

# ***Constitutionalism in Pakistan: A Study of Convergence and Divergence of the Proposals of the Constitution Commission with the Provisions of 1962 Constitution***

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Pakistan started its political career with the British parliamentary system when it achieved independence in 1947. It inherited a quasi-federal parliamentary system under the Indian Independence Act of 1947. Section 8 of that Act laid down that until a constitution was framed the interim settlement for the country's political affairs would be set out on the Government of India Act 1935. Under that interim arrangement the executive authority of the federation was exercised by the Governor-General either directly or indirectly i.e., through the officers subordinate to him or through his council of ministers led by the Prime Minister.

The parliamentary system was recommended in the First, Second and Third Basic Principles Committee reports which were prepared in 1951, 1952 and 1953 respectively as constitutional drafts. The parliamentary system, however, was formally adopted in the country's first constitution in 1956. Although the 1956 Constitution followed the parliamentary system of government yet it did not fully reflect its basic principles and spirit. As a result the President and Prime Minister were at logger heads, the reason

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being that under this system both of them shared significant powers with each other.

The first fundamental change had appeared when Ayub Khan opted for presidential form of government. Before the framing of 1962 Constitution Ayub Khan appointed a Constitution Commission under the chairmanship of Justice Shahabuddin with an assigned duty.

This paper deals with the major recommendations of the Constitution Commission in general and with the convergence and divergence between the recommendations of the Constitution Commission and the 1962 Constitution in particular. The 1962 Constitution is often called as one man show by majority of the scholars and writers yet this terminology needs to be explained further within the constitutional framework in order to perceive why this constitutional document is called one man show. The recommendations of the Constitution Commission also need to be put and reviewed in the right political and historical perspective to explain the nature and direction of Pakistani politics under the despotic and authoritarian rule of General Ayub Khan which paved a way for the traditions of military rule in future.

### **The Establishment of Constitution Commission and Its Term of Reference**

On 17 February 1960 Ayub Khan, after having secured a vote of confidence of the Basic Democrats, set up the promised Constitution Commission consisted of eleven members (five members from East Pakistan and five from West Pakistan) was headed by Mr. Mohammad Shahabuddin<sup>1</sup>, a former Chief Justice of the Federal Court. The principle of parity was maintained

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1 Mr. Mohammad Shahabuddin was born on 13th May 1895 at Ellore in Madras Presidency. He entered the Indian civil service in November 1921. He served in Madras Presidency as a Sub-collector, Joint Magistrate, District and Session Judge and a Judge of the High Court at Madras. After independence, he opted for Pakistan. He was appointed Judge of the High Court of Dacca and later became the Chief Justice of that Court. In 1952 he was elevated to the Federal Court of Pakistan. He remained Governor of East Pakistan from December 1954 to June 1955. Later on he became the Chief Justice of Federal Court of Pakistan where from he retired in 1960. He died on April 2, 1971. See, Muhammad Shahabuddin, *Recollections and Reflection* (Lahore: P.L.D. Publishers, 1972), p.ii.

between the two wings of Pakistan by providing equal numbers from both the wings.

President Ayub Khan declared the following terms of reference of the Commission.

1. To examine the progressive failure of the parliamentary governments in Pakistan leading to the abrogation of the Constitution of 1956 and to recommend how a recurrence of similar causes can be prevented;
2. To submit proposals for constitution, taking into consideration the genius of the people, the general standard of education and political judgment in the country, the present state of nationhood, the need for sustained development and the effects of constitutional and administrative changes in the recent months.
3. The proposals should embody the recommendations as to how best the following objectives could be achieved:
  - A democracy adaptable to the changing circumstances and based on the Islamic principle of justice, equity and tolerance;
  - Consolidation of national unity;
  - A firm and stable system of government.<sup>2</sup>

An additional term of reference was received by the Constitution Commission towards the end of June 1960. This additional term of reference was as under:

In the light of the social, economic, administrative and political reforms which are being carried out by the present regime, particularly the introduction of the Basic Democracies, what would be the most appropriate time table for the implementation of the proposals to be made by the Constitution Commission?<sup>3</sup>

Ayub Khan expressed that no deadline had been fixed by virtue of the complexity of the task, but assured that no time would be unnecessarily lost by the Commission to complete its work. Further he told that the Commission would be supplied any data that might be required in the course of its task.<sup>4</sup>

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2 Mohammad Ayub Khan, *Friends not Masters: A Political Autobiography* (Karachi: Oxford University Press, 1967), pp.210-211.

3 Government of Pakistan, *Report of the Constitution Commission, 1961*, p.1.

4 *The Pakistan Times*, Lahore, 18 February 1960.

The Commission devised its own *modus operandi* as it had no precedent to follow, although it could, and did benefit from the constitutional reports drafted since 1950 and the Constitution of 1956.<sup>5</sup> It issued a questionnaire in the form of a booklet, spread over 75 pages, in English, Urdu and Bangali.<sup>6</sup> A total of 28,000 copies of the questionnaire, 9,000 in Urdu and Bengali were sent to individuals and organizations all over Pakistan while 6269 replies were received.<sup>7</sup> Individuals were interviewed from different walks of life by the Constitution Commission during its tour both in East and West Pakistan. Opinion was elicited in East Pakistan from 9 June to the 25 of August and in West Pakistan from 1 of September to the 30 December, 1960. In all, 565 persons were interviewed. The Chairman of the Commission also held informal discussions with several persons who hesitated to appear before the Commission at its formal sittings.<sup>8</sup>

The initial draft of the report was prepared by Justice Shahabuddin. On 6 May 1961 the report of the Commission was formally presented to Ayub Khan in a well publicized ceremony. The report contained ideological assertions, theoretical arguments and a compilation of opinions of those persons who were interviewed. It covered many aspects of the history of Pakistan and the British legal traditions.

### **General Views and Proposals of the Constitution Commission**

Regarding the first term of reference the Commission, after thorough deliberation, came to the conclusion that parliamentary form of government proved to be a failure in Pakistan by virtue of the following causes.

1. Lack of proper elections and defects in the late Constitution.
2. Undue interference by the heads of state with the ministries and political parties and by the central government with the functioning of the governments in the provinces.

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5 M. Rafique Afzal, *Political Parties in Pakistan, 1958-1969*, Vol.II (Islamabad: National Institute of Historical and Cultural Research, 1998), p. 38.

6 Altaf Gauhar, *Ayub Khan: Pakistan's First Military Ruler* (Lahore: Sang-e-Meel Publications, 1993), p. 170.

7 Afzal, Vol.II, p.38.

8 *Report of the Constitution Commission*, p.2.

3. Lack of leadership resulting in lack of well organized and disciplined parties, the general lack of character in the politicians and their undue interference in the administration.<sup>9</sup>

While dealing with the future constitution, the Commission recommended that there would be only one person at the helm of affairs but with an effective restraint exercised on him by an independent legislature, members of which should not be in a position to interfere with administration by exercising political pressure for personal ends. The Commission concluded that such a system was available in the presidential form of government as found in the United States of America.<sup>10</sup> The Commission's preference for the presidential system was due to four major reasons. Firstly, under the presidential system there was to be only one person (president) at helm of affairs and not two (president and prime minister) and the collision of personalities, that had marked Pakistan's politics since the death of Jinnah and Liaquat, would be averted; secondly, the opportunities and temptation open to an average member of the legislature to exploit his position to his advantage would be so restricted that persons who in the past had treated election to parliament as an investment would be discouraged from standing for election. Thirdly, there would be greater stability which was Pakistan's prime need. Fourthly, administrator could be selected from the ablest men available and not necessarily from among the members of the parliament.<sup>11</sup>

The report embodied federal form of government like that of India and not a unitary one prevailing in Great Britain. It recommended three legislative lists i.e. federal, concurrent and provincial in order to distribute the legislative powers between the centre and the provinces.

The Commission proposed bicameral legislature consisting of a lower house to be known as the House of People and an upper house to be known as Senate. It emphasized the need of an upper chamber which would be able to check impetuosity of legislation

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9 *Ibid.*, p.6.

10 Safder Mehmood, *Constitutional Foundation of Pakistan* (Lahore: Bookland Publishers, 1985), p.420.

11 Hamid Khan, *Constitutional and Political History of Pakistan* (Karachi: Oxford University Press, 2001), pp.231-32.

by the lower house and which would also exercise a healthy influence through its utterances, both on the legislature and the public. It envisaged an upper house as a body of elder statesmen selected from categories of people rather than of members elected on a territorial basis as in the American Senate.<sup>12</sup> The upper house was to be consisted of forty-eight members, forty elected by an electoral college consisting of the lower house at the centre and the two provincial houses (East and West Pakistan assemblies) on the basis of parity, i.e. twenty from each province, among meritorious personalities aged fifty years and above, not being members of any of the said legislatures. The remaining eight were to be nominated by the president.<sup>13</sup> While in respect of lower house, it recommended that it should be elected on the principle of parity. The Commission, while dealing with the primary function of the central legislature, categorized a detailed sphere of power. It proposed that money bill was to be initiated only in the House of People and if the Senate failed to express its opinion within one month or agreed with the House of People, the bill would go to the president for his final approval. In case the Senate suggested alterations the bill would go back to the House of People, to be submitted to the president with those changes in case the lower house accepted and without those changes when the lower house rejected.<sup>14</sup> As regards other legislation, bills might be introduced in either house. A bill introduced in the House of People, if accepted by the Senate should go up to the president for his final approval. The president could veto such a bill passed by the parliament but that veto could be removed only if that bill was again passed by a two-third majority of each of the house of parliament.

The Commission's scheme for the presidential system was greatly modeled on the American pattern and proposed a comprehensive system of checks and balances. While recommending this system of government, it however, stressed the importance and role of the legislature and stated "if we want to have a democratic form of government, the legislature should be in a sufficiently strong position to act as a check on the exercise by

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12 *Ibid.*, p.232.

13 *Report of the Constitution Commission*, pp.46-47.

14 *Ibid.*, p.48.

the executive of its extensive powers without at the same time affecting the firmness of the administration”<sup>15</sup> Consequently, the Commission proposed an elaborate criteria for the impeachment of president, vice-president, governors and ministers as well. All these dignitaries could be liable to impeachment on a charge of violating the constitution or for a gross misconduct. The resolution seeking impeachment could be signed by not less than one fourth of the total number of members of the lower house and fourteen days notice thereof could be given before it was moved in the said house and if the resolution was passed by majority of the total number of the said house, the trial on the charges alleged in the resolution could be held by the Senate presided over by the Chief Justice of the Supreme Court in the case of the president, vice-president, governors and ministers (both central and provincial) and by the vice-president in all other cases. The person impeached was to vacate his office in case he was found guilty by two-third of the total number of the members of the Senate.<sup>16</sup>

It was recommended by the Commission that the president should have the power of a partial veto in respect of appropriation bills. He would also be able to give assent to such items as would be passed according to his demand or in substantial compliance with it. The legislature could cut down appropriations and if the reduction was not substantial or the item reduced even substantially was a fresh item i.e. introduced for the first time in the budget, the president should abide by the decision of the House of People, even if the Senate would think otherwise. In case the reduction was substantial, and the president should make a declaration to that effect giving the reason thereof, the matter should be considered by the House of People and the Senate and should the House of People ultimately repeat their original decision, the president then should have the choice of either trying to carry on the administration by the parliament or of continuing by ordinance the current year’s appropriations, in respect of the item concerned, for the next financial year. If he should take the latter step then he would have to pass such an ordinance which

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15 *Ibid.*, p.28.

16 *Ibid.*, p.48.

would have the force of an act of the legislature and would not require ratification. However, the Commission did not give this power of ratification for an indefinite period. It stated categorically that such a state of affairs would not be conducive to good government and a repetition of the certification of the budget for the next financial year should be avoided. It, therefore, suggested that the budget for the next financial year should be put before the House of People six months before the end of the year for which an ordinance had been passed so that the attitude of the House might be known. Should the attitude of the House remain the same and the appropriation bill again cut down substantially, the president either tries to manage the appropriation so sanctioned or declares not later than a month thereafter that it was impossible to carry on the administration in which case there should be a fresh election to the House of People, the president and vice-president. If no such declaration was made within the time fixed, the president would be bound by the appropriation bill as passed.<sup>17</sup>

The Commission recommended that the members of the president's cabinet should be given the right to attend the session of the legislature in order that they might answer the questions and if necessary, explain their policy without having the right to vote. The Commission stated that this system of asking question in the legislature would safeguard individual liberties and would be a great check on the arbitrary exercise of its power by the executive.

Keeping in view the large scale illiteracy in Pakistan, the Commission stated, "we would be taking a grave risk if, in the matter of the election of the president, vice-president, the House of People and the Provincial Assemblies, we adopt universal franchise in our present state of widespread illiteracy amongst the people, whose passion can easily be inflamed".<sup>18</sup> So, the Commission observed that the right to vote was not an inherent one like the right to liberty but was an office or function, conferred only on those who were able to discharge its obligation. It was pointed out that in developed countries like England, the extension of franchise went hand in hand with education, with the result that

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17 G.W. Choudhury, *Democracy in Pakistan* (Dacca: Green Book House, 1963), pp.149-150.

18 *Report of the Constitution Commission*, pp. 67-68.

universal franchise followed universal education.<sup>19</sup> It however, suggested that the suffrage should be restricted to those citizens of Pakistan who had attained a standard of literacy which would enable them to read and understand what was published about the candidate, so that they might form their own judgment as to their respective merits; or possessed sufficient property or a stake in the country which would give rise to a keen desire in them to acquaint themselves with the antecedents and the qualification of various candidates, so that they might select the proper representatives.<sup>20</sup> The Commission favoured direct elections for the president and members of the central and provincial legislatures. In respect of joint vs. separate electorate, the Commission suggested the system of separate electorate for the country.

Political parties were deemed necessary for the uplift of any democratic system. Political organizations were far older than democracies and existed in nearly all countries and under all forms of government with some minor exception. Being an essential part of a democratic set up, political parties play their pivotal role in different political societies. The Commission, therefore, stated that endeavours would be made to create conditions in which a party based on principles could emerge.

On 6 May 1961 the report of the Constitution Commission was formally presented to Ayub Khan by the Chairman of the Commission in a well-publicized ceremony which was held in Rawalpindi. During his speech at the presentation ceremony of the report, Ayub Khan said:

Gentlemen: we have gathered together to receive from the Chairman of the Constitution Commission Mr. Justice Shahabuddin, the report which he and his colleagues have produced after hard labour extending over a period of fourteen months. I thank Mr. Justice Shahabuddin for this and also through him his colleagues and the staff. This report is in the nature of advice to me as to what shape our constitution should take. I have every intention of giving its recommendations the greatest consideration they deserve and I have no doubt also that it will help me in discharging the

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19 *Ibid.*, p.65.

20 *Ibid.*, p.68.

supreme obligation of giving my people a constitution that will bring solidarity, peace and happiness to them.<sup>21</sup>

On the one hand Ayub Khan was publicly declaring his gratefulness to Justice Shahabuddin and his team for such a tremendous job they conducted while on the other hand he started his struggle to chip away those recommendations which were harmful for his rule in the coming days. The report of the Commission was examined by his cabinet under his leadership. Two committees, an Administrative Committee and a Cabinet Sub-Committee were appointed to review the report. The Administrative Committee chaired by the cabinet secretary N.A. Faruqi, considered the report from administrative point of view and understandably proposed no basic alterations. Whereas the majority members of the Cabinet Sub-Committee subscribed to Ayub Khan's views on constitutional issues and in fact received specific guidelines from him. Manzur Qadir, who later on chaired the drafting committee, played the key role. It is generally believed that the Cabinet Sub-Committee was appointed and a report was obtained from it only in order to frustrate the report of the Commission. In this manner Ayub Khan could change the original shape of the Commission's recommendations.

The constitutional proposals were finally discussed at the Governors' Conference held in Rawalpindi from 24 to 31 October 1961. The Governors' Conference was attended by the provincial governors, central ministers, and senior officers. It was decided that the President would announce the outline of the constitution soon after Governors' Conference, but it was announced in its entirety in March 1962. While the Governors' Conference was under way, Ayub declared in his speech on the third anniversary of 'Revolution Day' that the constitution would be capable of producing a strong, and stable government, with an emphasis on a strong executive.<sup>22</sup>

However, the Governors' Conference had appointed a drafting committee with Manzur Qadir and Law Secretary, Abdul Hamid, as members. The committee was authorized to enlist, if necessary,

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21 *Speeches and Statements: Field Marshal Mohammad Ayub Khan*, Vol.III, July 1960 to June 1961 (Karachi: Pakistan Publications, n.d.), p.127.

22 Khan, p.254.

the services of experts on constitutional law. It took about four months to finally draft the constitution which was announced in a broadcast to the nation by Ayub on 1 March 1962. In his speech Ayub referred to the pledge given on 8 October 1958 to restore democracy in Pakistan and claimed that the new constitution represented the fulfillment of the pledge.<sup>23</sup> Anyhow, the constitution was enforced on June 8, 1962 when Martial Law was lifted.

Though the Constitution of 1962 was fundamentally different from the recommendations of the Constitution Commission yet Ayub Khan referred to the report as his working draft without pointing out the essential differences. He thanked the members of the Commission especially its Chairman, Shahabuddin for helping him to prepare the constitution. The immediate effect of the President's observation was that the people thought that the Constitution of 1962 was based on the Commission's report. When press representatives contacted Justice Shahabuddin, he told them that there were fundamental differences between the recommendations of the Commission and the new constitution. However, his statement to the press was suppressed by the Information Department under instructions from Ayub Khan and Manzur Qadir.<sup>24</sup>

### **Convergence and Divergence in the Proposals of Constitution Commission and the Provisions of 1962 Constitution**

The 1962 Constitution bore more similarity with the Government of India Acts of 1919 and 1935 than with the Constitution of 1956 or any other constitutional reports drafted after independence.

The Constitution as promulgated by President Ayub Khan was a written document of 134 pages. It consisted of 250 articles, twelve parts and three schedules. It had a lengthy preamble, almost similar to its predecessor, based on the language of the Objectives Resolution of March 1949.

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23 *Ibid.*, p.255.

24 Muhammad Shahabuddin, pp.127-28.

The most novel feature of the 1962 Constitution was the presidential form of government. Under this Constitution, the President was the repository of all powers. The President was the Head of the Executive as well as of the State.

The Constitution provided that there would be a President elected in accordance with the constitution and the law.<sup>25</sup> The President was required to be a Muslim not less than 35 years of age, and qualified to be elected as a member of the National Assembly.<sup>26</sup> He was to be elected indirectly by an electoral college in accordance with the provisions outlined in the Constitution.<sup>27</sup>

The Constitution Commission also favoured the reservation of the presidency for a Muslim.<sup>28</sup> It is also recommended that the President was required to be elected as a member of the House of People.<sup>29</sup> However, unlike the 1962 Constitution the Commission recommended that the minimum age qualification of the President would be forty years. It also strongly favoured direct election of the President.

To favour indirect elections through Basic Democrats, President Ayub Khan said:

I could not see why Basic Democrats should not become an electoral college, here we had eighty thousand members elected directly by the people on the basis of adult franchise and, they, in fact formed the 'Grand Assembly of Pakistan'. Why should not they choose the President and members of legislature?<sup>30</sup>

However, the Commission did not favour Basic Democrats as an electoral college because it considered that they could be corrupted easily.<sup>31</sup> The Commission was of the opinion that the President because of the extra-ordinary position he occupied under the presidential system should command the confidence of the

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25 *The Constitution of the Republic of Pakistan, 1962, Part-III, Article 9.*

26 *Ibid.*, Article 10.

27 Khan, p.257.

28 Choudhury, p.193.

29 *Report of the Constitution Commission*, p.82.

30 Ayub, p.214.

31 *Report of the Constitution Commission*, p.78.

people and that such confidence would be forthcoming only by a direct election.<sup>32</sup>

Under the 1962 Constitution the term of the President was fixed at five years.<sup>33</sup> Normally an incumbent President could not be re-elected if he had office for a continued period of more than eight years. If, however, the President presented himself for re-election after having served for such a period, the Chief Election Commissioner must inform the Speaker of the National Assembly, who would forthwith convene a joint session of the members of the National Assembly and the Provincial Assemblies to consider the candidature. If the candidate was approved by a majority of those present at the joint session, voting by secret ballot, the President would be eligible for re-election.<sup>34</sup> In fact, with the approval of the legislatures there seemed to be no limit to the number of terms for which a person might be eligible for re-election as President.<sup>35</sup> Whereas the Commission recommended that the term of the President would be fixed at four years and a person would not be eligible for election as President for more than two consecutive terms.

In view of the wide range of functions and responsibilities conferred on the President, the Commission recommended the office of Vice-President.<sup>36</sup> But Ayub Khan could not agree to the Commission recommendation for the creation of a post of Vice-President, to whom the President should delegate some of his functions.<sup>37</sup> Therefore, the office of Vice-President did not find a place in the Constitution of 1962.

Though the Commission recommended a presidential form of government, it suggested effective checks and balance which were not incorporated in the new constitution.<sup>38</sup> The 1962 Constitution

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32 *Ibid.*, p.64.

33 Khan, p.258.

34 *Keesing's Contemporary Archives*, Vol.XIII (1961-1962) (Bristol: Keesing's Publication Limited, n.d.), p.18858.

35 Khan, p.258.

36 *Ibid.*, p.234.

37 Ayub, p.215.

38 Shahabuddin, p.130.

empowered the President to make all key appointments. He could appoint the Governors, central ministers, the Election Commissioner and the Auditor General of Pakistan.<sup>39</sup> Whereas the Commission recommended the power of approval to be provided to the Senate in the course of the above appointments which were to be made by the President.<sup>40</sup>

The 1962 Constitution empowered the President to be the supreme commander of the defence services of Pakistan. He had the power;

- a. To raise and maintain the defence services of Pakistan and the reserves of those services,
- b. To grant Commission in those services, and
- c. To appoint Commander-in-Chief of those services and to determine their salaries and allowances.<sup>41</sup>

Like the 1962 Constitution the Constitution Commission also recommended that the supreme command of the Army, Navy and Air Force should be vested in the office of the President.<sup>42</sup>

Under Article 18 of the 1962 Constitution, the President had the power to grant pardons and respites and to remit, suspend or commute any sentence passed by any court, tribunal or other authority. Like the Constitution of 1962, the Commission too recommended the power of pardons and reprieves to be given to the President of the State.

The Constitution declared that if the office of the President was vacant, or the President was absent from Pakistan, or was unable for the time being to perform the functions of his office due to illness or other causes, the Speaker of the National Assembly would act as President.<sup>43</sup> Whereas the Commission recommended that Vice-President should act during the period of temporary incapacity of the President.

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39 *The Constitution of the Republic of Pakistan, 1962*, Article 33, 66, 147 & 199.

40 *Report of the Constitution Commission*, p. 85.

41 *The Constitution of the Republic of Pakistan, 1962*, Article 17.

42 *Report of the Constitution Commission*, p. 85.

43 *Keesing's Contemporary Archives, Vol.XIII*, p.18858.

According to the 1962 Constitution, if the President was satisfied that a grave emergency existed in which Pakistan, or any part of Pakistan was threatened by war or external aggression or in which the security or economic life of Pakistan was threatened by internal disturbances beyond the power of a provincial government to control, the President could issue a proclamation of emergency. The proclamation of emergency had to be laid before the National Assembly as soon as it was practicable. He could revoke a proclamation when satisfied that the grounds on which it was issued had ceased to exist. In such a state of emergency, the President could make and promulgate ordinances as might appear to him to be necessary to meet the eventuality. An emergency ordinance could be issued even if the National Assembly was in session and it had the same force of law as an Act of the Legislature. The ordinance was to be placed before the National Assembly as soon as practicable, but the Assembly had no power to disapprove it during the emergency. With the revocation of the proclamation of emergency the ordinance made by the President ceased to have effect unless such ordinances had been approved by the National Assembly.<sup>44</sup>

The Constitution Commission also recommended that during such emergencies the President would enjoy the power of issuing ordinances with effect until the legislature could assemble.<sup>45</sup> However, the Commission suggested that the President would have the power to suspend the constitution only in the emergency of a war.<sup>46</sup> While there was no provision in the 1962 Constitution that during an emergency the President would have any power to suspend any clause of the Constitution.<sup>47</sup>

The 1962 Constitution authorized the President to address the central legislature and to send messages to it. The members of his council of ministers and the Attorney General had also the power to speak and otherwise to take part in the proceedings of the legislature or any of its committee without having the right to

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44 *The Constitution of the Republic of Pakistan, 1962*, Article 30.

45 Karl Von Vorys, *Political Development in Pakistan* (New Jersey: Princeton University Press, 1965), p.213.

46 *Ibid.*

47 Khan, p.266.

vote.<sup>48</sup> The Constitution Commission also favoured the idea of the President delivering messages to the legislatures. It further suggested that the members of his cabinet would also have the right to attend legislative sessions of the legislature without having the right to vote. However, the Commission unlike the 1962 Constitution did not suggest to authorize the Attorney General to attend the sessions of legislature.

The 1962 Constitution provided that the President could be removed from his office on a charge of violating the constitution or for gross misconduct. For that purpose a resolution was to be tabled by one-third of the members of the National Assembly. If the resolution was passed by the votes of not less than three quarters of the total members of the Assembly, the President should forthwith cease to hold office and should be disqualified from holding public office for a period of ten years. If the resolution for removal of the President failed to obtain one-half of the total numbers of the National Assembly, the movers of the resolution would cease to be members of the National Assembly.<sup>49</sup> Whereas the Constitution Commission recommended that the resolution for impeachment of the President should be signed by not less than one-fourth of the total number of the House of People and would not be deemed as passed unless two-third of the total number of the Senate voted in its favour.

According to the Constitution of 1962 the central legislature of Pakistan was consisted of the president and one house, known as the National Assembly.<sup>50</sup> It had 156 members which were to be elected on the basis of parity of representation between East and West Pakistan. Of these, three seats for each province were reserved for women.<sup>51</sup> In addition, women could contest from general seats if they wish. The general members of the National Assembly were to be elected by the elected members of Basic

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48 *The Constitution of the Republic of Pakistan, 1962*, Article 25.

49 *Ibid.*, Article 13.

50 J.S. Bains, "Some Thoughts on Pakistan's New Constitution" in Verinder Grover and Ranjana Arora, ed. *Political System in Pakistan, Vol. II* (New Delhi: Deep and Deep Publications, n.d), p. 180.

51 *The Constitution of the Republic of Pakistan, 1962*, Article 20.

Democracies.<sup>52</sup> Whereas the Commission recommended a bicameral legislature consisting of a lower house to be known as the House of People and an upper house to be known as the Senate. The House of People was to be consisted of 200 members, out of which six seats were to be reserved for women, who could also contest from general seats. The House of People was to be elected directly by the people on the basis of parity of representation between East and West Pakistan. While the Senate was to be consisted of forty-eight seats, forty elected by an electoral college consisting of the House of People and Provincial Assemblies on the basis of parity, i.e. 20 from each province, from amongst meritorious personalities aged 50 years and above, not being members of any of the said legislatures. The remaining eight were to be nominated by the President. However, there was no reservation of seats for women in the Senate.

Under the 1962 Constitution a candidate for election to the National Assembly had to be at least 25 years of age and his name had to appear on the electoral roll for any electoral unit.<sup>53</sup> A person could not, at the same time, be a candidate for election to more than one seat in any Assembly or to a seat in more than one Assembly. If a person who was a member of one Assembly was elected to another Assembly, then he would lose his seat in the previous Assembly, of which he was a member.<sup>54</sup> Whereas the Constitution Commission recommended that a candidate for election to the House of People should be at least 30 years of age. However, like the 1962 Constitution the Commission also prohibited double membership, i.e. the same person should not be allowed to be a member of more than one House, either central or provincial.

The Constitution provided for a Federal State of two provinces, East and West Pakistan. The principle of One Unit of West Pakistan was retained and in its legislature, the mode of representation approved for ten years in 1955, i.e. forty percent for the Punjab and sixty per cent for the remaining regions of West

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52 *Speeches and Statements*, Vol.IV, p.173.

53 Khan, p.268.

54 *Ibid.*

Pakistan was continued. The provinces had a separate personality with an elaborate set up of their own. Each province had a legislature of 155 members including five seats reserved for women, who could also seek election to an open seat.<sup>55</sup> Like the 1962 Constitution the Commission also favoured the idea of a Federal State. However, unlike the 1962 Constitution it suggested that each provincial legislature should have one hundred seats, three of which should be reserved for women, who could not be restricted to contest election from general constituencies.

Unlike the 1956 Constitution, the Constitution of 1962 provided just one list of subjects for legislation by the National Assembly, leaving the Provincial Assemblies with the power to legislate on subjects not included in the central list.<sup>56</sup> There were in all forty-nine items in the central list as against thirty in the 1956 Constitution.<sup>57</sup> Residuary powers were vested in the province. However, the provinces did not have a free hand in running their affairs. The National Assembly had the power to legislate on any matter, outside as well as within the central list on grounds of national interest in relation to the security of Pakistan, including economic and financial stability, planning, coordination, or ensuring uniformity in matters concerning all parts of Pakistan. The centre could also legislate on subjects outside the central list, when authorized by the provincial legislatures.<sup>58</sup> Whereas regarding the distribution of powers the Commission recommended three lists of powers on the line of 1956 Constitution to be incorporated in the new constitution.

The 1962 Constitution was a rigid one as it provided a rather stiff process of amendment. According to Article 209, the Constitution could be amended only when the proposed amendment was passed by an enhanced majority of at least two-third of the total number of the members of National Assembly and assented by the President. Two facts made it rigid. If the President refused to assent to an amendment passed by the two-third

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55 Afzal, Vol.II, p. 51.

56 *Ibid.*

57 Choudhury, p. 220.

58 Afzal, Vol.II, p. 51.

majority of the National Assembly, it could again pass it, but by three-fourth majority votes, even then it would not necessarily be adopted. If he liked, the President might still withhold his assent and refer the matter to the electoral college.<sup>59</sup> If the bill got support of majority members of electoral college, the President would be deemed to have assented the bill on the day, the result was declared.

However, a bill to amend the Constitution that would have the effect of altering the limits of a province could not be passed by the National Assembly unless it had been approved by a resolution of the Assembly of the province concerned by two-third of the total number of members of the Provincial Assembly.<sup>60</sup>

Unlike the Constitution of 1962 the Commission recommended that any amendment to the constitution would be subject to the assent of the President in the same manner as any other pieces of legislation, with the difference that the bill for amendment should be supported by a two-third majority of the total number of both the Houses sitting together. If the President withheld his assent and referred the bill back to the legislature, the effect of his veto could be nullified by a three-fourths majority of the two Houses sitting together.<sup>61</sup>

The 1962 Constitution did not contain any provision with regard to fundamental rights. They were, however, embodied in the constitution as “principle of law making” seeking to maintain and guarantee the fundamental rights, but were not justifiable.<sup>62</sup> These principles of law making were no more than pious declarations, since there was no remedy if a fundamental right was violated.<sup>63</sup> Whereas the Constitution Commission recommended that fundamental rights contained in the 1956 Constitution should be incorporated in the new constitution but without affecting the Land

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59 Mazhar-ul-Haq, *An introduction to the Constitution of Pakistan* (Lahore: Noor Sons Publishers, 1968), pp. 17-18.

60 *The Constitution of the Republic of Pakistan, 1962*, Article 210.

61 *Report of the Constitution Commission*, p. 127.

62 Saeeda, “Political and Constitutional Development in Pakistan 1958-1972”, Unpublished M.A. Thesis (Pakistan Studies Centre, University of Peshawar, 1994), pp.58-59.

63 Afzal, Vol.II, p.53.

Reforms and the Frontier Crimes Regulation.<sup>64</sup> According to the 1956 Constitution no law inconsistent with these rights would be passed and any existing law inconsistent with them would be declared void to the extent of repugnancy.<sup>65</sup>

Article 173 of the 1962 Constitution banned the formation of political parties until the legislature passed law for their existence.<sup>66</sup> While the Constitution Commission had already rejected in this regard the suggestion of the official delegation to disallow political parties. So, well organized political parties were considered more essential by the Commission for the smooth functioning of a democratic government.

The 1962 Constitution introduced indirect elections not only for the President but also for the National as well as Provincial Assemblies.<sup>67</sup> Each province was to be divided into not less than forty thousand territorial units to be known as electoral units.<sup>68</sup> Any citizen who was at least twenty-one years of age, of sound mind and a resident of an electoral unit was entitled to be enrolled on the electoral roll for that electoral unit.<sup>69</sup> The person enrolled on the electoral roll for an electoral unit would elect from amongst themselves a person of at least twenty-five years age who would be an elector for that unit. The electors for all electoral units in both provinces would constitute the electoral college of Pakistan and would be known as the members of the electoral college.<sup>70</sup>

However, the Commission examined the problem with reference to Basic Democracies and argued that in view of the wide responsibilities conferred on the President under the proposed constitution, it was desirable that he should be elected directly by the people. Similarly, rejecting Basic Democracies as an electoral college, the Commission recommended that the members of the

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64 *Report of the Constitution Commission*, p.103.

65 *The Constitution of the Islamic Republic of Pakistan, 1956*, Article 4.

66 Syed Shabir Hussain, *Lengthening Shadows* (Rawalpindi: Mujahid Publications, 1970), p.71.

67 Khan, p.276.

68 *The Constitution of the Republic of Pakistan, 1962*, Article 155.

69 *Ibid.*, Article 157.

70 *Ibid.*, Article 158.

legislatures, both central and provincial, should also be elected directly by the people.<sup>71</sup> It further suggested that the electoral college for the Senate would be consisted of the House of People and the Provincial Assemblies.<sup>72</sup>

Unlike the 1962 Constitution the Commission favoured restricted franchise qualified by certain educational and property qualification.<sup>73</sup> For that purpose the Commission recommended the immediate appointment of a franchise Committee to submit within one year its report determining the required standards.<sup>74</sup>

The 1962 Constitution provided the principle of joint electorate for all elections.<sup>75</sup> While the Constitution Commission recommended separate electorate to be the mode of determining constituencies and elections.

The Constitution also provided for a Supreme Court of Pakistan. It was to consist of a Chief Justice and so many other judges as were determined by law and in the absence of such law by the President.<sup>76</sup>

The Chief Justice of the Supreme Court was to be appointed by the President and the other judges by the President after consultation with the Chief Justice.<sup>77</sup> Whereas the Commission recommended different procedure from that of 1962 Constitution for the appointment of the Chief Justice of the Supreme Court. It proposed that a recommendation should be made by the retiring Chief Justice to appoint the next senior judge of the Court as the Chief Justice of the Supreme Court. In case the President should exercise his discretion when the retiring Chief Justice should not recommend the next judge.<sup>78</sup>

Regarding the appointment of other judges of the Supreme Court, the Commission favoured the procedure suggested by the

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71 Choudhury, p.165.

72 *Report of the Constitution Commission*, p.77.

73 *Ibid.*, p.68.

74 *Ibid.*

75 Saeeda, p.55.

76 Bains, p.181.

77 *The Constitution of the Republic of Pakistan, 1962*, Article 50.

78 *Report of the Constitution Commission*, p.93.

Law Commission that recommendation for a judgeship should emanate from the Chief Justice after consultation with his colleagues and as a matter of convention, the President should accept that recommendation.<sup>79</sup>

According to the 1962 Constitution a Supreme Judicial Council was to be constituted by the President, consisting of the Chief Justice, the two senior judges of the Supreme Court and the Chief Justice of the two High Courts. The President, on the receipt of information indicating that a judge of High Court or Supreme Court was no longer able to perform the duties of his office on account of physical or mental illness or that he had been guilty of gross misconduct, could direct the Council to conduct an inquiry and if the information was found correct, he could remove the judge.<sup>80</sup> Whereas the Commission proposed a method of impeachment with regard to the removal of the judges of the Supreme Court which was as follows:

The resolution for impeachment should be signed by not less than one-fourth of the total number of the House of People and fourteen days notice thereof should be given before it would be moved in the said House and, if the resolution was passed by a majority of the total number of the said House, the trial on the charges alleged in the resolution should be held by the Senate presided over by the Vice-President. The person impeached would have to vacate his office, in case he was found guilty by two-third of the total number of the members of the Senate.<sup>81</sup>

However, regarding the removal of the judges of the High Court, the Commission favoured the same procedure as adopted in the 1956 Constitution under Article 169.<sup>82</sup>

The Constitution Commission recommended that all the clauses of the preamble to the late Constitution should be incorporated in the new constitution with its third clause suitably re-drafted, as the constitution was to be promulgated by the President and not passed by an Assembly.<sup>83</sup>

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79 *Ibid.*

80 Choudhury, pp.237-38.

81 *Report of the Constitution Commission*, p.48.

82 Choudhury, pp.169-70.

83 *Report of the Constitution Commission*, p.120.

The preamble to the 1962 Constitution was almost identical with the preamble to the 1956 Constitution. Some important changes were however made in the preamble to the 1962 Constitution.

In the preamble of 1956 Constitution it was provided that “sovereignty over the entire universe belongs to Allah Almighty alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust.”<sup>84</sup> Whereas in the preamble of 1962 Constitution the vital words “within the limits prescribed by Him (Allah)” were omitted.<sup>85</sup>

It was laid down in the preamble to the late Constitution that “the Muslims of Pakistan should be enabled individually and collectively to order their lives in accordance with the teachings and requirements of Islam, as set out in the Holy *Quran* and the *Sunnah*.”<sup>86</sup> Whereas in the preamble of 1962 Constitution the words “as set out in the Holy *Quran* and the *Sunnah*” were dropped.

The 1962 Constitution contained a separate chapter entitled “principles of policy” which included Islamic way of life, national solidarity, fair treatment to minorities, promotion of interests of backward people and underprivileged castes, opportunities for participation in national life, adequate livelihood and other basic necessities and social securities, equal opportunities in administrative service and education, prohibition of gambling, drinking, prostitution, usury and to promote international peace and to strengthen bonds with the Muslim world.<sup>87</sup>

The Constitution Commission also recommended that the Directive Principles of State Policy as enumerated in the 1956 Constitution should be adopted in the new constitution. However, the Principles of Policy of 1962 Constitution was different in certain aspects from that of the 1956 Constitution.

The Directive Principles of State Policy of the late Constitution declared, “steps shall be taken to enable the

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84 *The Constitution of the Islamic Republic of Pakistan, 1956, Preamble.*

85 Afzal, Vol.II, p.54.

86 *The Constitution of the Islamic Republic of Pakistan, 1956, Preamble.*

87 Bains, p.183.

Muslims of Pakistan individually and collectively to order their lives in accordance with the Holy *Quran* and the *Sunnah*.”<sup>88</sup> Whereas the words “lives in accordance with the Holy *Quran* and the *Sunnah*” of the late Constitution were substituted for “lives in accordance with the fundamental principles and basic concepts of Islam.”<sup>89</sup>

Further it was laid down in the principles of policy of the 1962 Constitution that teaching of the *Quran* and *Islamiyat* should be made compulsory whereas the word *Islamiyat* was not included in the relevant Article of the 1956 Constitution.<sup>90</sup>

The Constitution Commission had recommended incorporation of the Islamic provisions of 1956 Constitution, but its recommendations were ignored. The 1962 Constitution retained the Islamic provisions only in a diluted form.<sup>91</sup>

Article 1 of the 1956 Constitution laid down, “Pakistan shall be a Federal Republic to be known as the Islamic Republic of Pakistan.”<sup>92</sup> Whereas the relevant clause of the 1962 Constitution laid down simply, “the State of Pakistan shall be a Republic under the name of the Republic of Pakistan.”<sup>93</sup>

The most vital Islamic provision in the 1956 Constitution was Article 198 which laid down that no law should be passed which was repugnant to the injunctions of Islam as laid down in the Holy *Quran* and the *Sunnah*, and that existing laws should be brought into conformity with such injunctions for which the President was to appoint a Commission to suggest ways and means of introducing Islamic injunctions and compile such injunctions in a suitable

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88 *The Constitution of the Islamic Republic of Pakistan, 1956*, Article 25.

89 Choudhury, p.181.

90 *Ibid.*, pp.181-82.

91 Afzal, p.53.

92 Choudhury, p.183.

93 *Ibid.*

form for the guidance of the legislatures.<sup>94</sup> Whereas the 1962 Constitution substituted Article 198 of the late Constitution with a simple clause on the “principle of law making” to the effect that “no law should be repugnant to Islam.”<sup>95</sup> The responsibility of deciding the Islamicity of any legislation was vested in the legislature concerned. It was clearly laid down that the validity of a law not be called in question on the grounds that it disregarded, violated, or was otherwise not in accordance with the “principle of law making.”<sup>96</sup>

### **Conclusion**

The evaluation of the proposals of Shahabuddin’s Commission and the provisions of 1962 Constitution indicate that both the documents converged and diverged on certain points. Ayub Khan had established the Commission to secure justification in favour of his decision to abrogate the 1956 Constitution. It seems that he wished to get legal and moral cover in favour of his unconstitutional and illegal measures. He was also seeking to give sacred burial to the late Constitution under the impression of the failure of parliamentary democratic experience in Pakistan. The establishment and the recommendations of the Commission served the purpose of Ayub Khan’s Government in two ways. On the one hand it endured the oft-repeated assertions of Ayub Khan’s Government that parliamentary democracy was neither suitable nor workable in the Pakistani context. On the other hand it established an impression that Ayub Khan was eager to seek guidance in the process of evolution of the new constitution based on the principles of presidential democracy which was in fact a long cherished dream of Ayub Khan to arrogate all the executive authority to his own person. So far as the recommendations of the Commission were concerned, they were not binding on Ayub Khan anyway as he was free

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94 Afzal, p.54.

95 Khan, p.278.

96 Afzal, p.54.

to selectively choose some recommendations and reject others as per his sweet choice and will. The exercise of the establishment of the Constitution Commission and its recommendations facilitated Ayub Khan in the process of scaffolding of the new constitution which represented his political ideals in letter and spirit. Though Ayub Khan didn't incorporate all the recommendations of the Commission in his final draft constitution yet he successfully established an impression that 1962 Constitution was a brain child of the Constitution Commission.