

Chapter 5

Towards Effective Democratic Governance

This is the first Commonwealth Observer Mission whose terms of reference include a responsibility 'to propose to the government and other concerned authorities such action on institutional, procedural and other matters as would assist the effective functioning of the elected government.' Thus it has been necessary to canvass with Pakistani groups not only their immediate concerns regarding the elections but also their observations on this issue. The observations or proposals we make on this aspect are based on concerns communicated to us and our own understanding of the Pakistan situation.

We are happy to note that many, including government representatives, discussed their views and suggestions on desired changes with great openness and frankness.

The framework within which our observations or proposals are made is based on the pledge made by Commonwealth Heads of Government in the 1991 Harare Commonwealth Declaration. Based on point 9 of that Declaration, the important elements of that pledge for our purposes read as follows:

Having reaffirmed the principles to which the Commonwealth is committed, and reviewed the problems and challenges which the world, and the Commonwealth as part of it, face, we pledge the Commonwealth and our countries to work with renewed vigour, concentrating especially in the following areas:

- the protection and promotion of the fundamental political values of the Commonwealth:
 - democracy, democratic processes and institutions which reflect national circumstances, the rule of law and the independence of the judiciary, just and honest government;
 - fundamental human rights, including equal rights and opportunities for all citizens regardless of race, colour, creed or political belief;
- equality for women, so that they may exercise their full and equal rights.

It is clear that the Commonwealth believes that effective democratic government rests on certain basic principles and factors.

Democracy, Democratic Processes and Institutions

Effective democracy can occur within a presidential or a parliamentary system. In Pakistan, the Constitution is basically drawn in parliamentary terms. We found no inclination among the people of Pakistan to change the Constitution to a presidential democracy. Such a decision would require fundamental change in both the Constitution and many governmental institutions in Pakistan. That in itself would be a major exercise and would mean the loss to Pakistan of the experience gained over several years of an admittedly fragile democracy. Indeed, even the period of martial law where the Head of State exercised total power was an unhappy learning experience for Pakistan. Putting the presidential option aside, therefore, leaves Pakistan with the more desirable and less difficult objective of creating a democratic culture and strengthening its democratic institutions.

If any democratic system is to work effectively, the participants in the system must respect their institutions and one another. Politicians, in particular, need to set an example. Their practices must be beyond reproach and demonstrate a common commitment to democratic institutions. This shows their acceptance of the restraints, frustrations and challenges of effective democracy. Many examples were pointed out to us by the people we spoke to,

suggesting that such a political culture is largely absent in Pakistan. The President, when Parliament is not in session, has an almost unfettered ordinance-making power. This practice has been used repeatedly in ways that have enhanced the powers of the Presidency at the expense of the power and authority of Parliament. Parliament's role is to debate and to make laws. If that is short-circuited by successive Prime Ministers using the ordinance-making power of the President, Parliament's role is severely curtailed. Unfortunately, such practices have been adopted by successive governments in Pakistan.

The attitude of the politicians to Parliament is also revealed in the way oppositions are reported to have gone about their business. Successive oppositions have sought to persuade the President to use his power to dismiss the government. Such an approach again reinforces the authority of the President at the expense of Parliament. Another example of which we have been informed concerns crossing the floor in the Assembly and thereby changing allegiances. Such practices are not unknown in other countries, but in the case of Pakistan it has been suggested that such changes occur not from conviction but through inducements which would not stand public scrutiny. Recent amendments to the electoral law making this practice subject to a by-election or the agreement of the party leader is an attempt to address this problem.

We have also been informed that both Prime Ministers and Leaders of the Opposition, and senior members of their parties, have seldom attended Parliament. Such indifference to Parliament clearly undermines its status and authority.

The Rule of Law

We observed considerable support for an independent judicial system in Pakistan. This is a good sign. The rule of law is critical to any democracy, indeed to any functioning social order. It is the bedrock on which political institutions and the fundamental rights of the citizen must rest.

Its very essence is that no one is above the law and that all are equal before it. It is a basic principle that guides the functioning of society, its institutions and the relationship of its citizens as they interface with each other and with the instruments created to administer their affairs and permit their leaders to seek the public good.

If that quest for the public good is to be successfully pursued, citizens who have entrusted their government with the necessary powers must be able to hold those governors to account. Accountability is effected in a parliamentary democracy through its Parliament. That institution must therefore be vibrant, active and effective, elected by the people through universal suffrage. Elections permit the citizens to pass periodic judgment on their elected representatives, thereby assuring accountability of those who govern, including the head of government and the head of state.

The constitution is the basic document offering the legal context in which the state functions. It needs to be faithfully followed by those who govern, which includes their obligation to protect the very process of accountability.

In our view, the dividing lines between the Presidency, the Prime Minister and the Parliament have become blurred. The President has a capacity to dismiss the government and to dissolve Parliament. When this happens, elections must be held within 90 days. In the intervening period, the President exercises considerable power by the appointment of a Caretaker Prime Minister and a Cabinet, and by the use of his ordinance-making powers. The subsequent elections therefore become in part a referendum on the President's action in dismissing the government. Although the President's decision may be deemed justifiable, it nevertheless has the unfortunate effect of dragging the Supreme Court into the political process.

In such a caretaker period, the Prime Minister and Cabinet are not accountable to the electorate in the normal parliamentary sense. There is no Parliament to provide the normal checks to executive action. In a parliamentary system, the executive power is checked because the Prime Minister and Ministers are themselves part of Parliament. They can be exposed, questioned, be forced to debate issues, and even censured. When Parliament fails to function effectively, the normal checks necessary for good democratic governance fail to operate.

For this reason, it is important that a caretaker government operates within a clearly circumscribed framework of law. For example, a caretaker government could be prohibited from making major appointments and far-reaching policy changes, using the legal machinery for partisan purposes or altering the distribution of power among the principal institutions of government.

In light of these considerations, the creation of the Council for Defence and National Security (CDNS) may need to be reviewed by the new Parliament. Parliament may also wish to pay particular attention to the Ordinance proclaimed by the President on 31 January 1997 (three days before the elections) amending The Representation of the People Act.

The Independence of the Judiciary

It is evident that in a parliamentary democracy under the rule of law the judiciary is a fundamental institution. It must ensure that the law is supreme and applied equally and fairly with favour to none and justice to all. The judiciary must be free to judge both the governors and the governed. It must interpret the Constitution and other laws of the land without political interference. An example of such a requirement of the Supreme Court of Pakistan is the role it plays when the President dismisses a Prime Minister and dissolves the National Assembly. This has occurred four times in nine years. Apart from the substantive political issues the Court is asked to decide, the fact that the proceedings, the politically charged arguments, and finally the judgment inevitably coincide with an election campaign involving the dismissed party, is clearly unfortunate. This was dramatised most recently by the fact that the Court's decision was handed down less than one week before polling day itself.

Article 58(2)(b) of the Constitution places the Court in a difficult position – in the centre of the political maelstrom. Its ability to resist political interference and to be seen as politically independent may be weakened. The danger is that the public judgment as to that independence, once cast, will tend to colour the whole of the judiciary and its processes.

There have been accusations that governments have interfered with the independence of the judiciary. These accusations particularly included interference with the appointment of judges by the previous government. The litigation which surrounded the recent tension has resulted in judicial appointments being effectively placed in the hands of the judiciary. While such a practice may free the Court from political interference in judicial appointments, it has been suggested to us that this may have changed the balance too far. Transparency and accountability are important matters in Pakistan, as elsewhere. Such principles should apply to all institutions, including judicial bodies.

To secure that transparency and accountability, the process of appointment must itself be subject to accountability, and that is best achieved through Parliament.

Transparent and Honest Governance

Accountability of those in high places is of great importance in today's Pakistan. The public is demanding accountability of its rulers. Accountability, including transparency and honesty in government, is critical to effective democratic governance. On all sides, we have been told that corruption is widespread, that those in high places have been able to enrich themselves and evade the consequences of the law. In answer to the mounting criticism, the President introduced a new accountability law and appointed a Commission which seeks to enforce accountability on all. The Commission has already laid charges against a number of citizens including senior political and other official figures. The powers of the Commission are substantial. They are designed to achieve honest government and to assist in changing substantially aspects of the political culture of Pakistan. We welcome this development. However, we wish to underline that such a process is no substitute for, and should not supplant, accountability through the parliamentary process.

New rules for the operation of the Election Commission have also been introduced by presidential decree. All candidates are now required to produce to the Commission two important documents. The first, which must be produced as part of the nomination process, is a complete disclosure of assets of wealth held within Pakistan or without. (A similar declaration

is required annually of all elected members.) The second relates to election expenses, to be produced within 15 days after an election, and requires a full accounting of election expenses for the candidate. False statements in either declaration can lead to rejection of nomination or loss of the seat.

The laws relating to the Accountability Commissioner and to the Chief Election Commissioner have been introduced by Ordinance. They will have to be placed before the new Parliament for confirmation or modification. The new Parliament's attitude to these laws will be critical to a transparent, honest and accountable government in Pakistan. It is to be hoped that such laws will be examined for their potential to serve the national interest and contribute to a new political culture, rather than narrow party or personal interests.

Equality for Women

Evidence would seem to indicate that women are under-represented in the voters' register. This phenomenon is reflective of the limited participation of women in the public life of Pakistan. On the other hand, it would appear that there is an eagerness on the part of women to participate in the political process and generally to improve their condition in society.

The Caretaker Government introduced universal voting for the first time in the tribal areas. However, it was not possible to issue identity cards, which are a requirement for voting in all other parts of Pakistan and which are intended to be a protection for the integrity of polling. Our Observers were advised by tribal elders in such areas that women would not be voting, contrary to the requirements of the law.

It has been suggested to us that to remove the disadvantages of women in Pakistan the lapsed law which provided 20 special seats for women should be revived. This would allow women not only to vote on the general roll, but also to elect, by direct vote, a number of women to represent them. This form of affirmative action would not only provide a voice for women in Parliament, but also encourage their general participation in the political process.

A New Political Culture

Throughout this chapter we have really been speaking about the need for Pakistan to develop a political culture supportive of democratic institutions and practice. As we have pointed out, the consequence of a lack of the appropriate political culture has been a drift of power from Parliament to the President such as to distort the proper functioning of a democratic system.

If Pakistan is to achieve an effective and enduring democratic government, participants in the process must, as we have pointed out, change their approach. They need to build a new culture based on respect for Pakistan's institutions, for each other and for the processes of law and of government which alone can maintain the integrity of the system. We have already mentioned the undue use of the decree-making power of the President. Using such powers to bypass Parliament is a fundamental cause of Parliament's woes. This is compounded by the Opposition encouraging the use of the President's powers of dismissal, instead of seeking to defeat the Government in Parliament.

Pakistan has developed a complex parliamentary system of government overlaid by significant presidential powers. It is not so much the institutions nor the rules of the government as the attitude political participants show towards those institutions which are the cause of Pakistan's political difficulties and the dismissal of the last four governments. Some changes in the rules, however, could contribute to a more stable system.

There is an urgent need for political leaders and all those who participate in the political process to change the state of affairs and to restore confidence in the parliamentary system. We also suggest that the new Ordinances relating to 'horse trading' be maintained by the new Government. ('Horse trading' is a term used to describe the defection of an elected Member of Parliament from her/his political party to another, with the implication of financial inducement.) It may be reasonable for a member changing her/his seat in Parliament to keep it subject to a by-election within six weeks.

Suggestions and Recommendations

(i) The Rule of Law

Consideration might be given to setting specific limits under the law to the scope of activities of a caretaker government; in particular, its primary responsibility to create an environment in which a credible election will be held. The caretaker government would be expected to be especially sensitive to the need to avoid any changes to the electoral law which are not essential. As far as possible, it might avoid making laws and taking decisions more properly left to an elected government.

Parliament might review Ordinances and decisions taken under the Caretaker Government, including the establishment of the Council for Defence and National Security. It may also consider, as appropriate, the Ordinances amending The Representation of the People Act.

(ii) Independence of the Judiciary

We recognise that in the tradition of Pakistan it is inevitable that the courts will be asked to decide issues which are often highly charged and political. To suggest otherwise would ignore the tradition and practice of Pakistan. However, to enhance the independence of the judiciary, it may well be worth considering a different means of appointing judges. As a result of a decision by the Supreme Court in March 1996 the power of the President to appoint judges of the Supreme Court on the advice of the Prime Minister and after consultation with the Chief Justice has been circumscribed and confirmed to be justiciable. The Court held that judicial appointments must in addition be made on the basis of seniority and only after consultation with senior judges. Thus we have the unsatisfactory situation that the appointment of these judges is essentially controlled by the judges themselves. It may be worth considering a system in which arrangements for appointments to the superior courts will in future be more flexible by involving not only the Prime Minister and the Chief Justice but also the Leader of the Opposition.

The powers of the President under Article 58(2)(b) should be significantly curtailed. In the circumstances of Pakistan we would not suggest that the power be abolished altogether, but in dealing with the shortcomings of the government, the opposition should focus its attention on Parliament rather than on the dismissal powers of the President. It may be worth considering limiting the power of dissolution to matters where there is a deadlock in the Parliament, but where the Prime Minister refuses to recommend an election.

(iii) Transparent and Honest Governance

We suggest that the new Parliament may wish to consider the establishment of a Parliamentary Ethics Committee which will provide an additional safeguard for the integrity of Parliament. The new Parliament may also be well advised to preserve the powers of the Accountability Commission and the more stringent provisions which are the responsibility of the Election Commission.

(iv) Equality for Women

A fool-proof identity card system, taking appropriate account of religious and cultural considerations, might be developed to ensure that women as well as men are provided with this important document. Special efforts need to be made to see that women in tribal areas can vote freely. Special directly elected seats for women should be restored and women should continue to have the right to vote in their own constituencies.