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Author(s): G. W. Choudhury

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CONSTITUTION-MAKING DILEMMAS IN PAKISTAN

G. W. CHOUDHURY

Dacca University

I

PAKISTAN, which won its independence in 1947, is confronted with the task of framing a constitution. A Constituent Assembly was set up for this purpose under the India Independence Act of 1947. The task, however, proved to be highly complex and threatened to be a major national problem endangering national unity. Certain features of the country's geography and population, which have no parallel in any other country, have made the task even more difficult. The Constituent Assembly grappled with the problem for seven years (1947-54) and formulated a number of proposals. A final draft was accepted in September, 1954, at which time the head of the state, Governor-General Ghulam Mohammed, dissolved the Constituent Assembly on the ground that it had lost the confidence of the people. Although the Constituent Assembly was unsuccessful, its deliberations during the last seven years throw interesting light on the problems to be faced in framing a constitution for Pakistan.

The first and most difficult problem was the exact character that the state should take. The vast majority of the people of Pakistan are Muslims. Their aspiration to preserve and foster Islamic values was the main justification for insisting upon the partition of India. It may be said that implicit in the demand for an independent Pakistan was the demand for an Islamic state. Some speeches of important leaders who were striving for Pakistan lend themselves to this interpretation. The first prime minister, Liaquat Ali Khan, in introducing the objective resolution of the Constitution of Pakistan in the Constituent Assembly stated:

Pakistan was founded because the Muslims of this Sub-Continent wanted to build up their lives in accordance with the teaching and traditions of Islam, because they wanted to demonstrate to the World that Islam provides a panacea to the many diseases which have crept into the life of humanity today.¹

No one who has given serious thought to the introduction of a religious state in Pakistan has failed to notice the tremendous difficulties with which any such scheme will be confronted. While it was generally agreed that the aim should be an Islamic state, there was no agreement as to the meaning of the term "Islamic State." Though it has not been precisely defined, this phrase is on the lips of almost all the intelligentsia of Pakistan and has produced an immense volume of talk and enthusiasm. Soon conflict arose between the two factions: *Ulema* (lay religious teachers), that

¹ *Constituent Assembly of Pakistan Debates* (Karachi: Government of Pakistan Press), V, No. 1, 2.

wanted the country to become a full fledged Islamic state, and those Muslim elements who consider the "Back to Shariat Movement" as incompatible with Pakistan's ambition to find an important place for itself in the modern world. The latter liked to interpret Islamic principles in terms of twentieth-century democratic constitutional practices.

The *Ulema* would like to reproduce a society which no longer exists and a polity which was suited to the early days of Islam. They hold that all that was done then was the final interpretation of Islam, and it is not possible for human intellect to deviate from it in any detail. They believe that since Islam is a perfect religion containing laws governing the whole field of human activity, there is no place in an Islamic state for what, in the modern sense, may be called legislation. *Ulema* concedes that the form of government in Pakistan, if it is to comply with the principles of Islam, will not be democratic. A leading member of the *Ulema*, who was a member of the Constituent Assembly, stated:

The Islamic State means a state which is run on the exalted and excellent principles of Islam . . . people who do not subscribe to those ideas may have a place in the administrative machinery of the State but they cannot be entrusted with the responsibility of framing the general policy of the State on dealing with matters vital to its safety and integrity.²

According to the *Ulema* the non-Muslim minorities in Pakistan cannot be full citizens; they will have no voice in making laws, no right to administer them, and no right to hold public offices.

This view has never been accepted by the Pakistan intelligentsia. Their concept of an Islamic state — which was accepted in the draft constitution — is fundamentally different. Mohammed Ali Jinnah, the founder of Pakistan, declared in a broadcast to the people of the United States in February, 1948:

The constitution of Pakistan has yet to be framed by the Pakistan Constituent Assembly. I do not know what the ultimate shape of this constitution is going to be, but I am sure that it will be a democratic type, embodying the essential principles of Islam. . . . Islam and its idealism have taught us democracy; it has taught equality of man; justice and fairplay to everybody. We are the inheritors of these glorious traditions and are fully alive to our responsibilities and obligations as framers of the future constitution of Pakistan. In any case, Pakistan is not going to be a theocratic state to be ruled by priests with a divine mission. We have many non-Muslims — Hindus, Christians and Parsis but they are all Pakistanis. They will enjoy the same rights and privileges as any other citizens and will play their rightful part in the affairs of Pakistan.³

Here he clearly envisions a democratic state wherein the citizens, irrespective of their religion or creed, would enjoy equal rights. Even so, he found no difficulty in calling it an Islamic state. He, like other Pakistani intellectuals, stresses the fact that a policy based on Islamic ideals of equality

² *Ibid.*, V, No. 3, 45.

³ *Quaide-Azam Speaks* (Karachi: Pakistan Publicity, 1948), pp. 92-93.

and justice is true to the spirit of the modern democratic state. Dr. I. H. Qureshi, Pakistan's former education minister, has also expressed this feeling:

The legal Sovereign shall be the Muslim Law; but its definition shall be in the hands of a legislature representing the people, which will, by deliberation and discussion, decide how to apply the principles of Islam to the needs of the community in varying circumstances. . . . The political sovereign shall be the people who will elect and dismiss their legislature and their government.⁴

The framers of the constitution were faced with the problem of producing a document that would be satisfactory to secularists and sectarians alike. This proved to be one of the main causes of the delay. The *Ulema* could not be ignored altogether as they are sometimes capable of producing mass agitation and movements such as that which took place in West Punjab in 1953. A board of *Ulema* known as the board of *Talimat i-Islamiah* was associated with the work of the Constituent Assembly. The *Ulema* made considerable headway when Nazimuddin became the prime minister of Pakistan. In 1952, Nazimuddin proposed to the Constituent Assembly that a board of *Ulema* be designated as a court to rule upon the repugnancy of legislation.⁵ But this proposal soon raised a storm of protest and the Constituent Assembly, after weeks of debate, adopted a proposal that the Supreme Court alone should have jurisdiction for determining whether or not a particular law is repugnant to the Koran or Sunnah.⁶ In fact, the final draft of the constitution which was adopted by the Constituent Assembly is a collection of secular laws for the administration of a democratic form of government, with the exception of some clauses that reaffirm and secure the Islamic character of Pakistan. The proposed constitution created a ministry for minority affairs charged with the task of safeguarding the rights of all its 76,000,000 citizens, including 11,000,000 members of minority communities. All citizens are entitled to appeal to the Supreme Court for enforcement of their fundamental rights. Identification with Islam, in the proposed constitution, begins with the preamble "in the name of Allah" and continues in several articles, as follows:

(1) No legislation shall be enacted repugnant to the Koran and Sunnah.

(2) Steps shall be taken in various spheres of government to enable Muslims to order their lives in accordance with the Koran and Sunnah.

⁴ *Proceedings of the Second All-Pakistan Political Science Conference* (Peshawar, 1951), p. 8.

⁵ *Report of the Basic Principles Committee* (Karachi: Government of Pakistan Press), pp. 5-6.

⁶ Report of the B.P.C. as adopted by the Constituent Assembly (Karachi: Government of Pakistan Press), pp. 5-6.

(3) Facilities shall be provided for them to understand what life in accordance with the Koran and Sunnah means.

(4) The teaching of the Koran and Sunnah to Muslims shall be made compulsory.

(5) Islamic moral standards shall be promoted and maintained.⁷

It is difficult to say whether even these few clauses affirming the Islamic character of the constitution are likely to be retained in the new draft which the present government in Karachi is reported to be drawing. The new regime seems to be less lenient towards the *Ulema*. Major-General Iskander Mirza, who is one of the most powerful members of the new regime, offends the *Ulema* by warning religion to keep out of politics. He proclaims: "We can't run wild on Islam; it is Pakistan first and last."⁸ Prime Minister Mohammed Ali has maintained, however, that the Islamic character of the constitution will be preserved.⁹

II

Representation between East and West Pakistan in the federal legislature was the problem which, more than any other, delayed the framing of a constitution. Pakistan consists of two parts separated by a thousand miles of foreign (Indian) territory. East Pakistan is one-seventh of the whole in area, but its population exceeds the total population of all the provinces and states in West Pakistan. In other words, Pakistan is a curiously dual state with most of its area in the West and most of its population in the East. The eastern region is a compact area whose economy is no organic part of the economy of the rest of the country, nor are the two parts alike in culture or language. Most people in the western region, though speaking different dialects, regard Urdu as the common language, whereas in East Pakistan Bengali is the cherished language of the people. West Pakistan is predominantly Muslim; East Pakistan has an important non-Muslim minority. To find a common parliament for a state whose territory and population are so uniquely distributed, proved to be a complex task. The Constituent Assembly made a number of proposals to solve the problem of representation but none of these could satisfy the demands of East and West Pakistan. The Basic Principles Committee, which was set up by the Constituent Assembly to frame the federal structure of the government, made reports in 1950 and 1952.¹⁰ The first report dealt, in a

⁷ *Report of the Basic Principles Committee* (Karachi: Government of Pakistan Press, 1953), p. 2.

⁸ Reported in *New York Times*, February 7, 1955.

⁹ *Times* (London), October 30, 1954.

¹⁰ Henceforth referred to as first and second reports.

rather vague way, with the representation problem. It envisaged a House of Units representing the legislatures of the provinces, and a House of the People elected by the people. The report said nothing on the structure of the House of the People, but made it clear that existing provinces should have equal representation in the House of Units. The two houses were given equal powers. It was recommended that the budget and certain other financial matters should be placed before the joint session of both the houses.

The first report created a storm of protest in East Pakistan on the ground that it did not provide that province — the most populous one — with an over-all majority in the federal legislature and might even convert it into a minority in a joint session of the two houses. Objection was raised to equality of powers for both houses as provinces would then have equal representation in the upper house. In East Pakistan, opposition to the report assumed the dimensions of a full-scale agitation fostered by disgruntled politicians and it seemed that a serious split between the central government and that province had occurred. Because of this agitation the Constituent Assembly decided to postpone its deliberations, and invited suggestions and proposals from the public to be received by January 1, 1951. A subcommittee was formed to examine these proposals, and on the basis of its findings the Basic Principles Committee presented its second report in 1952. The structure of the proposed federal parliament under the second report was as follows:

There were to be two houses of parliament as in the first report. The House of Units would consist of 120 members of whom 60 would come from East Pakistan and 60 from West Pakistan. Similarly, out of the total membership of 400 in the House of the People, half would be elected from the East and half from the West. The House of the People was to have all real authority; the House of Units would enjoy only the privilege of recommending revision in hasty legislation; the Council of Ministers was to be responsible collectively to the House of the People.

The second report brought the principle of parity between East and West Pakistan as its most important contribution towards solving the representation problem. It claimed to bring about a constitutional balance of power as well as a balance of responsibility between the two sections.¹¹ But the reaction to the second report was more unfavorable than to the first, particularly in West Punjab. The press in all of West Pakistan, with few exceptions, joined in a chorus of protest. The leaders saw no logic in treating one single province — East Pakistan — as being equal in importance to all the other units put together. They regarded this as a violation of the

¹¹ Nazimuddin — speech on the Second Report Pakistan Constituent Assembly, December 22, 1952.

federal principle under which each unit is given equal representation in the upper house, and cited the example of federation in the United States.

Though the criticism directed against these reports was often fostered by disgruntled politicians, in all fairness it cannot be denied that neither the first nor the second reports were entirely adequate. The following arguments could be advanced against the second report:

(1) It did not recognize, in a democratic way, the fact that East Bengal has a majority of the total population of the country.

(2) It did not pay due respect to the fact that West Pakistan has the major part of the federation's territory.

(3) By giving the upper house an identical composition with the lower house, it made the former a weak replica of the latter and raised the question of the usefulness of two houses.

(4) A still more serious flaw consisted in the lack of a constitutional provision in case the two houses were unable to resolve a conflict. Once more, the Constituent Assembly had to postpone its deliberations for an indefinite period. It seemed that the country faced a constitutional crisis of great magnitude; and that no solution acceptable to both East and West Pakistan was possible. National unity and solidarity were seriously threatened. The matter was further aggravated by the growing sense of provincialism which has been making headway in Pakistan in the past few years. Jinnah warned his nation against this menace as early as 1948. He said: "If we begin to think of ourselves as Bengalis, Punjabis, Sindhis, Baluchis first — Muslims and Pakistanis only incidentally — then Pakistan is bound to disintegrate."¹² But after the death of Jinnah, sectionalism increased rapidly, particularly over the constitution-making issue.

On his appointment, Prime Minister Mohammed Ali considered it one of his principal tasks to overcome the constitutional deadlock. He was soon successful in achieving a compromise known as the "Mohammed Ali formula" which was accepted by the Constituent Assembly in October, 1953. While this formula maintained the principle of parity between East and West Pakistan, it brought a substantial departure from the parity clauses of the second report. The main features of the formula were as follows:

(1) The upper house was to consist of 50 members distributed geographically. As West Pakistan has a preponderance of the country's territory, it was given a clear majority in the House of the Units.

¹² *Quaide-Azam Speaks* (Karachi: Pakistan Publicity), p. 186.

(2) The lower house was to consist of 300 members, the majority to come from East Pakistan since it has the absolute majority of the country's population.

(3) The distribution of seats was made in such a way as to ensure parity between the two zones in the joint session of the houses:

	<i>Upper House</i>	<i>Lower House</i>	<i>Joint Session</i>
East Pakistan	10	165	175
West Pakistan	40	135	175

A further innovation was that both houses were given equal powers and in case of conflict a joint session must be called. Still a further safety valve was provided in that no bill could pass a joint session if the majority supporting it did not include at least 30 per cent of the total members from each zone. Thus it was sought to make the two zones interdependent. Important measures like a vote of confidence in the cabinet or the election of the head of the state were to be decided only in joint sessions.

The "Mohammed Ali formula" attempted to meet a novel situation by a novel method. There is no doubt but that the 30 per cent clause would hinder the smooth working of the constitution, for government by regional parity is always likely to produce deadlocks and difficulties. In the existing circumstances, such a solution was a practical necessity. The people of Pakistan were united by Jinnah in a rather unique way and they fought for their country without any sense of distinction as Bengalis, Punjabis, Sindhis, etc. Soon after Pakistan was established as a country, however, regional or provincial feelings began to be manifested. The East Pakistanis felt, rightly or wrongly, that they had no fair and adequate share in the federal government or administration. They felt themselves to be neglected and dominated by the West. Their dissatisfaction, in turn, produced similar feelings in West Pakistan. Many of the difficulties encountered by the framers of the constitution had their origin in these feelings of mutual distrust, suspicion, and fear held by the two wings of Pakistan, separated from each other by more than a thousand miles of foreign territory. Though there are no fundamental ideological or other differences between the two sections, the lack of geographic and linguistic unity are proving to be great obstacles in the achievement of national solidarity. The Muslim League party was the great unifying force which gathered the Muslims of undivided India under the leadership of Jinnah. With the decline of the party's popularity and prestige, that unity is seriously challenged. It will take able leadership to restore it. The move to consolidate the whole of West Pakistan into one zone seems to be a new approach to the problem. Both the tie of common religion and the fear of Indian aggression are there to unite the people of the two wings.

III

The third problem was that of the distribution of powers between the federal and the provincial governments. This problem was not entirely peculiar to Pakistan; the indispensable quality of any federal state is a distribution of the powers between the central authority and the federating units. A federal constitution attempts to reconcile the apparently irreconcilable claims of national and state sovereignty. The objective resolution, as passed by the Constituent Assembly of Pakistan, lays down that "The territories now included in or in accession to Pakistan and such other territories as may hereafter be included or acceded to Pakistan shall form a Federation."¹³ This decision in favor of the federal state was regarded as the "dictate of Geography" and it was noncontroversial. It would be idle even to think of a unitary form of government when the two parts of the country are separated by more than a thousand miles. Apart from this natural factor, there were other forces working in favor of a federal state. Since 1935 the provinces which constitute Pakistan have enjoyed autonomy under the Government of India Act (which Act still serves as the interim constitution in Pakistan), and their provincial spirit has become deep-rooted. It was felt that only through the recognition of these established divisions could national unity be maintained and strengthened.

While there was general agreement over the federal form of government, conflicts developed between those who wanted maximum autonomy for the provinces with a weak center and those who favored a strong federal central government with limited provincial autonomy. The makers of the constitution were at great pains to steer a course midway between these two conflicting aims. Their problem might be compared with that encountered by the makers of the American Constitution who had to compromise by balancing the ideas of those who desired a strong central government with the ideas of those who were afraid of such a government. Provincial Pakistani leaders with political aspirations and vested interests have developed a narrow outlook which conflicts with the wider interests of the nation. Disgruntled politicians in both wings wanted not merely provincial autonomy but also a weak center. The school of provincial rights claimed that in view of geographical and other factors the central powers should be strictly enumerated and residuary powers should be vested in the provinces. It is rather strange that demands for maximum autonomy first came from the largest unit — East Pakistan — where, unfortunately, fear of domination was already deep-rooted. As mentioned earlier, the people of that region felt they were being neglected by the central government and feared that any increase of its power would mean a corresponding decrease

¹³ *Constituent Assembly of Pakistan Debates*, V, No. 5, 100.

of their own power and influence. This sentiment was strongly encouraged by the non-Muslim minorities, who were always vocal in championing the cause of provincial autonomy and provincial rights. A national convention was held in Dacca on November 4 and 5, 1950, which demanded that only three powers — defense, foreign affairs, and currency — should be given to the center and the rest be vested in the provinces.¹⁴ This demand for maximum autonomy received further impetus from the new political party, the United Front, which won an overwhelming victory in the provincial election in March, 1954. There has been considerable opinion in favor of giving more powers to the East Pakistan provincial government. It has been felt for some time, especially in view of the experience of the last seven years, that this province can be administered better by the local legislature in Dacca than it can by the central one in Karachi.¹⁵

The school of national rights used the same geographical and natural factors to argue in support of a strong national government. Mr. A. K. Brohi, former minister for parliamentary affairs, said that if there had been geographical contiguity between East and West Pakistan, then the principle of decentralization of powers might have been the basis of the constitution. But in order to overcome this natural difficulty in the way of the unity of the peoples of Pakistan — the distance that separates the two wings — there was no alternative but to provide for a strong central government.¹⁶ The demand for a strong national government was supported by the majority of the framers of the constitution, who felt that it was necessary to give a mortal blow to provincialism, which had so nearly succeeded in tearing the nation apart. But the framers could not altogether ignore the demands for a maximum autonomy and decentralization. Whether the central government shall have enumerated powers and the state governments residuary ones, or vice versa, is a matter of the utmost importance, particularly when the field of government is constantly widening. The general social tendency is the breaking down of local barriers and the conversion of matters which were formerly of purely local interest into matters of general concern. No matter how much one may regret it for sentimental reasons, the fact remains that more and more the problems of society are becoming such that they can be met only by an authority representing the general interest. It is desirable, therefore, that the central government shall have as free a hand as possible to meet these conditions as they arise.

¹⁴ *Pakistan Observer* (Dacca), November 6, 1950.

¹⁵ Malik Firoz Khan's speech in the Constituent Assembly on September 16, 1954, reprinted in *Morning News* (Dacca).

¹⁶ *Constituent Assembly of Pakistan Debates*, XV, No. 12, 349.

There are two generally accepted patterns relating to the distribution of powers in a federal state: the constitution may provide what powers the federal authority shall have and leave the remainder to the federating units, as in the United States; it may state what powers the federating units shall possess and leave the remainder to the federal authority, as in Canada. Neither of these two methods could be accepted in Pakistan. The framers of the constitution adopted a third method which was devised by the British experts when they distributed powers in the federal constitution for undivided India under the Government of India Act, 1935. During the course of the discussion which led to the promulgation of the Constitution Act of 1935, the Muslims demanded more powers for the provinces, because in some of them, at least, there was a preponderant Muslim majority and they felt they would be able to capture some power in the provincial government. The Hindus, on the other hand, demanded greater concentration of power in the Indian legislature. So the British constitutional experts devised, as a compromise, two lists enumerating the subjects wherein the federation and the provinces respectively would have exclusive legislative jurisdiction, and a third list of subjects over which they would have concurrent jurisdiction. Residual powers were vested neither in the central government nor in the provinces; the governor-general, acting at his discretion, was empowered to allocate the right to legislate on such subjects either to the central authority or to provinces — as he might think fit. The framers of the Pakistan constitution found this method of great use in striking compromise between the school of provincial rights and the school of national rights. In the final draft, as adopted by the Constituent Assembly on September 16, 1954, they incorporated three lists of powers — federal, provincial, and concurrent. The central government was given wide jurisdiction in the controlling of defense, foreign affairs, currency and banking, communications, foreign commerce, and scores of other subjects. In all, there were seventy-two items in the federal list.¹⁷ The provincial list included forty-one items dealing with such matters as law and order, public health, education, agriculture, trade and commerce, and other subjects of local interest. The concurrent list was the smallest and included relief and rehabilitation of refugees, broadcasting and television, criminal law, civil procedure, newspapers, welfare of labor, etc. Residual power, following the model of the 1935 act, was vested in the head of the state, who, in consultation with the provincial government, might direct that any specified subjects not mentioned in any of the lists be classified as being a part of either the federal, the provincial, or the concurrent list. An analysis of the distribution of powers, as adopted by the Constituent As-

¹⁷ *Second B.P.C. Report* (Karachi: Government of Pakistan Press).

sembly, shows that it was guided largely by the need for a strong national government. While making concessions to the natural and geographical factors of Pakistan, it made the central government sufficiently strong to meet any eventuality. In case of conflict between the federal and the provincial authorities, federal predominance was provided. But no sooner did the framers appeal for a strong federal government than it became clear that their draft constitution was not acceptable to the country. The West Pakistan leaders demanded that the whole of West Pakistan be merged into one unit and that more power be given to both East Pakistan and West Pakistan. Before the Constituent Assembly could decide the matter it was dissolved by the head of the state on the ground that it had lost the confidence of the people. The whole issue is now being reviewed anew by the present government in Pakistan and it is uncertain what shape the structure of the future federal government will take.

IV

The last hurdle in the way of constitution-making in Pakistan was the language controversy. Pakistan is a multilingual state. The East speaks Bengali and in the West there are a number of different languages, such as Punjabi, Sindhi, Pushtu, and Baluchi. Urdu, however, is regarded as the common tongue of the region. The language question has been agitated from the beginning. The country was faced with this issue early in 1948, within a few months of its establishment. The conflict started when a group of students of Dacca University, led by some interested politicians, began to agitate for the inclusion of Bengali as one of the official languages of the state. Pakistan was then preoccupied with serious problems arising out of the partition of India; particularly it had faced a major crisis in dealing with the mass migration that followed the partition. The movement was not genuine, but was fostered and encouraged by subversive elements who found in it a wonderful opportunity to disrupt the newly-born state. Jinnah could see the danger and came to Dacca. He declared, "without one state language, no nation can remain tied up solidly together and function. Look at the history of other countries. Therefore, so far as the state language is concerned, Pakistan's language shall be Urdu."¹⁸ Such was the hold of Jinnah over the people that within a few days the movement collapsed. After his death, the agitation was revived again in 1952; it resulted in the death of several university students. After this incident the movement gained more and more impetus, since by this time provincial feelings were also steadily increasing. The new United Front party used the language agitation for its political purposes. By 1954, it was hardly possible

¹⁸ Quaide Azam Speaks, p. 133.

to ignore this movement. The framers of the constitution could see the importance of the issue. Among the cultural characteristics of nationality, language is and always has been pre-eminent. Uniformity of language tends to promote like-mindedness, to provide an inclusive set of ideas, and to develop a sense of common interest. Linguistic uniformity was considered by many patriotic Pakistanis as the most essential prerequisite to developing a sense of unity. The framers of the constitution tried for months to arrive at an acceptable solution, but the task proved to be too complex and too difficult. They presented a formula in May, 1954, which was acceptable by the Constituent Assembly, but it was clear from the day of its adoption that the formula could not be satisfactory. It accorded an equality of status to both Urdu and Bengali as the official languages. It further provided that the state should take all measures necessary for the development and growth of a common national language (without mentioning what should be the common language). In the meantime, it was provided that English should continue to be used as the official language of the state for a period of twenty years. As Prime Minister Mohammed Ali explained, the formula made an attempt to reconcile the demands of all sections of the people.¹⁹ It tried to accede to the demand of the Bengalis and at the same time it sought to maintain linguistic unity. In fact, an analysis of the formula would show that the framers of the constitution wanted to postpone the issue for the next twenty years at which time they expected a better environment in which to solve it.

¹⁹ *Constituent Assembly of Pakistan Debates*, XVI, No. 9, 88-99.