces or the lure of power. Discussing the Constitution, Professor K. J. Newman observes:

“what emerges then is the fact that the constitution has been drafted in such a way as to perpetuate the present regime, and to eliminate the competition of political parties for a long time to come.”⁴

Indeed without a parliamentary system, the President does not have to share authority with a Prime Minister who, if backed by the parliament, could refuse to be pushed around or could even menace Ayub's supremacy. By disallowing general elections, President Ayub has forestalled the emergence of a class of people who together might enjoy more popular support than Ayub himself commands and thus prove too formidable even for his army.

The real danger to the state will arise when power politics involves the military and creates dissensions in military ranks. Power corrupts army officers as much as it does politicians. Reports of corruption and conflicts are already current and in the absence of a free press, a whispering campaign is flourishing on a mixture of fact and fancy. General Azam, the second most powerful man in the Pakistan army, was allegedly transferred to East Pakistan to separate him from his supporters in West Pakistan. Armed conflict would be ruinous to the country. Is it because of the fear of growing resentment in the army against his personal rule that President Ayub has devised a Constitution which gives him civilian support to sustain him against army rebels without requiring him to surrender the substance of his authority to civil control in return?

The faith reposed in Ayub earlier by the people of Pakistan has begun to wane. Efficiency and benevolence can no longer compensate for the loss of freedom of press, expression and association. That President Ayub is not unaware of his declining influence is indicated by the fact that the constitutional proposals were not submitted to a plebiscite for approval as promised, but were instead promulgated under his own authority. The outlook for democracy in Pakistan, fettered as it is, does not appear promising. At best Ayub's Constitution, by running the country with the assistance of the civil service and armed force—mutually distrustful of each other—introduces an authoritarian regime of the old British colonial type.

⁴K. J. Newman, “Democracy Under Control,” *The Times* (London), March 16, 1962, p. 13.