

Syed Shah

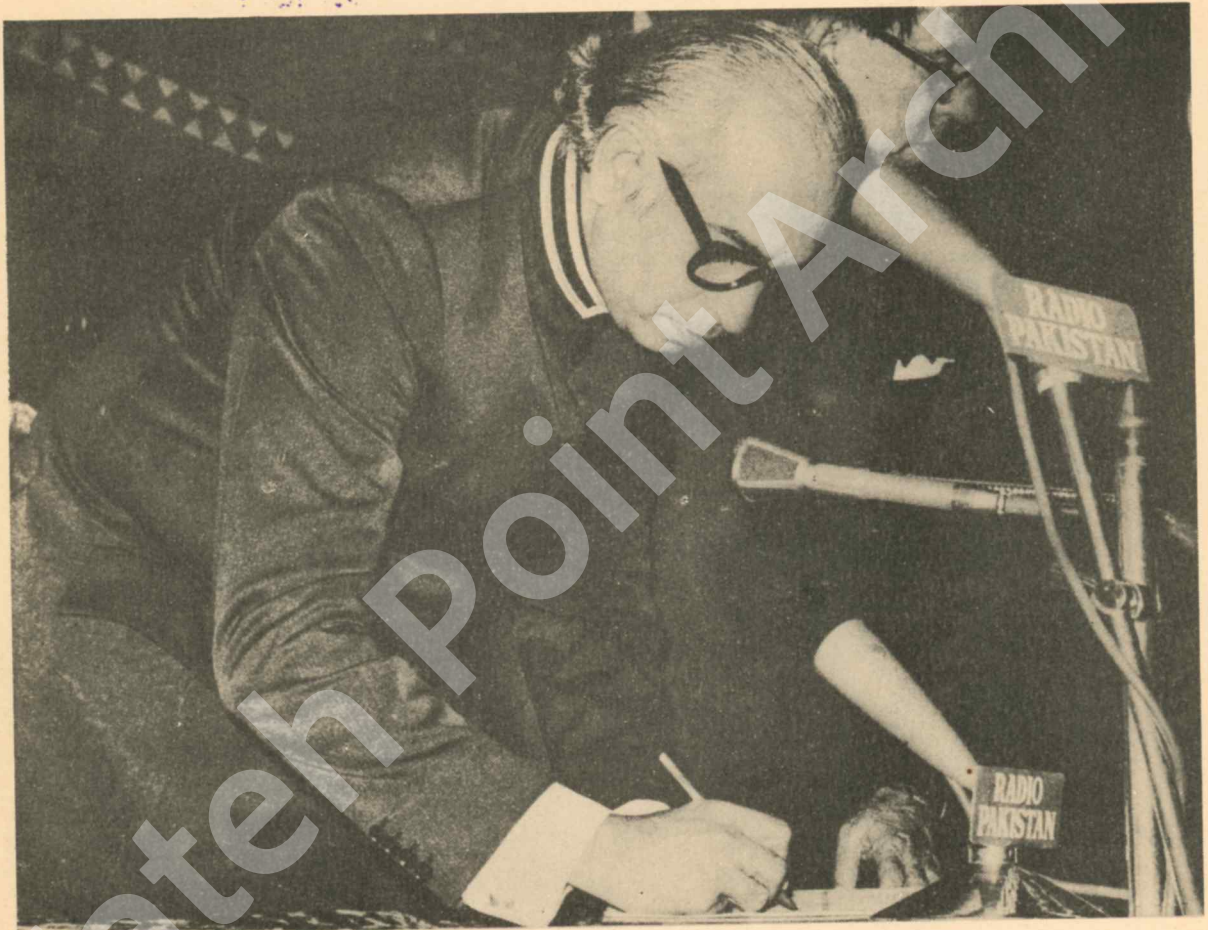
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Introducing
The
Constitution
of
Pakistan
1973

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OF
THE ISLAMIC REPUBLIC OF
PAKISTAN
1973



**President Zulfikar Ali Bhutto
authenticating the Constitution of Pakistan
on 12 April, 1973 earlier passed by the Constituent Assembly on
10 April, 1973.**

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Distt. Larkana.

THE CONSTITUTION OF PAKISTAN

ON April 6, 1973, the *New York Times*, commenting on President Bhutto's political skills in reconciling inflexible principles and viewpoints, stressed the mounting intensity of the constitutional crisis in Pakistan. The distinguished American journal expressed the apprehension, which was widely shared by many friendly observers, that the cleavages and tensions may add intolerably to the spate of other difficulties—foreign and domestic—that were pressing upon the dissected country.

As it happened, only four days later, the National Assembly adopted the new Constitution by an almost unanimous vote (only two abstentions in a house of 146) that bewildered many and belied all the gloomy prognostications of violence and despair.

In a little over a year—a period that will be reckoned as too short in the perspective of history—Pakistan has emerged from the devastating experience of dismemberment with a new vision of its future and formally inscribed its national ideals in a constitutional document. The Constitution, as President Bhutto said in his final address to the Constituent Assembly before its prorogation, represents the will of the people. It is a testament of their faith and their commitment to an open society, with individual liberty, political freedom and equal opportunity for every citizen.

The months of constitutional endeavour were often marked by a tendency towards sharp rhetoric, polarization of views, and an atmosphere of agonising doubts about political identity and national allegiance. The adoption of the Constitution has finally resolved the profound crisis of identity and reinforced the people's confidence in the goals and possibilities of a new Pakistan that has been halved in the size of its population but not attenuated in the will and resolve to build a progressive and nationally consolidated state, with a creative role in the wider world setting and a sharper focus on its many communities of needs and aspirations with the Third World.

End of a Tortuous Road

The constitutional achievement has been widely hailed by the world press and public opinion as a watershed in the political history of Pakistan. The *Christian Science Monitor* said it "signalled the emergence of a new Pakistan". The *Times*, London, saw it "as a commendable demonstration of national unity," and added: "One reason for thinking that the constitution—the third in Pakistan's history—will now survive is that the opposition has from the beginning had a spurious character". The paper noted that in successfully resisting theocratic pressures of factious groups in the opposition, Mr. Bhutto has correctly interpreted the national will. The *Washington Post* commented: "The near-unanimous passage was a major political victory for President Zulfikar Ali Bhutto", and it "set the stage for conditions which could lead to greater stability at home and throughout the sub-continent". The *Daily Telegraph*, London observed: "The passage of the constitution has also resolved a crisis in the nation's affairs which, in the view of some, threatened the very fabric of Pakistan".

Like *The Times*, *The Telegraph* noted the phoney character of those "claiming a little presumptuously to own the conscience of Muslim Pakistan", their "unholy alliance" with the regional protagonists to combat the constitution, and President Bhutto's lucid courage and perseverance in overcoming their influence. It is being increasingly recognized that the majority of articulate Pakistanis do not accept those elements of medieval theocracy that are sometimes made to pass for religious dictates by self-appointed guardians of the faith seeking to exploit religion for political ambition. The broad national consensus on the constitution has demonstrated that their influence on the mind of the people is often grossly overrated, and that Pakistanis, in devising their political structure have demonstrated a forward-looking attitude, while keeping faith in the moral values and garnered political wisdom of their own civilisation and the fruits of its cross-fertilisation with other great civilisations of the East and the West.

A Quarter Century of Experiments

In common with other Asian countries which have emerged from a colonial past and suffered a rupture of their own traditions, Pakistan was faced with the problem of creating a cohesive national ethic. Because the state was also based on a cultural conception, it had the added predicament of how to harmonise the essential principles and values of its thought-inheritance with the requirements of a new society struggling to come to birth. This should have presented no great problem if the putative leaders of thought and public opinion had gone beyond their nostalgic reconstructions of a proud past to apply their minds to the compelling needs of the present. As Professor Gunnar Myrdal has noted in a perspi-

cacious comparison of the Pakistani and Indian experiments with democracy : " Islam is egalitarian and in its higher manifestations has traits of rationalism that should permit it to be integrated more readily with modernisation ideals than, for instance, Hinduism in India ". But while in India the tradition of disciplined political co-operation had been relatively more firmly established and the Congress Party was able to lend the necessary initial momentum to the building of a constitutional structure on the inception of independence, power in Pakistan lapsed quickly after the death of its founding father (a year after independence) into the hands of a bureaucratic oligarchy.

Retarding Influence

This ruling elite, which remained firmly entrenched through the various turns and twists of the country's fortune, had little identification with the concerns and interests of the masses. Its ossified dogmatism and class interests militated against a true flowering of democratic processes. With the disintegration of the Muslim League into factions, there was no political party with its roots among the people, and capable of reflecting the national will and giving it a constructive direction. The sense of national purpose frittered away and its place was taken by a sense of disillusion with political activity as a means of social and economic change. The country did adopt a constitution in 1956, reflecting a compromise on the level of political and constitutional theory ; but before it had a chance to be worked out it was abrogated in 1958 when the democratic process was disrupted by a *coup d'etat*. Then came the constitution of 1962, which was fabricated at the instance of a military dictatorship by a small committee of handpicked men and finalised in effect by one man to perpetuate, in the name of a strong centralised direction of national affairs, the stranglehold of a small ruling clique. This constitution was annulled after the second military take-over of 1969.

The present constitution, to be promulgated on August 14, is the first to have been drawn up by the directly elected representatives of the people. It reflects a broad national consensus and seeks to reinforce the sense of community encompassing the four constituent units. Its federal principle is designed to accommodate and protect internal linguistic diversity in the nation without weakening national unity and cohesion. It envisages political arrangements to preserve the peculiar interests and values of each territorial unit, giving them the maximum autonomy consistent with national solidarity.

Division of Powers

Sharp differences over the quantum of autonomy for the various constituent units so often plagued constitution-making in the past that

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their final resolution in the new fundamental law has become one of the guarantees of its enduring character. It removes at once the constant sources of friction and the recurring crises of participation and identity which stultified the national democratic process. The Constitution defines the relations between the Federation and the provinces in respect of the distribution of legislative powers and administrative arrangements. Provincial assemblies will be elected by a direct and free vote of the people, and the Governor to be appointed by the President will act on and in accordance with the advice of the Chief Minister, who along with other Ministers shall be collectively responsible to the Provincial Assembly. While the locus of sovereignty, or supremacy, has been settled decisively in favour of the Federal Government, enabling it to penetrate into local communities and carry out public policies in the national interest, the Constitution gives full freedom to the federating units in their own spheres, allowing for the optimum assertion of their historical identity and their distinctive cultural and linguistic heritage.

Special Provision

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Federal.

The creation of a Council of Common Interests, consisting of the Chief Ministers of the Provinces and an equal number of members from the Federal Government to be nominated by the Prime Minister from time to time, is a special provision making for flexibility and adaptability. Article 154 describing its functions and rules of procedure states that the Council shall formulate and regulate policies in relation to matters in Part II of the Federal Legislative List which includes railways, mineral oil, natural gas, development of industries where development under federal control is declared by Federal Law to be expedient in the public interest, bodies and corporations such as the Water and Power Development Authority, and Industrial Development Corporation, and others.

Interlocked Economy

This provision is specially significant in the geo-economic conditions of the territories constituting the federation of Pakistan. In many ways, their economic life is unified and interlocked. Since the federal principle postulates unity in diversity and stands for equality of status between the constituent units, this Constitutional provision seeks to ensure that the right of regional self-assertion will not be limited or curtailed by the paucity of resources or their inadequate organisation and exploitation at a given time. The Chief Minister of a Province, responding to the mandate of his people, will, through membership of the Council of Common Interests, be able to watch over the special interests and needs of his own region in such large federal undertakings as the discovery of new sources of power, the development of natural

resources, energy and communications for economic and social advancement. Each region thus has a constitutional guarantee not only of the freedom of social and economic development in its own way but also of access to sufficient resources to make such development possible.

Fundamental Rights

The constitution articulates a harmonization of adequate governmental authority for the necessary element of stability with the essential requirements of protecting the individual from arbitrary government and enabling him to enjoy his freedom. Article 7 of the Constitution declares as void all laws inconsistent with or in derogation of fundamental rights. Going beyond a constitutional declaration of such rights, the document also stipulates judicial remedies to enforce these rights, against any State action, legislative or executive. Articles 184 and 199, defining the original jurisdictions of the Supreme Court and the High Courts respectively empower them to issue prerogative orders (mandamus, prohibition, quo warranto and certiorari, as well as the writ of habeas corpus) with reference to any of the fundamental rights enumerated in the Constitution.

Independent Judiciary

The form of government is parliamentary, the Parliament consisting of two houses to be known as the National Assembly and the Senate. The Prime Minister to be elected, by the votes of the majority of the total membership of the National Assembly, will head the Federal Government. The National Assembly shall consist of two hundred members elected by direct vote, the seats in the Assembly to be allocated to each province, the Federally Administered Tribal Areas and the Federal Capital on the basis of population in accordance with the last preceding census officially published. The Senate shall consist of 60 members, to be elected in accordance with the system of proportional representation by means of the single transferable vote. The democratic process is by definition one in which " the supreme power is vested in the people and exercised by them or by their elected agent under a free electoral system ". The Constitution provides for the lawmaking power of the Parliament as the freely elected body of the people's representatives, reasonably assumed to reflect the ethical judgments and moral aspirations of the people, but the superemacy of the Legislature is circumscribed by the creation of an independent judiciary to ensure that the full spectrum of constitutional rights accorded to everyone are guaranteed through judicial remedies against their possible violation.

Freedom of Conscience

In their approach to fundamental rights, the framers have not only adopted the principles laid down in the various international

Covenants of Human Rights but have in numerous cases improved upon and enlarged the scope of protection stipulated in the international documents. Thus freedom of conscience, thought and religion is not merely asserted in the constitutional declaration, (Article 18), but the guarantee is reinforced by other provisions under which every religious denomination and every sect is entitled to establish, maintain and manage its religious institutions, and it is further provided that in respect of any religious institution there shall be no discrimination against any community in the granting of exemption or concession in relation to taxation.

In composing and adopting their text of the fundamental law for a new, open, democratic society, the constitution-makers provide categorical guarantees of all the recognised freedoms and individual rights, freedom of speech, freedom of the press, freedoms of movement, association, assembly and profession and the full and inviolable dignity of man. But they have also shown awareness of the truth that society cannot be atomized, that the individual can have no absolute or unfettered rights and that what Madison called the "great rights" of mankind are to be collectively enjoyed.

Society and the Individual

The welfare of the individual, as a member of the community, lies in a happy compromise between his atomistic rights as an individual and the interests of society to which he belongs. The constitutional provisions of fundamental rights are throughout imbued with the knowledge that there can be no protection of the rights themselves, without a corresponding measure of control to harmonise the free exercise of rights by one with the same exercise by others. The Constitution, therefore, also formulates the limitations, subject to which the rights inscribed in the fundamental law can be enjoyed. This makes for greater clarity; and the superior courts, which are going to be the guardians of these rights, will not have to devise vague doctrines and will not uphold any encroachment upon rights or any restrictive State act (censorship or reprisal) on grounds other than those specified in the Constitution.

Equality before Law

The basic right of equality and equal protection before law is guaranteed in every constitutional document, even the most repressive societies where it remains for the most part a flaccid promise and a pious exhortation. The Constitution of Pakistan has toughened this provision into an imperative that, as between persons similarly circumstanced, a law cannot provide for discriminatory privileges or liabilities. This is to say, the Legislature cannot discriminate between one person and another, if as regards the subject matter of the legislation, the position is the same. "To enjoy the protection of law and

to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan". Article 3 of the Constitution stresses in particular that (a) no action detrimental to life, liberty, body, reputation or property of any person shall be taken except in accordance with law (b) No person shall be prevented from or be hindered in doing that which is not prohibited by law; and (c) no persons shall be compelled to do that which the law does not require him to do. Article 8 states that no person shall be deprived of life or liberty save in accordance with law.

Procedural Safeguards

This protection against arbitrary arrest or detention by the Executive can be extended through the writ of habeas corpus, which is a powerful weapon in the hands of the Superior Courts. Article 9 provides procedural safeguards against arbitrary arrests and detention. "No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds of such arrests nor shall he be denied the right to consult and be defended by a legal practitioner of his choice". This last portion, guaranteeing the right to be defended by a counsel, is a distinct improvement on the international Covenant, as is also the subsequent provision in Article 9 (2) that every person who is arrested or detained shall be produced before a magistrate within a period of twenty four hours of such arrest (as against the more elastic word "promptly" used in the Covenant).

Preventive Detention : Pragmatic Approach

Article 9 (4) deals with preventive detention specifying the special categories of persons, the exigencies of particular situations and the requirements of public order and State security for which the law of preventive detention can be made. Preventive detention is an extraordinary measure and it is too easily dubbed as a diabolical principle of persecution, and so it might be in the hands of dictatorial or totalitarian regimes. But even in the free and democratic societies, including the United States and the United Kingdom, traditionally tolerant of dissent, preventive detention is not something unknown. Its adoption in the Constitution of Pakistan reflects the special circumstances of a country whose very survival has been threatened and which has suffered dismemberment due to external intrigues and internal subversion. The framers of the Constitution could not be pragmatic in this approach if, in this regard, they remained attached to abstract libertarian principles and heedless of concrete experience.

Mandatory Safeguards

But while preventive detention has been authorised, definite and mandatory safeguards have been provided against any abuse of this power. Clause 4 of Article 10 states: "No law providing for preventive detention shall be made except to deal with persons acting in a manner prejudicial to the integrity, security or defence of Pakistan, or any part thereof, or external affairs of Pakistan, or public order, or the maintenance of supplies or services; and no law shall authorise the detention of a person for a period exceeding one month unless the appropriate Review Board has, after affording him an opportunity of being heard in person, reviewed his case and reported, before the expiration of the said period, that there is in its opinion sufficient cause for such detention". (The Review Board in the case of a person detained under a Federal Law will be appointed by the Chief Justice of Pakistan and in the case of a person detained under a provincial law, by the Chief Justice of the High Court concerned). Clause 5 of Article 10 provides further that "when a person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, but not later than one week from such detention, communicate to such person the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order."

Vision of Unity and Peace

The Constitution which envisages a federal democratic republic, is essentially a Pakistani document, embodying political experience and the socio-cultural orientation of its various constituents. It exhibits an awareness of the opportunities for growth as well as of the dangers of sudden convulsions or slow erosion against which the tender plant of democracy must be protected. It seeks to create a political structure that gives to government the necessary element of stability but insists on fair procedures that make it, in the words of a famous American jurist, a "symbol of justice, not a badge of oppression". Implicit in the Constitution is a vision of peace and unity; peace, which is protected and preserved by the actual reign of law, and unity which requires for its vigour and vitality a broad diversity of institutions, processes and participants. It assimilates ideas, principles and purposes that are necessary for the country's transformation into a modern progressive society.

Spiritual Foundations

The Constitution's Islamic inspiration is made manifest by subjecting positive law, that is, the law of human contrivance, to the basic injunctions of Islam, which are an extension and refinement of

the fundamental values of the Judeo-Christian heritage, in that they make religion not simply a revelation of the Divine Law and the moral order of the universe, but also a social fact occupying a primacy of place among the institutions for ordering human affairs.

The Constitution proclaims the sovereignty of God, whose rational acceptance does not deny but affirms the power for action of the personal and collective will. The Islamic concept of life is far from being one of absolute determinism. It gives man the freedom and the responsibility to be the architect of his own destiny, and it makes it abundantly clear to the faithful that the necessary response to the contingencies of history are to be forged by their own hands. The striving for a better world, for a more equitable social order, and for peace and justice between men and nations, flows naturally from a conscious acceptance of the faith.

Social Imperatives

The Constitution embodies a national commitment to the creation of an egalitarian society at home and to the pursuit of closer understanding and co-operation with like-minded peoples, near and far. "We, the people of Pakistan", it declares, in the preamble, "conscious of our responsibility before Allah, the Almighty, and men.....dedicated to the preservation of democracy achieved by the unremitting struggle of the people against oppression and tyranny....." and goes on to incorporate into the Principles of Policy the provisions for conforming to the fundamental principles and basic concepts of Islam, promotion of social justice and eradication of social evils to wipe out the ravages of long decades of exploitation and savage superstition. The Constitution makes it binding on the State to make deliberate purposive efforts, as a vital national concern, to create a socio-economic organisation extending justice and equality in the light of the principle, "from each one according to ability and to each one according to need".

Expanding Horizons

The Constitution also makes into a principle of policy and a categorical imperative what has been a constant aspect of the history and tradition of Pakistan's foreign relations. Article 43 under the Principles of Policy says: "The State shall endeavour to preserve and strengthen the fraternal relations among Muslim countries based on Islamic unity, support the common interests of the people of Asia, Africa and Latin America, promote international peace and security, foster goodwill and friendly relations among all nations and encourage the settlement of international disputes by peaceful means".

It thus gives a sharper focus of meaning and a new emphasis to Pakistan's identification with the struggle and aspirations of the Third World for the reclamation of political freedom, economic opportunity and human dignity. It deepens Pakistan's commitment to the pursuit of world peace and to the consistency of the basic principles of an international order. It highlights the intensity of her involvement in the common striving to fight the forces of reaction, militarism, fascism and revanchism that bedevil the happiness of all mankind.

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