

Eighteenth Amendment Revisited

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Edited by
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Islamabad Policy Research Institute

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For the papers presented in this volume, we are grateful to all participants as well as the chairpersons of the different Sessions. We are also thankful to the scholars, students and professionals, whose participation made the discussion lively and instructive.

The success of the conference owes much to the efforts and logistical support provided by the staff of the IPRI and the HSF.

We deeply regret that this volume could not be produced within the stipulated time due to some unavoidable circumstances. Finally, our thanks are due to all those whom it would not be possible to thank individually for their help in making the conference a success. ■

ACRONYMS

PPP	Pakistan Peoples Party
CCI	Council of Common Interest
FATA	Federally Administered Tribal Areas
FCR	Frontier Crimes Regulation
KPK	Khyber Pakhtunkhwa
AL	Awami League
NAP	National Awami Party
JUI	Jamiat Ulemai-e-Islam
NFC	National Finance Commission
LFO	Legal Framework Order
US	United States
BNP	Balochistan National Party
JIP	Jam'at-e-Islami Pakistan
NP	National Party
PPP-S	Pakistan Peoples Party-Sherpao
NPP	The National Peoples Party
PKMAP	Pakhtoonkhwa Milli Awami Party
JWP	Jamhoori Watan Party
PML-N	Pakistan Muslim League Nawaz
PML-Q	Pakistan Muslim League Quaid-i-Azam
MQM	Muttahida Qaumi Movement
NEC	National Economic Council
PAC	Public Accounts Committee
RCO	Revival of the Constitution 1973 Order
CMLA	Chief Martial Law Administrator
EOBI	Employees Old-age Benefits Institution
VAT	Value Added Tax
IMF	International Monetary Fund
PCCR	Parliamentary Committee on Constitutional Reform
CPI	Corruption Perception Index
ICCPR	International Covenant of Civil and Political Rights
GB	Gilgit Baltistan
AJK	Azad Jammu and Kashmir
HQM	Hazara Qaumi Movement
NGO	Non-governmental Organization
MNAs	Members of National Assembly
MPAs	Members of Provincial Assembly

PLGC	Provincial Local Government Commission
TMA s	Tehsil Municipal Administration
EDO	Executive District Officer
CCB s	Citizen Community Boards
CoD	Charter of Democracy
GST	Goods and Services Tax
NRO	National Reconciliation Ordinance
PCO	Provisional Constitutional Order

INTRODUCTION

**Dr Maqsudul Hasan Nuri, Muhammad Hanif and
Muhammad Nawaz Khan**

This book presents the proceedings of a two-day national conference on “*Eighteenth Amendment Revisited*” jointly organised by the Islamabad Policy Research Institute (IPRI), and Hanns Seidel Foundation (HSF) Islamabad on June 28-29, 2011. Prominent scholars, academicians, senior public servants, lawyers and politicians from all over Pakistan participated in the conference. The conference was held in the National Library Auditorium.

The objective of the conference was to have an in-depth review of the 18th Amendment to the 1973 Constitution and study how truly and to what extent it has restored the federal and parliamentary structure of the government as envisaged in the original document, identify the difficulties and bottlenecks in its implementation and guide the federation and its units in bringing about the transformation that it lays down to bring about. This would need going into the evolution of the constitutional process over the years and the factors that affected its course to the present historic constitutional reforms.

A country’s constitution embodies the set of rules which its people have agreed to live by and enshrines the basic principles they have formally decided to be governed under as a nation state. The constitution is not a rigid document and is amenable to amendments through a set procedure if the society to be responsive to the needs of the time so wants. The constitution of a federation determines the principles and rules that govern the overall relationship between the units and the federal government. In a democratic polity, the constitution defines the rules for the smooth running of the government structures and state institutions with necessary checks and balances. An independent judiciary watches over to ensure their compliance and to see that all organs of the state heed the fundamental law of the land and function within its confines.

The process of constitution making started late in Pakistan which caused a number of serious problems that the country is still struggling to solve. Pakistan was beset with the shock of the early death of its founder Quaid-i-Azam Muhammad Ali Jinnah in 1948 and assassination of its first Prime Minister, Liaquat Ali Khan, soon thereafter in 1951. Pakistan was ruled by a shaky political structure under a Muslim League that had lost its earlier cohesiveness, lacked the maturity and political sobriety that constitution making demanded. In the first decade of its existence the political life of the resource strapped state was vitiated by the rise of strong regional parties,

agitating for provincial rights and religious groups demanding an Islamic dispensation for the country. The country's unique geography with two wings, a thousand miles apart, and the eastern wing as a single unit commanding population majority contrasted with the western wing's four ethnic provinces created a clash of interests in the overall power politics. From these and other related factors, the prospects of framing a constitution that could hold the varied political and economic interests in a just equilibrium grew dimmer. A constitutional crisis was engendered that could linger on and remain unresolved for a quarter century till the country produced its third constitutional document in 1973. However, the consensus that was achieved to frame this constitution could only come after the country got dismembered in 1971.

The 1973 Constitution has survived through nearly four decades of political upheavals. It remained suspended or was partially revived under two long military regimes of Generals Zia ul Haq and Pervez Musharraf with short and shaky civil intermissions of Benazir Bhutto and Nawaz Sharif's governments. It was preceded by earlier constitutional exercises namely the 1956 and the 1962 Constitutions. The former had a parliamentary structure based on the British model whereas the latter, framed under the martial law regime of Field Marshal Ayub Khan, gave the country a presidential system. The 1973 Constitution, framed by an elected government, returned the country to a parliamentary dispensation. However, soon after promulgation, it underwent a number of amendments instituted by its own author, Zulfikar Ali Bhutto, followed by those instituted by General Zia ul Haq, Nawaz Sharif and General Pervez Musharraf. These amendments altogether, 17 in number, resulted in transforming the state structure into a hybrid of presidential and parliamentary forms with characteristics of a unitary dispensation, as opposed to the federal structure initially proposed in the original document.

As a result of the general elections held by General Pervez Musharraf in 2008, the Pakistan Peoples Party (PPP) came into power. General Pervez Musharraf resigned from his office and Mr Asif Ali Zardari was elected as President. After assuming power, the PPP government constituted a Constitutional Amendment Committee in 2009 to recommend a package of amendments in order to restore the 1973 document to its original shape and intent. The Committee, comprising 26 members and drawn from all major political parties and other stakeholders, produced a consensus draft bill which the National Assembly and the Senate passed with near unanimity on April 8 and 15, 2010 respectively. The amendment became law on April 19, 2010 when the President affixed his signatures to it. The government constituted an 18th Amendment Implementation Commission on May 4, 2010 to work on its implementation. The restoration of the Constitution to its original form is meant to strengthen the democratic structure of the country and remove the bottlenecks that have impeded institutional growth and create amiable working

relationship between the federal units. The passage of the 18th Amendment now confronts the present and future governments with the task of implementing it in letter and spirit. It is being deemed a challenging task in a political milieu that is accustomed to centralization of powers at the federal level.

It is being hoped and speculated by all stakeholders and the civil society that the passage of the 18th Amendment and restoration of 1973 Constitution to its original position will guide our political elite, state institutions and civil society to work within the bounds of the Constitution and struggle hard to overcome the security and economic crisis which Pakistan is facing. Whereas the 18th Amendment is a source of satisfaction for the people of Pakistan, it also raises some questions as to what extent the 18th Amendment can help in resolving Pakistan's internal issues and what challenges of implementation it faces for failure to deliver and what can be done to surmount these challenges.

The book contains fourteen papers/presentations read in the conference by the scholars that dwell on the above mentioned aspects of the 18th Amendment in addition to a paper titled "Eighteenth Amendment Revisited" by two IPRI scholars that was not part of the conference proceedings but provided useful input as a background study for the organisers and the speakers of the conference. The book is organised into two parts. The first part includes Inaugural Address by the Chief Guest, Senator S.M. Zafar, former Minister, Law and Parliamentary Affairs, Government of Pakistan, and the concluding speech in the final session by Mr Shahid Hamid, Senior Advocate Supreme Court, ex-Governor, Punjab. The second part comprises papers and presentations read at the conference.

In their paper, "Eighteenth Amendment Revisited," Muhammad Hanif and Mr Muhammad Nawaz Khan discuss the history of the constitutional crises in Pakistan, the necessity of restoring the original shape of the 1973 Constitution, the salient features of the Eighteenth Amendment, its benefits, the challenges that its implementation faces and how those can be overcome. The paper urges think tanks, intellectuals, media and members of civil society to closely watch the process and progress of implementation and proffer inputs for guidance of concerned stakeholders.

In their joint paper, "Challenges to Independence and Sovereignty of Parliament in Pakistan," Mr Ahmad Bilal Mehboob and Hamza Ijaz assert that democracy has never been as powerful in Pakistan as it was now and the 18th Amendment has made the Parliament sovereign. But in some Muslim countries, such as Pakistan and Iran, the sovereignty of the parliament was restricted by the supremacy of religion. The eroding rule of law and the shrinking writ of the state were factors that further diluted parliament's sovereignty. Its moral legitimacy would be diminished by people's lack of trust in the representatives and electoral legitimacy by dwindling voter turnouts. A 40 per cent turnout meant a weaker parliament. They identify serious gaps in

parliament's performance as foreign and defence policies were still outside its scope and various parliamentary committees were not doing their job as they should be doing.

In his presentation on "Balance of Power among the President, Prime Minister and Parliament," Mr Amjad Abbas Khan gives prominence to the centre's role in the background of Pakistan's constitutional and political history, heterogeneity of population and its division into linguistic, parochial ethnic groups. He believes that the smooth functioning of parliamentary system depends not only on the mere wording of the constitutional law but on the growth of democratic conventions and the parliamentary spirit. He focuses on those clauses of the 18th Amendment which balance the power equation between the President, the Prime Minister and the Parliament. He credits the 18th Amendment for restoring the parliamentary culture by pruning presidential powers in favour of the Prime Minister.

In his paper on "18th Constitutional Amendment & Need for Passage of the 19th Constitutional Amendment," Mr Babar Sattar analyses the judiciary's stand on the appointment of judges and finds that to be flawed. In his opinion, due process, transparency and security of tenure is needed to ensure the freedom of judiciary but not simply the power of appointment of judges in the hands of judges. He points out that in the 19th Amendment, the composition of Judicial Commission has been changed to have consensus, and the powers of the Judicial Commission have been increased with checks and balances. He also refers to the Basic Structure Theory which was propounded by the Indian Supreme Court. According to this theory, the parliament can amend the constitution without affecting its basic structure, because the basic structure was framed by the original Indian Constituent Assembly of 1952 and the subsequent legislative assemblies cannot alter it. According to Babar Sattar, this theory is flawed. It makes the Constituent Assembly of 1973 superior to the present Parliament, which is thus forbidden to convert the parliamentary system into a presidential system.

In her paper on "Will Enhanced Powers of Judiciary Stop Future Military Takeover in Pakistan?," Dr Iram Khalid analyses the law of necessity with reference to judiciary as a helping hand in the takeover of power by the armed forces. She presents a strong critique of the role of judiciary in the affairs of the state and calls for reforms in the lower judiciary which was the source of much suffering for the common people due to corruption and delay in justice. According to her, judicial freedom cannot be ensured by giving the power of appointment of judges to the Supreme Court. She thinks that rule of law, strong democratic institutions, political leaders and parties, media, mass education, provincial autonomy and enhanced powers of judiciary together can prevent military intervention. She fears that intolerance and impatience with political institutions and not giving them time to complete their tenure can create the kind of crisis adventurists are looking for.

Prof. Dr Ashfaq H. Khan's presentation on "18th Amendment and New NFC Award: Implications for Pakistan's Economy," emphasized that objectives of fast economic growth and poverty reduction could not be achieved in the presence of grave macroeconomic imbalance and in that context he criticized the seventh NFC Award as a blunder as it had no economic basis and overlooked the rising expenditure, the war on terror and high interest payments by the centre. He said that 93 percent of revenue was collected at the federal level and only seven per cent at the provincial level. He described the NFC Award as a purely political award that should have been considered and finalised after the 18th Amendment. According to him, this award has sowed the seeds of perpetual economic crisis in the country and in order to salvage the situation, either its implementation be postponed for three years or impose a hand-binding constraint on the provinces to generate a targeted surplus consistent with the overall fiscal deficit target. He highlighted the importance of political stability, without which there could be no economic stability.

On the other hand, Dr Pervez Tahir's paper on "Does Amended 1973 Constitution Provide a Mechanism to End Corruption and Ensure Economic Security of Pakistan?," defends the NFC Award and the 18th Amendment as the best things that could have happened to the country as both were based on national consensus. He observes that economic problems are rooted in politics. He recognises that the 18th Amendment through devolution could take governance closer to people if local government had not been abolished by politicians. He says that national security is a sub set of human security.

Prof. Dr Razia Sultana's paper on "18th Amendment: Financial Impact on Provinces," says much the same thing about the 18th Amendment and the 7th NFC Award calling them as a landmark that will bring significant change. According to her, the 18th Amendment is a watershed development in the politico-constitutional history of Pakistan. She holds that the amendment has repudiated the long held view of a strong centre as the guarantee of political stability and established that refusal to grant due powers to provinces had been injurious to national cohesion and prevented progress and resulted in serious threats to the integrity of the country as can be seen in the present insurgency in Balochistan. On the other hand, during the course of the years, the provinces had become accustomed to financial dependence on the centre and now with the devolution of new powers, were at a loss how to raise funds for the increased responsibilities. However, she lays great store by the NFC and the Council of Common Interests (CCI) in dealing with the problems of conflicts that may arise as a result of devolution.

In his presentation, "Challenges of Devolution of Power to the Provinces," Mr Zafarullah Khan objected to the opinion that the provinces were not ready to take over the new responsibilities in the wake of devolution. He was of the view that the transformation would take time but the transition

must be facilitated through creating a federal culture which is sharing and caring in nature. He highlighted the need to reform political parties and strengthen provincial civil services. He recommended that only those projects should be undertaken at the federal level which are supported by more than one province and there should be cooperative federalism and not coercive federalism. He suggested that devolution should not stop at the provincial level but should continue from provincial to district and tehsil levels. He was optimistic that despite difficulties and predictions of doom, a new Pakistan was in the making. His brief presentation in the point form elaborated by him during his talk has been reflected in this book.

Mr Akbar Nasir Khan's paper on "After 18th Amendment: Federation and Provinces," states that the country was undergoing a transition from centralism to provincialism and from military to civilian rule and that these transitions would require great care and caution to proceed on course. If these transitions are not peaceful, timely and inclusive then it may cause some risks and embitter the relationships among the federating units in the years to come. He advocates that the federation and the provinces have to trust each other more than ever before. His premise is based upon experiences in the neighbouring countries, including the creation of Pakistan itself some 65 years ago.

Prof. Dr Naheed Anjum Chishti's paper on "Impact of Eighteenth Amendment on Resolving the Issue of Balochistan," discusses the deprivation and injustices suffered by the people of Balochistan. She thinks that the *Aghaz-i-Huqooq-i-Balochistan* programme is not making much progress as was expected. She advocates dialogue with the stakeholders in Balochistan, so that their problems could be addressed. According to her, it is the responsibility of the state to promote social justice, remove illiteracy and to empower the people. In her view, the 18th Amendment may achieve the resolution of the problems faced by the provinces.

Prof. Dr Razia Musarrat's paper on "Constitutional Provisions on Creation of Provinces and Suggested Model," explains that the creation of new provinces would strengthen the federation but this could only be done with the consent of the units. She rules out the creation of the Hazara province on linguistic basis as the government of Khyber Pakhtunkhwa would not accept it. Similarly, the Sindhis would not accept ethno-linguistic division of the province. She points out that Bahawalpur's claim for provincial status can be justified and gives a historical account of Bahawalpur's provincial status that was abolished when the One Unit proposal for West Pakistan was accepted but the status was not restored after its dissolution. She proposes the creation of a Lahore Province, Multan Province, Bahawalpur Province, Sindh Province, Khyber-Pakhtunkhwa Province, Gilgit-Baltistan Province, and Federally Administered Tribal Areas (FATA) Province on the basis of their economic and administrative viability.

Mr Syed Hussain Shaheed Soherwordi's paper on "Adverse Implications in Creation of New Provinces in Pakistan," discusses the adverse implications of creation of new provinces. He argues that the provinces cannot be created on economic or administrative viability as ethnicity and language were strong forces of provincial integration. He recognises that renaming of Khyber Pakhtunkhwa (KPK) Province was demanded on this reality, but if a referendum would have been conducted, the result might have been different. According to him, the demand for separate provinces is based on certain factors, i.e., the feeling of isolation or fear of becoming a minority, distance from the capital, demographic reasons, and lack of good governance. He claims that re-naming a province on ethnic basis alone as in case of KPK, was a big blunder. It would inspire similar aspirations in other parts of the country. He thinks that problems of Pakistan cannot be solved by creating new provinces. It can be done, however, by improving law and order situation, economic conditions and solving the energy crisis. In his opinion, good governance would dilute the demand for new provinces and it could be achieved through provincial autonomy and strengthening of local governments.

Mr Shahid Hamid's paper on "Significance and Required Structure of the Local Governments," points out that the gross mismanagement of resources and poor implementation of development projects is the result of not allowing local governments to work. He recommends that while structuring a local government system, the principle of devolving to the lowest level must be followed. He states that a primary school must be governed by a local council. He criticises the local government system introduced by General Zia as its aim was to strengthen the centre. He also finds fault with Musharraf's local government system as it lacked coordination with higher governance tiers. Moreover, he opposes non-party based elections for local bodies as that introduces polarisation and promotes elite control over governance. He encourages provinces to devise a new structure for local bodies in the light of the 18th Amendment.

Prof. Dr Zafar Mueen Nasir's presentation on "Devolution of Financial Resources to the Local Governments," asserts that the creation of Pakistan has brought no change in the life of the people living away from the centers of power. He says that only an effective local bodies system can bring change in the lives of the poor people living in far flung rural and backward areas. He criticizes the present democratic system as it has not brought about any improvement in the life of the rural people and those living in backward areas. He advocates local participation in development planning. In his opinion, the 2001 Local Government Ordinance was a very prudent document which could be improved further. He emphasizes the need for innovation in service delivery.

Recommendations

In the light of the views expressed by the eminent participants, Mr Usman Ghani, Assistant Research Officer, presented the following key recommendations:-

- National matters like curriculum, higher education, standard of drugs, and environment should remain under federal government.
- Democratic institutions have to be strengthened and military interventions resisted.
- Proper resources should be provided to parliamentary committees to function effectively.
- Like other provinces, Balochistan Assembly should also make parliamentary committees to help resolve the problems of the Baloch people.
- To achieve sovereignty and national integrity, laws enshrined in the constitution should be respected.
- Distribution and devolution of power is better than concentration and centralization of power and the devolution should be from centre to provincial level and from provincial to district and tehsil levels.
- Regular elections should be introduced within each political party. The elimination of this requirement in the 18th Amendment will strengthen dynastic leadership.
- For stable political system, balance of power and social justice is necessary.
- Media should only be a source of information and awareness for the people. It should not give judgments on sensitive issues.
- Hand-binding constraints on the provinces be imposed to generate a targeted surplus consistent with overall fiscal deficit target.
- There is a dire need to improve the working of lower judiciary as it affects the common people.
- Corruption has to be eliminated for effective working of institutions and organizations.
- There should be cooperative federalism and not coercive federalism.
- Trust has to be strengthened between provinces and federal government.
- The Election Commission now has to be enabled to play its crucial role in helping democracy.
- New provinces should be made on the basis of administrative needs and not on linguistic or ethnic basis.
- Effective land reforms are required which are hindered by a judgment of the Shariat Court.

- Far flung areas, which have remained neglected so far, must be given due attention.■

WELCOME ADDRESS

Dr Maqsudul Hasan Nuri

Honourable Chief Guest Senator S.M. Zafar, Resident Representative Hanns Siedel Foundation, Ms. Sarah Holz, distinguished participants, scholars and chairpersons of different sessions and members of the audience,

Assalam-o-Alaikum!

First of all, I must apologize for the delay in starting the Conference at the scheduled time which has been our tradition. But we could not avoid this situation because of high security in the area on account of the Cabinet meeting which is going on next door. This National Conference on “18th Amendment Revisited” is being organized by IPRI in collaboration with Hanns Siedel Foundation and it will continue for two days. It is a part of the series of IPRI conferences that are regularly held every year.

The historic 18th constitutional Amendment was passed unanimously in the National Assembly on April 8, 2010. The amendment embodies as many as 102 articles of the constitution. The basic features of the 1973 Constitution, that is Islamic Republic, parliamentary democracy, federal structure, independence of judiciary have been retained in this amendment along with some other provisions, for example, the Objectives Resolution, Federal Shariat Court and some sections of the 17th Amendment. In the new dispensation, the powers of the president to dissolve the National Assembly, the requirement of graduate qualification for parliamentarians have been deleted and new provisions for the appointment of judges through a judicial commission have been incorporated. The biggest beneficiaries of the Amendment are of course the federating units, which will enjoy the long-sought provincial autonomy as the Concurrent List stands dissolved. The renaming of NWFP as Khyber Pakhtunkhwa is a big achievement, though the tribal belt constituting FATA also needs to be renamed together with the revamping of the Frontier Crimes Regulation’s (FCR) into a more democratic body of laws.

Pakistan’s constitutional history has been a troubled one, starting from the Government of India Act 1935 to the formation of the 1973 Constitution, a document of national consensus that underwent four decades of political upheaval with periods of suspension and partial revival under the long military governments of Zia and Musharraf with brief democratic interludes. During this course, as many as 17 amendments were made to the 1973 Constitution turning it into a kind of hybrid presidential-cum-parliamentary system. Some constitutional experts termed it as semi-presidential during the late 1970s and

early 1980s. After assuming power, the present government decided to restore the 1973 Constitution to its original shape through the 18th Amendment in 2010. A commission has been formed to oversee the implementation of the Amendment. Although passed with consensus, it still raises questions about how it can tackle governance issues and sharing of powers. Further, it faces challenges from a political milieu, accustomed to authoritarian, centralized political systems. This conference, in fact, intends to probe into the political, legal, economic and social ramifications of the 18th Amendment, and issues relating to devolution of power and demands for autonomy. How this will strengthen democracy and ensure good governance is a central question that different speakers are going to address.

An important aspect of conferences organised by IPRI is that the papers read here are preserved by turning them into a book. This book will be published in course of time after the final papers and presentations have been received from the authors.

I would like to thank the chief guest, the esteemed scholars who are participating who have come from all over Pakistan, and the chairpersons who will be presiding over different sessions. I wish you good deliberations for the next two days and hope that the recommendations which we arrive at will be concrete, useful and implementable.

Thank you very much.■

OPENING REMARKS

Sarah Holz

*M*s Sarah Holz was representing Dr Martin Axmann, Resident Representative, Hanns Seidel Foundation (HSF). In her opening remarks, she highlighted the need for constitutional amendments and gave examples from various countries. She recognized that every country has its own circumstances to amend the constitution. She also informed the audience about the role of HSF to promote democracy, peace and development. She thanked IPRI for organizing a conference on such an important and current issue.■

INAUGURAL ADDRESS

S. M. Zafar

Former Minister, Law and Parliamentary Affairs,
Government of Pakistan

The Chief Guest, Senator S. M. Zafar, in his inaugural address, said the constitution had been generally referred to as a social contract, a contract across the board by the nation on the consensus as how the people would like to live and what ritual would govern them so that they could live smoothly and harmoniously for the development of each and every unit of federation. From 1973 to the year 2007, the nation had seen various unwarranted constitutional developments in the form of major amendments to the 1973 Constitution which had an impact on people's life. One intervention was made in the year 1977 which resulted in the introduction of a well known 8th Amendment to 1973 Constitution. The second one took place in the year 1999 and it led to the 17th Amendment.

The Senator said that in the elections of 2008, when the new parliament was elected, there was a demand to undo the amendments to the 1973 Constitution which had been brought about during the time of military rulers. Therefore there was a need that the Constitution which was framed in 1973 should be revisited. This was a normal and healthy demand of the parliamentarians, of the media, of the civil society, of the intellectuals, of all the research institutes — that the Constitution that was framed in 1973 might not be good enough for us after it had been intervened twice in the form of the constitutional amendments. On the basis of this common demand, there was a motion in the National Assembly of Pakistan and later also in the Senate of Pakistan that a constitution review committee should be constituted. As a result of these two resolutions, from the National Assembly and the Senate, a 26-member committee was constituted. Senator Zafar said that the “important part that I would like to share with you about this committee is that it must have been a very difficult task for the speaker of the National Assembly to constitute a committee on which there is consensus by all the members of the parliament but she was able to do so. In the committee's first meeting, it was decided that all decisions, as far as possible, would be taken with consensus. And Ladies and Gentlemen, when you go for consensus, many times you compromise. So while working for the amendment there were some compromises in preparing the draft of the 18th Amendment with full consensus. The committee worked for 9 months, and held 300 meetings. All of the members that were there, gave their full time, were serious in their work and there were a lot of, as I would say, brain storming sessions. The 18th constitutional Amendment itself was a revisiting of the 1973 Constitution,

which was framed in 1973, that revisited the truth about sixty years before it was undertaken. Over all it was a great job done.”

Mr S. M. Zafar said that as a member of the constitutional committee which framed the 18th constitutional Amendment, he would like to mention one area which was above any criticism. It was the issue of granting more fundamental rights. In the fundamental rights, three important fundamental rights namely, rights to free and compulsory education for citizens between the ages of 5 to 16 to be administered by the state of Pakistan, rights to information and rights of fair trial for each citizen of Pakistan were granted through this amendment. That was good progress, a move forward that made the list of fundamental rights up to date. “We are now with the contemporary world, almost, as most of the people in the world have these fundamental rights.” He said that there were some other important things to be mentioned which were now part of the 18th constitutional Amendment. “We decided to strengthen some institutions. So the first most important thing to my mind which we did was to strengthen the Election Commission. Today, the Election Commission by virtue of the 18th constitutional Amendment is a powerful organization. It is one of the most important institutions of our country to ensure holding of free and fair elections. Now all members of the Election Commission including the Chief Election Commissioner are independent, their tenure is fixed, their salaries are ensured, their removal is not possible easily except through judicial misconduct and that also by the Judicial Supreme Council. Nothing more could be given as protection to the election commission. If they do not perform their duties now without any fear it will not only be neglect, it will be criminal neglect.”

“The second institution we tried to empower was the judiciary. Our judiciary or any other judiciary in the world should be independent to make correct decisions. We had provisions for this in the 1973 Constitution. Judges’ tenure was secure, their removal was not possible, they had their right to ensure writs, they could go for suo moto jurisdiction, and had powers to try anybody on committing contempt of the court. But this strong judicial dispensation was suffering from one little ailment or a flaw of the induction of the judges into the judiciary which had to be corrected. The previous procedure was very arbitrary, it was not only arbitrary but it was non-institutional, discretionary and as a result bad judges, sometimes *jiyalas*, sometimes *divanas* and sometimes others got into the judiciary. And once *jiyalas* or *divanas* got into the judiciary, they had the power to do what they would like to do. So we thought that the judicial appointments be through a process, we institutionalized it. We took away the power, the discretionary power, the arbitrary power from the individuals. Previously it was between the Prime Minister and Chief Justice only. The decision of the Chief Justice was final; the Prime Minister could debate with him and the compromise between them was final. We have taken away that decision and handed it over to two

institutions, called the Supreme Judicial Council and a Parliamentary Committee. The Supreme Judicial Council consists of about eleven members, some members from the government, and some members from the judiciary. And we hope that these eleven wise people with their national conscience alive in them will select the best judges. And if the good judges selected on merit come into the system of judiciary which is powerful, we shall have independent judiciary, we shall have great hope for Pakistan. So this was the second category of improvement we made in the 18th constitutional Amendment.

“The Third is the Council of Common Interest. Ladies and Gentlemen, I am sure you know that this is the new body which is created by the 1973 Constitution which says that the settlement of common interests between the centre and the provinces shall be decided in a committee called Council of Common Interest. This Council of Common Interest was formed to have provincial ministers, central ministers sitting together and thinking over matters which are of common interest between the center and the provinces. It did not function from 1973. There was a retribution filed in the 90’s asking the court to please order the Council of Common Interest to function. Up till 2007, if we look into the past history, the performance of the Council of Common Interest was dismal and pathetic. So in the 18th constitutional Amendment, we have now provided for the Council of Common Interest to operate regularly. They have got a Secretariat now, previously there was no Secretariat. The CCI is a very good idea for bringing the provinces and the center together.

“Then there is another institution called the National Economic Council that has also been strengthened. Now having said this I will mention one more area which I believe is an improvement. Ladies and Gentlemen, we have inherited a parliamentary system that is part of our heritage and we wanted to work it out. The 18th constitutional Amendment also accepts a parliamentary form of government. And in a parliamentary form of government, the Prime Minister is the chief executive? All orders emanate from him. He should always be responsible for every executive action. The 8th constitutional Amendment and the 17th constitutional Amendment had distorted this picture and given more powers to the President. The Prime Minister was either a subordinate or sharing equal power with the President which was not in line with the parliamentary form of government. So, by taking away the 8th constitutional Amendment and the 17th constitutional Amendment we brought back the parliamentary form of government. We have made the Prime Minister, the Chief Executive. Today in Pakistan, the Prime Minister is the Chief Executive of Pakistan. And President is only the constitutional and formal head/representative of the state.”

Concluding his remarks, while talking about the amendments which were aimed at granting sufficient autonomy to the provinces, Senator Zafar

criticized the decision to abolish the concurrent list and suggested that subjects of national curriculum and higher education, standard of drugs, environment, and population must be kept with the federation. He pleaded for a new amendment to return these subjects to the centre. ■

CONCLUDING REMARKS

Shahid Hamid

Former Governor of Punjab and Federal Minister

Let me start by congratulating IPRI and Hanns Seidel Foundation for organizing extremely successful conference. I am quite certain that the views that have been expressed during the process of today, the various aspects of the 18th Amendment and allied subjects that have been examined and the recommendations that have been formulated, which were set out by Mr Usman just now, will prove most useful at all levels of federal and provincial governments, in the federal bureaucracy, and for the parliament and provincial assemblies, to work the system. This is what I want to express to you that the 18th Amendment is a truly historic event; there are 300 articles listed in the constitution and there are over a hundred amendments. One-third of the constitution has been modified or rewritten and that too by unanimous consensus and that's a remarkable national consensus that we have not seen since the adoption of the original Constitution in 1973. Just see the range of subjects it covers: we have three fundamental rights — the right to information, right to education, and the right to fair trial. We have seen very distinct strengthening of the federal structure and this happens by making the Prime Minister and his Cabinet answerable to the Parliament i.e., both the National Assembly and the Senate. Previously they were responsible only to the National Assembly. So the rights of the federating units have been strengthened and there is a significant increase in the powers of the Senate, which is part of the process. I would differ with Usman in one respect, that there is no balance of power between the President and the Prime Minister. The powers of the President have been transferred to the Prime Minister where they belong, to strengthen the parliamentary system. Thereby the supremacy of the Parliament has been established. The sixty year long old issue, and certainly an issue from 1973 onwards, of provincial autonomy has been resolved and we do not any longer have this issue before us. It was a very important issue in the context of centre, Punjab and the smaller provinces. There has been resentment that all the powers are with the centre and the centre is controlled by Punjab. This is strengthening national integration and unity. The subjects on which common policy is needed to be made, notwithstanding the abolition of the Concurrent List, has been achieved by strengthening the Council of Common Interests, which is now to be chaired by the Prime Minister, and which is to meet every quarter and have a permanent secretariat. In other words a new tier of government is emerging. We have a change in the manner of appointment of judges. During deliberations on this before the Supreme Court or full court, I also was asked

to assist and I am happy to be able to say that many of the suggestions I made were adopted in their interim model which was incorporated in the 19th Amendment. The process is made more transparent and more inclusive and there is now parliamentary involvement in that process while at the same time retaining the independence of judiciary. Then the manner of transfer of power has received a fillip, received a very necessary injection if you like by making for a permanent Election Commission and by providing for a caretaker government. The caretaker government and Election Commission of Pakistan are to be selected by consultation between the ruling Prime Minister and opposition. Then there has been the cleaning up of the constitution by removing from it all the deeds of Martial Laws. Another small but important point is the Objectives Resolution which was made a part of the constitution by Zia with reference to minorities. He deliberately omitted the word “freely”. Minorities were allowed to profess their religion but the word “freely” was removed and this is a small but significant change that parliament has unanimously reinserted the word “freely” with reference to the right of Minorities to practice their religion and culture freely. Now, of course, the question is, we have a new system. We have to work it and I am certain that your recommendations will contribute to the successful working of the system. I once again thank you for inviting me here and I once again extend my warmest congratulations to IPRI and Hanns Seidel Foundation for such successful conference.■

CHAPTER I

EIGHTEENTH AMENDMENT REVISITED

Muhammad Hanif & Muhammad Nawaz Khan

A country's constitution embodies the set of rules which its people have agreed to live by and enshrines the basic principles they have formally decided to be governed under as a nation state.¹ The constitution is not a rigid document and is amenable to amendments through a set procedure if the society, to be responsive to the needs of the time, so wants. A constitution for a democratic polity defines the rules for the smooth running of the government structures and state institutions with necessary checks and balances that an independent judiciary watches over to ensure their compliance and to see that all organs of state heed the fundamental law of the land and functioned within its confines. Thus the constitution of a country is the source of its sovereignty, its territorial integrity, its internal and external policies, the fundamental rights and well being of its people and is a guarantor of country's national interests.

The process of constitution making started late in Pakistan which caused a number of serious problems that the country is still struggling to solve. Pakistan was beset with the shock of the early death of its founder Quaid-i-Azam Muhammad Ali Jinnah in 1948 and assassination of its first Prime Minister, Liaquat Ali Khan. Soon thereafter in 1951, it struggled to cope with a resource-strapped economy that was destabilized by mass exodus of minority Hindus who ran commerce and trade. Burdened with the urgent task of rehabilitation of several million refugees, and caught in the Kashmir war and other disputes² with a hostile neighbour, Pakistan was ruled by a shaky political structure under a Muslim League that had lost its earlier cohesiveness, lacked the maturity and political sobriety that constitution making demanded.

Pakistan's political life in the first decade of its existence presented a picture of internal strife and intrigues in the Muslim League, the central party which had led the Pakistan movement. The state was further vitiated by rise of strong regional parties, agitating for provincial rights and religious groups demanding an Islamic dispensation for the country. The country's unique geography with two wings, a thousand miles apart, and the eastern wing as a single unit commanding majority population contrasted with the western wing's ethnic division into four provinces which created a clash of interests in the overall power politics. From these and other related factors, the prospects

¹ M.R. Kazimi, *A Concise History of Pakistan* (Karachi: Oxford University Press, 2009), 254.

² *Ibid.*, 186-188.

of framing a constitution that could hold the varied political and economic interests in a just equilibrium grew dimmer. A constitutional crisis was engendered that could linger on and remain unresolved for a quarter century till the country produced its third constitutional document in 1973. However, the consensus that was achieved to frame this constitution could only come after the country got dismembered in 1971 with the secession of its eastern wing reborn as the independent state of Bangladesh.

The 1973 Constitution has survived through nearly four decades of political upheavals. It remained suspended or was partially revived under two long military regimes of General Zia ul Haq and General Pervez Musharraf with civil intermissions of Benazir Bhutto and Nawaz Sharif's governments respectively. It was preceded by earlier constitutional exercises namely the 1956 Constitution and 1962 Constitution. The former had a parliamentary structure based on the British model whereas the latter, framed under the martial law regime of Field Marshal Ayub Khan, gave the country a presidential system. The 1973 Constitution, framed by an elected government returned the country to a parliamentary dispensation. However, soon after promulgation, it underwent a number of amendments instituted by its own author Zulfikar Ali Bhutto, followed by General Zia ul Haq, Nawaz Sharif and General Pervez Musharraf. These amendments, 17 in number, resulted in transforming it into a hybrid of presidential and parliamentary forms with characteristics of a unitary dispensation as opposed to the federal structure initially proposed in the original document.

As a result of general elections held by General Pervez Musharraf in 2008, the PPP came into power. General Pervez Musharraf resigned from his office and Mr Asif Ali Zardari was elected as President. After assuming power, the PPP government constituted a Constitutional Amendment Committee in 2009 to recommend a package of amendments in order to restore the 1973 document to its original shape and intent. The Committee, comprising 26 members and drawn from all major political parties and other stakeholders, produced a consensus draft bill which the National Assembly and the Senate passed with near unanimity on April 8 and 15, 2010 respectively.³ The amendment became law on April 19, 2010 when the President affixed his signatures to it.⁴ The government constituted an 18th Amendment Implementation Commission on May 4, 2010 to work on its implementation⁵. The restoration of the Constitution to its original form is meant to strengthen the democratic structure of the country and remove the bottlenecks that have impeded institutional growth and amiable working relationship between the

³ "Senate approves 18th Amendment Bill", *Dawn* (Islamabad), April 16, 2010.

⁴ "President signs 18th Amendment Bill into Law: Door closed on," *Daily Times* (Islamabad), April 20, 2010.

⁵ "18th Amendment: Implementation Commission formed," *Pak Tribune*, May 5, 2010.

federal units. The passage of the 18th Amendment now confronts the present and future governments with the task of implementing it in letter and spirit. It is being deemed a challenging task in a political milieu that is accustomed to centralization of powers at the federal level.

This paper attempts to study the process and problems of constitution making in Pakistan and the provisions of the 18th Amendment and to find out if it has restored the original 1973 Constitution, and its advantages to Pakistan and its people. The study begins with a review of the country's constitutional history from 1947 and focuses on the main provisions of the 1973 Constitution and subsequent amendments made under various military and civil regimes which had disfigured its true character and spirit. Then, dwelling on the necessity for restoring the Constitution to its original form, the paper discusses salient features of the 18th Amendment. Finally, the paper analysis the likely challenges in implementing the provisions of the 18th Amendment by the centre and provinces and offers recommendations for facilitating its implementation to the advantage of Pakistan. This paper has been written with a view to arranging further study of the subject by IPRI in the form of national conference with the ultimate objective of providing wide ranging recommendations to the policy makers for facilitating implementation of amendment which is necessary for strengthening and sustainability of our democratic system.

Pakistan's Constitutional History (1935-62): An Overview

A Brief Resume of Constitutional Crisis of Pakistan

The government of India Act, 1935 was to serve as the constitutional basis on which India after independence was to model its basic law. But when Muslim League's contention for a separate state for the Muslims was accepted by the British Government, it was decided that till the time the two dominions framed their own constitutions, the Government of India Act 1935 (adopted as the Independence Act 1947) shall serve as their interim constitution. Though constitution-making should have been undertaken soon after Pakistan's establishment, the early death of Quaid-i-Azam Muhammad Ali Jinnah and the assassination of Mr Liaquat Ali Khan two years later, weakened the Muslim League. Moreover, centre-provinces disagreements over rights, and privileges delayed the process of constitution making which could not be undertaken until 1956.

However, the Quaid had left guidelines for Pakistan's future constitution in the shape of his declared preference for a democratic and

pluralistic dispensation.⁶ During a Muslim League meeting on 9 June 1947, he said that the constitution of Pakistan would be democratic and embody the essential principles of Islam.⁷ Addressing the Constituent Assembly on 11 August 1947, he elaborated on the liberal and egalitarian character of the state in which all citizens would be equal without regard to their belief, caste or creed. He made the assembly responsible to act both as constitution making and legislative body of the country.⁸

Mr Liaquat Ali Khan furthered the process by having the Objectives Resolution approved by the Assembly on 12th March 1949. It was to serve as a constitutional guideline. From 1951 onwards, Pakistani politics was marked by agitation for provincial rights, autonomy, and demand for parity by West Pakistani provinces with East Pakistan to neutralize the latter's numerical majority.⁹ In a matter of less than two years (1953-1954) two Prime Ministers, Khawaja Nazimuddin and Muhammad Ali Bogra, were dismissed by Ghulam Muhammad, the Governor General¹⁰ who also dissolved the Constituent Assembly on 24 October 1954.¹¹ In 1955 One Unit was created out of the four provinces of West Pakistan¹² as a parity measure. Finally, the second Constituent Assembly, elected indirectly by members of provincial legislatures, framed the country's first Constitution in 1956.¹³ It replaced the post of Governor General with that of the president. Major General (retired) Iskander Mirza became the first president of Pakistan. The 1956 Constitution remained operational for only three years. In 1958, President Iskander Mirza dismissed the government, abrogated the 1956 Constitution and made General Ayub Khan the Martial Law Administrator,¹⁴ who, using his military powers, removed his benefactor and himself became the president. Iskandar Mirza probably did not imagine that he was changing the course of Pakistan's history by opening the door to future military takeovers and hampering the country's democratic advancement.

The second constitution of Pakistan was promulgated in 1962 under Ayub Khan's military regime. It replaced the principle of adult franchise with indirect elections through an electoral college of Basic Democrats who were to

⁶ Alan Whites, "Political Cohesion in Pakistan: Jinnah and the Ideological State," in *M.A. Jinnah Views & Reviews*, ed. M.R. Kazimi (Karachi: Oxford University Press, 2007), 110.

⁷ S.M. Burke & Salim Al-Din Quraishi, *Quaid-i-Azam Mohammad Ali Jinnah His Personality and His Politics* (Karachi: Oxford University Press, 2009), 369.

⁸ *Speeches - Quaid-i-Azam Mohammad Ali Jinnah*, (Karachi: Ferozsons, 1963), 6.

⁹ *Ibid.*

¹⁰ Safdar Mahmood, *Pakistan Political Roots & Development 1947-1999* (Karachi: Oxford University Press, 2010), 42-48.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ Ian Talbot, *Pakistan: A Modern History* (Lahore: Vanguard Books, 1999), 143.

¹⁴ M.R. Kazimi, *A Concise History of Pakistan*, 262.

elect the president. The parliamentary system was abandoned. It remained controversial throughout its life but remained in force till the end of Ayub Khan's regime in 1969.

The present Constitution, the country's third, was framed in 1973 by a directly elected legislature through consensus of all political parties and is regarded as the late Zulfikar Ali Bhutto's prime contribution to the country's political and democratic future. Ayub Khan's presidential form and indirect system of elections were abandoned and the parliamentary system based on adult franchise was restored. However, later, military rulers, General Zia-ul-Haq and General Pervez Musharraf, introduced certain amendments which gave them absolute powers such as Article 58 (2) (b) that authorized them to sack the government and dissolve the assemblies at their discretion.¹⁵ This quasi-presidential Constitution of 1973 became a source for instability of the civilian governments even when the military rulers were not ruling. Four general elections were held between 1988 to 1997, Benazir Bhutto of Pakistan Peoples Party (PPP) and Nawaz Sharif of Pakistan Muslim League (PML) became Prime Ministers twice in this period to be dismissed later by two presidents whom these parties had themselves elected.¹⁶

Following the General Elections of 2008 under General Pervez Musharraf and his subsequent resignation, the Pakistan Peoples Party assumed power by electing Mr Asif Ali Zardari, its Co-chairman as the president. The new government constituted a constitutional reform committee to recommend a package for restoring the 1973 Constitution to its original form. Consequently, the 18th Amendment to the Constitution was passed by the Parliament and became law.

Government of India Act, 1935

The Government of India Act, 1935 evolved from a long process of constitutional developments in India. The Government of India Act 1858 was the first Act passed by the British Parliament under which the Crown took over the reins of government from the East India Company¹⁷ making India a Crown and British Overseas Territory. With the passage of time, to accommodate the demand of Indian nationalists British Indian government started broadening representation to allow local participation. The India

¹⁵ "Parliament and the State in Pakistan: Case for Constitutional Reforms," *Strengthening Democracy through Parliamentary Development* (Islamabad) May 2008, http://www.sdpc.org.pk/publication_pdf_tmp/Briefing%20paper%20series.pdf (accessed April 3, 2011).

¹⁶ Iftikhar Malik, *Pakistan: Democracy, Terror and the Building of a Nation* (London: New Holland, 2010), 36.

¹⁷ Hamid Khan, *Constitutional and Political History of Pakistan* (Karachi: Oxford University Press, 2009), 7.

Councils Act of 1892 was enacted in order to establish provincial legislatures, increase the powers of the Legislative Council and also enhance the representation of Indians in the central government.¹⁸ Local participation was further expanded through Government of India Act 1909 which for the first time allowed the election of Indians to the various legislative councils and laid the ground work for parliamentary system in India.¹⁹ This process was hastened by the mass freedom movement launched by the Indian National Congress, World War I and 1917 declaration by the British Government that progressive realization of self government in India was its goal.²⁰ The Act of 1919 enabled the setting up of partially responsible governments in the provinces.

The Government of India Act 1935, which came in the wake of the freedom struggle, was a significant step in India's colonial history. It was passed by both the Houses of the British Parliament in July 1935 and received royal assent in August 1935.²¹ The Act visualized dominion status and a federal parliamentary system for India.²² It further enhanced the powers of the elected provincial and national legislatures and increased the participation of Indians in governance, though the discretionary powers of the Governor General were retained to maintain supremacy of the British Crown.²³ The Act was a comprehensive statute which had provisions for facilitating the autonomy of the provinces by making their legislatures wholly elective, introducing the cabinet system supervised by the Governor General under the direction of the secretary of state for India.²⁴ The Act provided that the federal legislature will be bicameral, comprising the Council of State and The House of Assembly.²⁵ The Governor General represented the King. The Act thus provided the foundations on which a new Constitution of independent India could be framed. The Governor General of India and the Governors of the provinces were given wide powers. The Federal Court, Federal Railway Authority, the Reserve Bank of India and the Public Service Commissions for the centre and

¹⁸ Muntzra Nazir, *Federalism in Pakistan: Early years* (Lahore: Pakistan Study Center University of the Punjab, 2008), 52-53.

¹⁹ Pyo, Su Yeon, "The Government of India Act, 1035," *World History Korean Minjok Leadership Academy*, November 2006, <http://www.zum.de/whkmla/sp/0809/sueyon/sueyon1.html> (accessed March 2011).

²⁰ Ram Gopal, *Indian Muslims A Political History* (Bombay: Asia Publishing House, 1959), 133.

²¹ *A short History of Pakistan Hind-Pakistan* (Karachi: Pakistan Historical Society, 1955), 397.

²² Muntzra Nazir, *Federalism in Pakistan: Early years*, 60-66.

²³ Ibid.

²⁴ Hamid Khan, *Constitutional and Political History of Pakistan*, 25-49.

²⁵ Ibid.

provinces were created. Burma was separated from India.²⁶ For the provinces, a three-fold division of functions was created and the subjects were divided into federal, provincial and concurrent lists. The federal and provincial legislatures were given the powers to make laws on subjects mentioned in their respective lists while both could legislate on subjects in the concurrent list. But in case of a dispute the federal law was to prevail over the provincial law.²⁷ As head of federal executive, the Governor General had the supreme command of the army, navy and the air force, subject to the powers of the King to appoint the Commander-in-Chief of the armed forces.²⁸ The Act established a diarchy at the Centre that the provinces did not have.²⁹ The Governor General was given special powers and responsibilities which were to be carried out by him by using his individual judgment and discretion.³⁰ The Government of India Act 1935 remained the law till 1947 when the India/Pakistan Independence Act was passed by the British Parliament.

India/Pakistan Independence Act 1947

The freedom struggle of the people of India ultimately succeeded and was helped by events of World War-II which had weakened the British Empire. The colonial power decided to award dominion status to Pakistan and India. The 1947 Act was passed and enacted on 15 June 1947 by the Parliament of United Kingdom and received royal assent on 18 July 1947.³¹ The Act was passed as a consequence of an agreement among the representatives of the Indian Congress, Muslim League and Sikh community and the Viceroy of India, Lord Mountbatten. The Act came to be known as the 3 June Plan or Mountbatten Plan.³² The Act stipulated important and historical provisions. It promulgated the partition of India and the independence of the dominions of Pakistan and India. According to the Act two independent dominions, Pakistan and India will come into existence on 14 and 15 August 1947 respectively.³³ On 15 August 1947, the suzerainty and responsibility of the government of United Kingdom shall end. The official commitments and

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

³¹ H.M. Seervai, *Partition of India Legend and Reality* (Rawalpindi: Services Book Club, 1991), 100.

³² Ibid., 99.

³³ "Indian Independence Act 1947," *Legislation.govt.uk*, <http://www.legislation.gov.uk/ukpga/Geo6/10-11/30/data.pdf>, (accessed April 15, 2011) see also Hamid Khan, *Constitutional and Political History of Pakistan*, 54-57.

treaty relationships of all Indian's princely states with the British Empire shall end and the states will be free to join either dominion.³⁴ Both the Dominions, Pakistan and India, will be self-governing in internal and foreign affairs and national security. Both Dominions will convene their Constituent Assemblies and write their constitutions. Both will be members of the British Commonwealth but can opt out of that at their pleasure. The provinces of Bengal and Punjab will be divided into two halves and one half of each of the provinces with Muslim majority will become part of Pakistan. The boundaries of India and Pakistan were to be determined by a boundary commission to be appointed by the Governor General.³⁵ Until the time of framing of their new constitutions, the new dominions of India and Pakistan and the provinces thereof would be governed by the Government of India Act 1935 as adopted by the Indian Independence Act 1947.³⁶ In the Act the powers of the Governor General were clearly defined. He was empowered to bring this Act in force. Division of territories, powers, duties, rights, assets, liabilities, etc., was the responsibility of Governor General. He could adopt, amend the Government of India Act 1935, as he may consider it necessary. The power to introduce any change was available until 31 March 1948; after that it was open to the constituent assembly to modify or adopt the same Act.³⁷ The existing legislative setups of India and Pakistan were allowed to continue as constitution making bodies as well as the legislatures. Section 10 of the Act provided for the continuance of service of the government servants appointed on or before 15 August 1947 under the governments of new Dominions with full benefits.³⁸ Sections 11, 12, and 13 dealt with the future of Indian Armed Forces. A Partition Committee was formed on 7 June 1947, with two representatives from each side and the Viceroy in chair, to decide about the division of assets including Armed forces.³⁹ As soon as the process of partition was to start, it was to be replaced by a Partition Council with a similar structure.⁴⁰

Based on the provisions of the Indian Independence Act, 1947, the Government of India Act, 1935, with certain adaptations became the working

³⁴ Ibid.

³⁵ Hamid Khan, *Constitutional and Political History of Pakistan*, 55.

³⁶ Ibid. 54.

³⁷ Ibid.

³⁸ "Indian Independent Act 1947," *Wikipedia*, http://en.wikipedia.org/wiki/Indian_Independence_Act_1947 (accessed April 18, 2011).

³⁹ Ibid.

⁴⁰ Ibid.

constitution of Pakistan. The Pakistan Provisional Constitution Order, 1947 established the federation of Pakistan, including the provinces of East Bengal, West Punjab, Sind, North West Frontier Province and Balochistan; any other areas that might, with the consent of the federation be included therein; Karachi, the capital of federation and such Indian states that might accede to the federation.⁴¹ According to the provisions of Section 8(c) of the Act of 1947, the powers of the Governor-General or any Governor of province to act in his discretion or to exercise his individual judgment as earlier allowed in Government of India Act 1935 were lapsed from 15 August 1947.⁴² Now the Governor General was to act only on the advice of his ministers. But under the provisions of Government of India Act, 1935, as adopted in Pakistan, the Governor-General was given wide and substantial powers. He was to be the executive head of the federation and all actions of federal government had to be taken in his name. He had the authority to appoint the Prime Minister, other federal ministers and the Council of Ministers who were supposed to hold office during his pleasure.⁴³ Powers to appoint principle military officers, governors of the provinces, the Advocate General of the Federation and Chief Justice, other Judges of Federal Court and other important officials also rested with the Governor General.⁴⁴ He also had the positive powers of legislation by issuing ordinances, when the legislature was not in session, and those ordinances had the same force of law as an Act of the federal legislature. The Governor-General had full powers of control over the provincial governments since part of his authority was derived from his control over Governors' actions. In Pakistan with effect from 14 August 1947, all functions and activities of the government were brought under the control of the cabinet which, in turn was responsible to the Constituent Assembly. The powers of the Governor-General as explained above were presumed to be exercised on the advice of the cabinet.⁴⁵

One Unit and the 1956 Constitution

It took nine years to frame a permanent constitution for the country which was at last written down and adopted by the second Constitution Assembly on 29 February 1956. It was enforced on 23 March 1956, proclaiming Pakistan to

⁴¹ Hamid Khan, *Constitutional and Political History of Pakistan*, 61.

⁴² *Ibid.*, 62.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

be an Islamic Republic.⁴⁶ The Constitution of 1956 provided for a federal system with the principle of parity between East Pakistan and West Pakistan. There would be only one house of parliament known as the National Assembly having 300 members divided equally between East and West Pakistan. Bengali was declared a national language alongside Urdu.⁴⁷ The Constitution provided for the parliamentary form of government, where real executive authority vested in the Prime Minister/Cabinet with collective responsibility to the legislature.⁴⁸ The Governor General was replaced by a President, who was to be a Muslim male and to be elected for a term of five years by the members of the National and Provincial Assemblies.⁴⁹ The President could proclaim an emergency and suspend fundamental rights.⁵⁰ The President could issue ordinances when the National Assembly was not in session. No money bill could be introduced without the consent of the President. The President could be impeached by a two-thirds majority of the National Assembly. He was required to act on the advice of the Prime Minister who held office during the pleasure of the President.⁵¹

The President could veto any legislation that the national assembly could override with a two-thirds vote.⁵² Democratic rights and freedoms and civil rights were granted in the Constitution with the usual qualifications and safeguards of an independent judiciary empowered to enforce the fundamental rights and decide, if a law was repugnant to any provisions of the fundamental rights.⁵³

To include Islamic provisions in the Constitution of 1956, the text of the Objectives Resolution⁵⁴ was repeated in the Preamble of the Constitution without any major change. The 1956 Constitution prevailed for only three years. Due to conflicting powers of the President and the Prime Minister, President Iskandar Mirza abrogated the 1956 Constitution, imposed martial law and appointed General Mohammad Ayub Khan, the Commander-in-Chief

⁴⁶ "Constitution of Pakistan 1956," *Wikipedia*, http://en.wikipedia.org/wiki/Constitution_of_Pakistan_of_1956 (accessed April 18, 2011).

⁴⁷ Tahir Kamran, "Electoral Politics in Pakistan (1955-1969)," *Pakistan Vision*, vol.10, no.1 (June 2009): 87.

⁴⁸ *Ibid.*, 86.

⁴⁹ *Ibid.*, 86-87.

⁵⁰ M.R. Kazimi, *A Concise History of Pakistan*, 261.

⁵¹ Tahir Kamran, "Electoral Politics in Pakistan," 87.

⁵² M.R. Kazimi, *A Concise History of Pakistan*, 261.

⁵³ Tahir Kamran, "Electoral Politics in Pakistan," 86.

⁵⁴ Hamid Yusuf, *Pakistan: A Study of Political Developments 1947-97* (Lahore: Sang-e-Meel, 1999), 63.

as the Chief Martial Law Administrator.⁵⁵ However, after three weeks General Ayub Khan compelled Iskandar Mirza to resign and on 27 October 1958 assumed the office of the President himself.

Field Marshal Ayub Khan and the 1962 Constitution

By declaring himself the winner of a dubious referendum held in February 1960⁵⁶ Ayub Khan had a new Constitution written for his rule. It was promulgated on 8 June 1962 making him the second President of Pakistan. Martial Law was lifted⁵⁷ and Pakistan was renamed as the 'Islamic Republic of Pakistan',⁵⁸ replacing the parliamentary system with a presidential system.⁵⁹ Direct Adult Franchise was done away with for an electoral college of 80,000 Basic Democrats who had been elected in February 1960.⁶⁰ They constituted four tiers of local government and acted as Electoral College for the President and the members of the National and Provincial Assemblies. The legislature was unicameral and there was no Vice President.⁶¹ Both the provinces would run their separate provincial governments. The responsibilities and authority of the centre and the provinces were clearly listed. The National Assembly had 300 members divided equally between the two wings of the country. The President, a Muslim, at least 35 years of age, was to be elected for five years, indirectly by the Electoral College.⁶²

The President was the Head of State as well as its Chief Executive. Governors and Ministers, Judges and services Chiefs were appointed and removed by him.⁶³ He was eligible to promulgate Ordinances and also veto the legislated laws that a two-thirds majority of the National Assembly could override. The president could dismiss a minister or a Governor⁶⁴ and could himself be impeached by a three fourth vote of the legislature. The mover of the resolution would lose assembly membership on failing to raise the support of

⁵⁵ Christophe Jaffrelot, ed., and Gillian Beaumont, trans., *A History of Pakistan and its Origins* (London: Anthem Press, 2002), 68.

⁵⁶ Hamid Khan, *Constitutional and Political History of Pakistan*, 196.

⁵⁷ Safdar Mahmood, *Pakistan Political Roots & Development 1947-1999*, 54-55.

⁵⁸ "Constitution of Pakistan," *Scribd*, <http://www.scribd.com/doc/14289333/Constitution-of-Pakistan> (accessed March 30, 2011).

⁵⁹ *Ibid.*

⁶⁰ M.R. Kazimi, *A Concise History of Pakistan*, 262.

⁶¹ *Ibid.*

⁶² Hamid Khan, *Constitutional and Political History of Pakistan*, 195.

⁶³ *Ibid.*, 197.

⁶⁴ Hamid Khan, *Constitutional and Political History of Pakistan*, 197.

half of the assembly membership.⁶⁵ The President could impose emergency under certain threats to security and peace.⁶⁶

The provincial legislature and executives were smaller replicas of the national model subject to overriding control and supervision of the President.⁶⁷ Besides its own subjects, the National Assembly could also legislate on matters falling under provincial control.⁶⁸ The National Assembly could amend the constitution with a two-thirds majority. The Preamble of the 1962 Constitution was almost identical to the 1956 Constitution, based on the Objectives Resolution. As per policy, steps were to be taken to enable the Muslims of Pakistan individually and collectively, to order their lives on the basis of precepts of the Qur'an and the Sunnah. "No law shall be enacted which is repugnant to Qur'an and Sunnah and all existing laws shall be brought in conformity to the Islamic principles. An Advisory Council of Islamic Ideology was also to be appointed by the President to advise the government for reconstruction of Pakistan on a truly Islamic basis."⁶⁹

The Constitution of 1962 remained operational till 25 March 1969, when, buckling under pressure of political forces seeking parliamentary form of government and right of adult franchise, President Ayub Khan resigned and handed over power to the then Commander-in-Chief, General Agha Mohammad Yahya Khan, instead of the Speaker of the National Assembly which his own constitution of 1962 prescribed.⁷⁰

1973 Constitution and Its Amendments

Events Leading to the Framing of the Constitution

Bowing to demands to abolish One Unit and restore adult franchise,⁷¹ President General Yahya Khan ordered general elections in December 1970 that were held simultaneously for both the national and provincial assemblies. Free and fair, these elections gave majority to the Awami League (AL) under the leadership of Sheikh Mujibur Rahman who bagged 160 out of 162 seats for East Pakistan without winning a single seat in West Pakistan whereas the Pakistan Peoples Party (PPP) under the leadership of Zulfikar Ali Bhutto emerged as the single largest party in West Pakistan winning 81 out of 138

⁶⁵ Ibid., 196.

⁶⁶ Ibid., 202.

⁶⁷ Ibid., 204.

⁶⁸ Ibid., 205.

⁶⁹ Ibid., 211-213.

⁷⁰ Hamid Yusuf, *Pakistan: A Study of Political Developments 1947-97*, 107.

⁷¹ Ibid., 114.

seats.⁷² The remaining 57 seats in West Pakistan were shared by seven parties and there were fifteen independent candidates. None of the West Pakistani political parties, like the PPP, could win a single seat in East Pakistan.

The Awami League (AL) had fought the elections on the basis of its Six Points to attain maximum political autonomy for East Pakistan and leaving few subjects under the Centre.⁷³ The PPP favoured a strong central government while assuring full provincial autonomy. Like the AL, the National Awami Party (NAP) and Jamiat Ulemai-e-Islam (JUI) coalition also demanded maximum autonomy for Balochistan and the NWFP. There were two major contenders for national power: Sheikh Mujibur Rahman and Zulfikar Ali Bhutto. The former sought a new constitution on the basis of his six points while the latter maneuvered to attain power somehow. Their lack of statesmanship was only matched by inflexibility and disregard for the country's unity. Bhutto refused to attend the scheduled opening session of the National Assembly in Dhaka on 3 March 1971 and demanded its postponement.⁷⁴ Yahya Khan postponed the session to 25 March 1971.⁷⁵ Refusing the right to form majority government and a new Constitution were steps against democracy by Mr Bhutto and General Yahya Khan. The AL's reaction was violent.⁷⁶ Yahya Khan ordered military action on 25 March 1971 and arrested Sheikh Mujib.⁷⁷ Later, India intervened militarily to support AL's liberation movement.⁷⁸ Thus East Pakistan became Bangladesh on 16 December 1971. General Yahya Khan handed over power in West Pakistan to Mr Bhutto who on December 20, 1971 took over as President and as the (first civilian) Chief Martial Law Administrator of Pakistan.⁷⁹ The country was thus broken up as a result of the constitutional crisis created by the adamant behaviour of the PPP and the AL who had both won the first free and fair elections of the country and did not give space to each other to formulate a new constitution.

Salient Features of the 1973 Constitution

As President of Pakistan, Zulfikar Ali Bhutto produced a consensus-based draft of a new Constitution which the leaders of all parliamentary groups in the National Assembly signed on 20th October 1972. It was passed

⁷² Ibid., 120.

⁷³ Ibid., 119.

⁷⁴ Ibid., 125.

⁷⁵ Ibid.

⁷⁶ Ibid., 126.

⁷⁷ Ibid.

⁷⁸ Ibid., 133.

⁷⁹ Ian Talbot, *Pakistan: A Modern History*, 213.

unanimously by the National Assembly and endorsed by the acting President Zulfikar Ali Bhutto on 12 April 1973. The Constitution came into effect on 14 August 1973.⁸⁰ Mr Bhutto took over as the Prime Minister and Chaudhry Fazal-e-Elahi as the President of Pakistan.

The Constitution provided for a federal parliamentary form of government on the British parliamentary model⁸¹ with a bicameral legislature comprising a Senate (the upper house), having equal provincial representation and a National Assembly (the lower house) - having 200 directly elected members.⁸² This arrangement was a measure to dispel fears of provinces concerning domination of the centre. Subject to the constitution, the executive authority of the federation shall be exercised in the name of the President by the federal government consisting of the Prime Minister and the Federal Ministers which shall act through the Prime Minister who shall be the Chief executive of the Federation. The Prime Minister and the Federal Ministers shall be collectively responsible to the National Assembly.⁸³

Islam has been declared as the State religion of the "Islamic Republic of Pakistan" and the Objectives Resolution has been annexed to constitution. No law repugnant to Islam was to be enacted and the present laws were to be Islamised. The President was to be a Muslim not less than 45 years of age and was to be elected by members of Parliament for five years⁸⁴ and carry out his duties on the advice of the Prime Minister.⁸⁵ The President could be removed by the resolution of parliament by two-thirds of the total membership of National Assembly.⁸⁶ The President could issue ordinances when the Parliament was not in session and had the power of granting pardon and the right to be kept informed by the Prime Minister on all matters of internal and foreign policies.⁸⁷ The President shall dissolve the National Assembly if so advised by the Prime Minister.⁸⁸ The Constitution of 1973 provided for the creation of a 'Council of Common Interests' consisting of Chief Ministers of the provinces and an equal number of Ministers of the Federal Government nominated by the Prime Minister.⁸⁹ The Council had the authority to formulate and regulate the policy in Part II of the Legislative List. The

⁸⁰ Ibid., 229.

⁸¹ "Constitution of Pakistan," *Scribd*.

⁸² Safdar Mahmood, *Constitutional Foundation of Pakistan* (Lahore: United Press, 1975), 821.

⁸³ Ibid., 833.

⁸⁴ "Constitution of Pakistan," *Scribd*.

⁸⁵ Safdar Mahmood, *Constitutional Foundation of Pakistan*, 820.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid., 823.

⁸⁹ "Constitution of Pakistan," *Scribd*.

complaint of interference in water supply by any province was to be resolved by the council.

The legislative powers of the centre and provinces were enumerated under two lists: federal and concurrent.⁹⁰ The federal legislative list consisted of two parts. Part I had fifty-nine items and Part II eight items. The constitution did not provide for a separate provincial legislative list and Provincial Assemblies were extended the power to make laws on the residuary subjects, that is, matters not enumerated in either the federal or in the concurrent list.⁹¹ The constitution also established a National Finance Commission (NFC) consisting of the federal and provincial Finance Ministers and other members to advise on distribution of revenues between the federation and the provinces.⁹² Familiar democratic rights and freedoms and civil rights were granted with usual qualifications and safeguards.⁹³ The judiciary enjoys full supremacy over other organs of the State.⁹⁴ Urdu is the national language. The Muslims of Pakistan, individually or collectively will be facilitated to order their lives in accordance with the fundamental principles and basic concepts of Islam. The state shall prevent prostitution, gambling and consumption of alcohol, printing, publication, circulation and display of obscene literature and advertisements.⁹⁵ Only a Muslim male could qualify for election as President though the Prime Minister could be of either gender. All existing laws shall be brought in conformity with the injunctions of Islam as laid down in the Holy Qur'an and Sunnah and no law shall be enacted which is repugnant to such injunctions.⁹⁶ A Council of Islamic Ideology shall be established to advise the government whether a law was as per precepts of Islam or otherwise.⁹⁷

For the first time, the Constitution of Pakistan gave definition of a Muslim and declared for the first time the Qadianis or the *Laboris* as non-Muslims, and their leader, Mirza Ghulam Ahmed Qadiani, who had styled himself as a prophet of Islam, as an imposter.⁹⁸

⁹⁰ Hamid Khan, *Constitutional and Political History of Pakistan*, 380.

⁹¹ *Ibid.*

⁹² "Constitution of Pakistan," *Scribd*.

⁹³ Hamid Khan, *Constitutional and Political History of Pakistan*, 375.

⁹⁴ "Constitution of Pakistan," *Scribd*.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

*Amendments to the 1973 Constitution***1. The Eighth Amendment: Main Features**

General Zia ul Haq had the Eighth Amendment passed in 1985 to empower himself to dismiss the Prime Minister and dissolve the assemblies at his discretion. This was provided under the infamous clause 58 (2) (b) of the amended constitution. The provincial governors enjoyed the same discretionary powers.⁹⁹ The amendment also gave powers to the President to appoint services chiefs and provincial governors at his discretion.¹⁰⁰ The President was required to appoint governors of provinces in consultation with the Prime Minister which was not binding on him.¹⁰¹ The President could invite a member of the National Assembly for election as Prime Minister if he commanded majority in the House.¹⁰² The provincial governor could do likewise for electing a Chief Minister. Thus the passage of the 8th Amendment diluted the parliamentary character of government turning it into a quasi-presidential form by tilting the balance of power in favour of the President.

2. Salients of 13th Amendment

The 13th constitutional Amendment, passed by the Parliament when Nawaz Sharif was Prime Minister in 1997, reversed the changes brought about by the Eighth Amendment, restoring parliamentary democracy in the country.¹⁰³ The Article 58(2) (b) was deleted along with curtailing President's and governors' powers in making key appointments. Now the president acted on the 'advice' of the Prime Minister which was binding on him.¹⁰⁴

⁹⁹ "Parliament and the State in Pakistan: Case for Constitutional Reforms," *Strengthening Democracy through Parliamentary Development*.

¹⁰⁰ Hamid Yusuf, *Pakistan: A Study of Political Developments 1947-97*, 207.

¹⁰¹ Hamid Khan, *Constitutional and Political History of Pakistan*, 509-516.

¹⁰² *Ibid.*

¹⁰³ *Parliament and the State in Pakistan: Case for Constitutional Reforms*," *Strengthening Democracy through Parliamentary Development*.

¹⁰⁴ *Ibid.*

3. Legal Framework Order 2002: Revival of Eighth Amendment

The main provision of the Legal Framework Order (LFO) of August 2002 promulgated by General Pervez Musharraf which impacted on the executive and legislature relations is the revival of Article 58 (2) (b) returning the discretionary powers to the President to dissolve the National Assembly.¹⁰⁵ Similar powers were given back to the Governors who could now dissolve the Provincial Assemblies¹⁰⁶ with the President's approval. For consultation on strategic matters, a National Security Council was created as a constitutional body.¹⁰⁷ The President's discretionary powers to appoint the Chairman, Joint Chiefs of Staff Committee, the three Services Chiefs and the provincial Governors¹⁰⁸ were restored. Previously it was with the advice of the Prime Minister. The LFO provided that in case of dissolution of the Assemblies the President and the Governors would appoint caretaker governments in the center and the provinces respectively. The LFO also provided that 11 Orders and Ordinances issued by the incumbent military authorities would remain in the Sixth Schedule of the Constitution, and could not be amended without the permission of the President. This meant that the powers of the parliament to initiate legislation on these statutes at its own had been curtailed.¹⁰⁹ These statutes barred a person from holding the office of Prime Minister or chief minister more than twice. This specifically applied to Benazir Bhutto and Nawaz Sharif who had both been Prime Ministers twice. The LFO had thus largely tilted the balance of power in favour of the President and the position of the Prime Minister and the Parliament had been undermined.

4. The 17th Constitutional Amendment: Main Points

Gen Pervez Musharraf had the 17th Amendment passed by the Parliament on 31 December 2003 amending Article 41 of the constitution to enable an incumbent President to seek

¹⁰⁵ Hamid Khan, *Constitutional and Political History of Pakistan*, 661.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*, 661-662.

¹⁰⁸ "Parliament and the State in Pakistan: Case for Constitutional Reforms," *Strengthening Democracy through Parliamentary Development*.

¹⁰⁹ *Ibid.*

another term through a vote of confidence from the National Assembly instead of fresh contest between candidates as required under the Constitution of 1973. The revived Article 58(2)(b) through LFO 2002 was also revalidated but with the proviso that in case of dissolution of the National Assembly the President shall refer the matter to the Supreme Court within 15 days of dissolution and the court will be required to decide the reference within 30 days and that decision shall be final.¹¹⁰ A similar provision was created for the Governor in case of dissolution of a provincial assembly.¹¹¹ The amendment provided that the appointment of services chief will be made by the President after “consultation” with the Prime Minister which will not be binding on the President.¹¹² The provision concerning the National Security Council as a constitutional body was omitted.¹¹³

Impact of Major Amendments to 1973 Constitution made by General Pervez Musharraf

The provision of Legal Framework Order 2002 and the 17th Amendment had actually made the constitution quasi-presidential giving more powers to the President at the expense of the Prime Minister. Section 58(2)(b) had made the parliamentary structure inherently unstable as neither the Prime Minister, his cabinet, legislators or the provincial governments could function in an independent manner. These powers of the president also undermined the sovereignty of the parliament as they amounted to making the collective wisdom of the legislature and the cabinet subservient to the opinion or decision of an individual. Also, the LFO’s provision that the President can seek a vote of confidence instead of contesting elections amounts to denying other eligible candidates to compete for the post of the President.¹¹⁴

The LFO’s provision that bars a person from holding the office of Prime Minister or chief minister for more than two terms is not a universal practice and in parliamentary systems, specially where these posts depend on winning elections and holding majority in legislatures, such restrictions become redundant. In several developing countries of Asia, leaders such as Mahatir Mohammad of Malaysia, Suleyman Demirel of Turkey and Lee Kwan Yew of

¹¹⁰ Hamid Khan, *Constitutional and Political History of Pakistan*, 661-668.

¹¹¹ Ibid.

¹¹² “Parliament and the State in Pakistan: Case for Constitutional Reforms,” *Strengthening Democracy through Parliamentary Development*.

¹¹³ Ibid.

¹¹⁴ Hamid Khan, *Constitutional and Political History of Pakistan*, 662-663.

Singapore have held multiple terms in office which enabled them to carry out long term development programmes of their countries.¹¹⁵

The Political Parties Order, 2002 was amended to omit its clause (9), which required the separation of party office from government office. Clause (9) provided that the holder of elected public offices shall not hold any political party office. Hence, it barred a person holding party office to become Prime Minister, chief minister or ministers. By allowing to hold two offices simultaneously this amendment has made it difficult for the ruling party to oversee government performance since if ruling party office bearers are in government also the party's role of oversight is undermined.¹¹⁶

During the Musharraf regime, the parliament suffered as an institution as it was relegated to subservience under the Executive. It was also not used for policy formulation and legislation. The government formulated almost all policies without debating those in the National Assembly and the Senate. Thus one-man rule made the parliament irrelevant as benefiting from its collective wisdom in making policies was not utilized. e.g., during five years, from 2002-2007, government promulgated 134 Presidential Ordinances while the National Assembly passed only 51 Bills.¹¹⁷

Constitutional Reform Committee (2009) and the 18th Amendment (2010)

Necessity and Purpose of Introducing 18th Amendment

In the constitutional history of Pakistan military dictators and civilian presidents have tried to assume the powers of de facto rulers by refusing to serve under the constitution as ceremonial heads and letting the parliament and the cabinet work independently. They have tended to continue the colonial era politics and opposed the evolution of democratic parliamentary culture in the country. With the exception of two brief periods, during 1973-77 and 1997-99 when parliament was allowed to play its due role, Pakistan has been ruled by executive dominated civilian and military governments. A parliamentary form of government envisions parliamentary sovereignty and independence of legislature in which elected representatives make laws and determine policies of the government. But flawed implementation of 1956 Constitution, the framing of 1962 Constitution which was Presidential in form, and amendments in the 1973 Constitution had distorted the traditions of parliamentary democracy in Pakistan, undermined parliament's sovereignty and denied people their political, fundamental and civil rights. In the 1956

¹¹⁵ "Parliament and the State in Pakistan: Case for Constitutional Reforms," *Strengthening Democracy through Parliamentary Development*.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

Constitution, a powerful President had made the parliament irrelevant and the 1962 Constitution was a Field Marshal's baby who was proposed president for life. In the 1973 Constitution the Eighth Amendment, LFO 2002 and the Seventeenth Amendment gave sweeping powers to the Presidents at the cost of the Prime Minister and the Parliament. In the process, in Pakistan the central role of the Parliament in state affairs and policy making has systematically been undermined making it necessary to correct the democratic course by restoring the 1973 Constitution to its original form through appropriate amendments so that the Parliament and elected governments could function with full freedom to play their constitutional role and the parliamentary tradition got firm roots in a sustainable democratic environment.¹¹⁸ Apart from this, to strengthen democracy, governance, ensure sufficient autonomy, to have independent judiciary and Election Commission and ensure proper socio-economic development of the country following additional measures were required to be taken by having necessary provisions in the desired amendments to 1973 Constitution for example:-

- For giving the country a stable political system, the constitution must have provisions to prevent the possibility of future military takeovers.
- To satisfy the smaller federating units, the powers of the Senate should be enhanced and brought at par with the National Assembly (as is the case in the United States (US) and Australian Senates). Also a law should be made that all reports (such as annual report of the auditor general of Pakistan on implementation of the principles of policy and some other ones) which are laid in the National Assembly should also be presented in the Senate. In line with the provision of Article 91(4) the Executive should be made answerable to the Senate also as it is to the National Assembly. The constitution should bar the President from issuing ordinances when the senate is in session as he is during National Assembly session. This will ensure that all laws have the stamp of the collective wisdom of the Parliament.¹¹⁹
- The constitution may also be amended to improve cohesion and internal functioning of political parties with a view to strengthening them in handling the country's affairs.
- Constitutional safeguards should be introduced to ensure that if government fails to maintain the indicators of the national economy at a healthy level it will itself resign failing which the judiciary would step in to do the needful.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

- Through a constitutional amendment the judiciary should be made independent so that it can deliver justice to the people of Pakistan.
- There should be a constitutional provision to ensure that key officials and ministers of the government are appointed on merit through confirmation by the parliamentary committees which will assess their eligibility as is done in the US and some other countries. This should also include confirmation of appointments of judges and ambassadors.¹²⁰
- All international and bilateral treaties should be ratified by the Parliament after necessary deliberations to remove any shortcomings and come into force only after such ratification.¹²¹
- In the interest of provincial autonomy the concurrent list of subjects should be abolished to devolve the subjects to the provinces. Matters such as payment of royalties on oil and gas, ownership of natural resources, the power to levy taxes and revenue distribution by the provinces also need to be provided for in the Constitution.

Constitutional Reforms Committee 2009

The 26-Member Committee which was constituted by the PPP Government in 2009 for recommending the constitutional reforms package to restore 1973 Constitution in its original form included only 11 members from the mainstream parties, i.e., the PPP-5, the Pakistan Muslim League-Nawaz (PML-N) 3 and the Pakistan Muslim League Quaid-i-Azam (PML-Q)-3. Other 15 members included the Muttahida Quami Movement (MQM)-2, the Awami National Party (ANP)-2, the Jamiat Ulemai-e-Islam Fazlur Rehman (JUI-F)-2 and one each from the Balochistan National Party (BNP), Jam'at-e-Islami Pakistan (JIP), the National Party (NP), the Pakistan Peoples Party-Sherpao (PPP-S), the National Peoples Party (NPP), the Pakhtoonkhwa Milli Awami Party (PKMAP) and the Jamhoori Watan Party (JWP).¹²² The original mandate of the Committee was to propose amendments to the constitution keeping in view the 17th Amendment, the Charter of Democracy signed in 2006 between

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Shahid Hamid, "Impact of the 18th constitutional Amendment on Federation-Provinces Relations," *Pakistan Institute of Legislative Development and Transparency* (Islamabad), July 2010, <http://www.pildat.org/Publications/Publication/PAP/Impactofthe18thConstitutionalAmendmentonFederalProvincesRelations-BriefingPaper.pdf> (accessed April 1, 2011).

the leaders of PPP and Pakistan Muslim League Nawaz (PMLN),¹²³ and Provincial autonomy in order to meet the democratic and Islamic aspirations of the people of Pakistan. Later, based on inputs from other political parties/forces in the country, the Committee extended the scope of the Constitutional Reforms to such matters as:¹²⁴

- Transparency
- Curtailing of individual discretion
- Strengthening of the Parliament and the Provincial Assemblies
- Provincial Autonomy
- Independence of Judiciary
- Strengthening of fundamental rights
- Respecting merit
- Good governance
- Strengthening of institutions

The Committee after co-opting proposals from various stakeholders finally produced a consensus-based constitutional package which was approved by the National Assembly and the Senate with absolute majority. The bill was signed by the President of Pakistan on 19 April 2010 and became law and part of the 1973 Constitution. The introduction of the 18th Amendment into the 1973 Constitution is being termed as a triumph of democracy that would help in bringing the required stability in the political system and enable the country to address the critical issues facing the nation.

Main Features of 18th Amendment

1. The 18th Amendment has restored the federal and parliamentary spirit of the 1973 Constitution.
2. Most of the undemocratic constitutional changes inserted during authoritarian regimes of Zia and Musharaf (including 17th Amendment) have been removed.¹²⁵
3. The amendment renames the former NWFP as Khyber

¹²³ Muhammad Waseem, "Federalism in Pakistan," *Forum of Federations*, funded by Ministry of Foreign Affairs, Germany, August, 2010, <http://www.forumfed.org/pubs/Waseem-Fed-Overview.pdf> (accessed April 1, 2011).

¹²⁴ Shahid Hamid, "Impact of the 18th constitutional Amendment on Federation-Provinces Relations."

¹²⁵ "Full text of 18th Amendment Bill," *Ministry of Information and Broadcasting, Government of Pakistan*, <http://www.infopak.gov.pk/Constitution/Full%20text%20of%2018th%20Amendment%20Bill.pdf>. (April 3, 2011).

- Pakhtunkhawa in recognition of its ethnic identity.¹²⁶
4. The 18th Amendment takes important steps towards devolution of authority and enhancing provincial autonomy. It has scrapped the Concurrent Legislative List of subjects and those subjects with few exceptions have been transferred to the provinces. The amendment also expands the scope of the Council of Common Interests (CCI). The CCI will become a powerful constitutional body comprised of representatives of centre and provincial governments to decide key matters. The National Economic Council (NEC) has been reformed with an advisory role to review overall economic condition of the country and to advise the federal and provincial governments to formulate plans in this regard. Another important step is the distribution of national revenues that is protected by the National Finance Commission under this amendment and provinces' share cannot be reduced beyond that given in the previous National Finance Commission award.¹²⁷
 5. The definition of "high treason" has been expanded in Article 6. Henceforth, an act of suspending the constitution or holding it in abeyance or any attempt to do so shall also be considered high treason. It has also been added to the article that such act of high treason cannot now be validated by the Supreme Court or a High Court. This amendment is likely to discourage future military takeovers in Pakistan.¹²⁸
 6. The number of Fundamental Rights in the constitution has been increased. These are the right of fair trial (Article 10A), the right to information (Article 19A) and the right to education (Article 25A). It is now the responsibility of the state to provide free and compulsory education to all children from age 5 to 16 years in such manner as may be determined by law.¹²⁹
 7. Article 17 has been amended so as to do away with, amongst other things, intra political party elections. This appears to be a negative change which favours only senior leadership of political parties.

¹²⁶ "18th Constitutional Amendment," *Centre for Civic Education Pakistan*, August 12, 2010, <http://www.civiceducation.org/2010/08/18th-constitutional-amendment/> (accessed April 1, 2011).

¹²⁷ *Ibid.*

¹²⁸ Shahid Hamid, "Impact of the 18th constitutional Amendment on Federation-Provinces Relations."

¹²⁹ *The Constitution of the Islamic Republic of Pakistan* (Islamabad: National Assembly of Pakistan, 2010), 10-15.

8. To safeguard against discrimination in services, a provision has been made that under representation of any class or area in the services of Pakistan is to be redressed by an Act of Parliament.¹³⁰
9. The role of the Senate has been considerably enhanced. The annual report on implementation of Principles of Policy is to be presented before the Senate also. Unlike the previous position, now the President cannot promulgate an Ordinance while the Senate is in session. The number of days that the Senate may take to give its recommendations on money bills has been increased from seven (7) to fourteen (14). The Prime Minister and his/her Cabinet will now be collectively responsible both to the National Assembly and the Senate. The number of Senate Members has been increased from 100 to 104 by adding four seats for non-Muslims, one from each province. The number of compulsory working days for the Senate has also been increased from 90 to 110.¹³¹
10. The Amendment has transferred key Presidential powers to the Parliament and established its supremacy. The President's discretionary powers to dissolve the National Assembly or to refer a question to a Referendum have been removed. To appoint the governors, the services chiefs and the Chairman Federal Public Service Commission the advice of the Prime Minister has been made binding for the President. Time limits have been fixed for the President to act on the advice given to him by the Prime Minister and his cabinet. The position and powers of the Governors in the provinces have also been reduced to that of President in the Federation. According to the amendments made in Article 90, the executive Authority of the federation shall not now vest in the President but be exercised in the name of the President by the federal government comprising the Prime Minister and Federal Ministers. The Prime Minister shall be the Chief Executive. Rules of Business shall be made by the federal government and not the President.¹³²
11. In Articles 62 and 63 relating to qualifications and disqualifications for elections to the Parliament and the Provincial Assembly, there are some positive and some negative changes. Earlier a person was not qualified if he had been convicted for an offence involving moral turpitude or giving false evidence. This

¹³⁰ Ibid., 16.

¹³¹ Shahid Hamid, "Impact of the 18th constitutional Amendment on Federation-Provinces Relations."

¹³² Ibid.

has been removed. This is not a good change since it clashes with the Islamic spirit of the constitution. On the positive side, in place of Musharraf era lifetime bans, time limits for disqualifications, i.e., five years from date of release in case of jail terms, five years from date of dismissal from public service, two years from date of compulsory retirement, have been reintroduced.¹³³

12. In Article 63-A relating to defection, the main changes, to be effective after next general elections, are that disqualification for defection will be triggered on a reference made by Head of a Party (by whatever name called) in place of Head of a Parliamentary Party, and the Speaker or Presiding Officer will not be able to 'sit on' i.e., delay the reference. With this amendment the position and power of party heads like Mr Asif Zardari in the PPP, Mian Nawaz Sharif in the PML-N, Mr Altaf Hussain in the MQM and some others has been strengthened.¹³⁴
13. The restriction on a person to be a third-time Prime Minister and/or chief minister has been removed. Only a Muslim member can become Prime Minister. This amendment cleared the way for Mr Nawaz Sharif and Shahbaz Sharif for becoming PM and chief minister for the third time.¹³⁵
14. The number of ministers, including ministers of state, has been limited to eleven per cent (11%) of the total membership of the Parliament – 49 out of 446 members of Parliament. In case of the Provincial Assemblies, the number of cabinet members cannot be more than 15 or 11% of the total membership of a Provincial Assembly, whichever is higher. This provision is to be effective after the next General Elections.¹³⁶
15. Article 140-A pertaining to devolution of power to local governments has been retained and expanded to provide that elections of the local governments shall be held by the Election Commission of Pakistan.¹³⁷ This amendment will help in having fair elections.
16. A new High Court has been created at Islamabad with its judges to be drawn from all four provinces and the Islamabad Capital Territory.¹³⁸

¹³³ *The Constitution of the Islamic Republic of Pakistan*, 34-39.

¹³⁴ *Ibid.*

¹³⁵ Shahid Hamid, "Impact of the 18th constitutional Amendment on Federation-Provinces Relations."

¹³⁶ *Ibid.*

¹³⁷ *The Constitution of the Islamic Republic of Pakistan*, 72.

¹³⁸ *Ibid.*, 99.

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17. By amending Article 200 the provision for compulsory retirement of a High Court Judge in case he refuses to accept transfer to another High Court has been done away with. High Court Judges cannot now be transferred from one court to another without their specific consent even for short periods.¹³⁹
 18. The Election Commission of Pakistan has been considerably strengthened. The term of office of the Chief Election Commissioner (CEC) has been increased from three to five years. For the appointment of the CEC the Prime Minister and the leader of the Opposition in the National Assembly shall agree on three names. The three names shall be sent to a Parliamentary Committee consisting of not more than 12 members of whom half will be from treasury benches and half from Opposition benches. The person selected by the Parliamentary Committee shall be appointed by the President. The Election Commission of Pakistan shall have five permanent members including the Chief Election Commissioner. The Commission shall have power to prepare electoral rolls, to hold elections to fill a causal vacancy, to appoint election tribunals and to appoint staff of the Election Commission, etc. This amendment will certainly help in holding free and impartial elections in Pakistan.¹⁴⁰
 19. According to the Amendment, after dissolution of the Assembly, the president shall appoint a Caretaker Prime Minister in consultation with the out-going Prime Minister and the leader of the Opposition in the National Assembly. The Caretaker Ministers shall be appointed on the advice of the Caretaker Prime Minister. The immediate family of the Caretaker Ministers i.e., spouse and children, shall not be eligible to contest the elections being supervised by the Caretaker Cabinet. Similar provisions have been provided for the Provincial Caretaker governments. This change will help in discouraging rigging of elections.¹⁴¹
 20. The Sixth and Seventh Schedules to the constitution have been omitted. The Sixth Schedule included 35 laws which could only be amended with the prior consent of the President. The Seventh Schedule included eight laws which could only be amended in the manner provided for amendment of the constitution. Now these laws will be treated as any other law on the statute books.¹⁴²

¹³⁹ Ibid., 103.

¹⁴⁰ Shahid Hamid, "Impact of the 18th constitutional Amendment on Federation-Provinces Relations."

¹⁴¹ Ibid.

¹⁴² Ibid.

21. Annex to the constitution is the Objectives Resolution passed by the Constituent Assembly in 1949. It has been clarified in the said Resolution that minorities have a right to freely profess and practice their religion. This is a good amendment as it will give more confidence to the minorities.¹⁴³
22. The Concurrent List containing subjects on which both the Parliament and the Provincial Assembly can legislate has been omitted. Hence these subjects will be transferred to the provinces except Criminal Law, Criminal Procedure and Evidence on which both the Parliament and the Provincial Legislatures can make laws. Some subjects out of the Federal List Part I and out of the old but now abolished Concurrent List have also been included in Part-II of the Federal List which will be under the domain of CCI. These include electricity and major ports. National Planning and National Economic Coordination including Planning and Coordination of Scientific and Technological Research, legal, medical and other professions, standards in institutions for higher education and research, scientific and technical institutions and inter-provincial matters and coordination. Now, in place of 'National Planning and National Economic Coordination etc' at serial no. 32 of the Federal List Part-I "International treaties, conventions and agreements and International Arbitration" have been included.¹⁴⁴
23. As per Article 153 of the constitution, the Council of Common Interests (CCI) has been given greater mandate and strengthened to carry out the increased responsibilities. Now the Prime Minister will be its Chairman. Earlier, according to Article 153, the membership or the chairmanship of the Prime Minister was not mandatory. The CCI shall meet once in a quarter. It shall have a permanent secretariat. It shall consist of the Prime Minister, three Federal Ministers and the four Chief Ministers. The list of subjects on which the CCI will have policy control has been very substantially increased by transfer of some of the subjects from the omitted Concurrent List and some of the subjects from Part-I of the Federal Legislative List to Part-II of the Federal Legislative List as already mentioned. Now the CCI will also have policy control over reservoirs in addition to natural sources of water supply. Furthermore the Federation shall not build new hydro-

¹⁴³ *The Constitution of the Islamic Republic of Pakistan*, 5,174-175.

¹⁴⁴ *Ibid.*, 42,205-212.

electric stations in any province except after consultation with that province.¹⁴⁵

7th National Finance Commission Award

1. No Reduction in the NFC Share

Now the National Finance Commission (NFC) shall not reduce the share of resources allocated to the provinces by the previous Commission.¹⁴⁶

2. Distribution of Revenues

Also provinces have become entitled, as of right to the entire proceeds of the excise duty on oil in addition to the excise duty on natural gas. The provinces have also been given power to raise domestic or foreign loans with the approval of the National Economic Council. The divisible pool of taxes namely taxes on income, wealth tax, capital value tax, taxes on the sales and purchase of goods imported, exported, produced, manufactured or consumed, Export duties on cotton, Customs duties, federal excise duties excluding the excise duty on gas charged at well head and any other tax which may be levied collected each year by the federal government will be distributed as follows: One per cent of the net proceeds of divisible pool taxes shall be assigned to government of Khyber Pakhtunkhwa to meet the expenses on war on terror. After deducting this amount as prescribed, of the balance amount of the net proceeds of divisible pool taxes, 56 per cent shall be assigned to provinces during the financial year 2010-11 and 57 and half percent from the financial year 2011-12 onwards. The share of the federal government in the net proceeds of divisible pool shall be 44 percent during the financial year 2010-11 and 42 and half percent from the financial 2011-12 onwards.¹⁴⁷

¹⁴⁵ Ibid., 77-78.

¹⁴⁶ Shahid Hamid, "Impact of the 18th constitutional Amendment on Federation-Provinces Relations."

¹⁴⁷ Ibid.

3. Shares of Royalties

Each of the provinces shall be paid in each financial year as a share in the net proceeds of the total royalties on crude oil an amount which bears to the total net process the same proportion as the production of crude oil in the province in that year bears to the total production of crude oil.¹⁴⁸

4. Taxes on Services

NFC recognizes that tax on services is a provincial subject under the Constitution of the Islamic Republic of Pakistan, and may be collected by respective provinces, if they so desired.¹⁴⁹ This measure will enhance financial resources of the provinces to some extent.

Impact of the 18th Amendment: An Analysis

Centre-Province Relations/ Empowering Provinces

Article I has been amended and the North West Frontier Province has been renamed as Khyber-Pakhtunkhwa. The provincial legislatures have been empowered by amending Article 142 and deletion of the Concurrent Legislative list thus transferring these subjects to the provinces. By amending Article 101 the President is now required to appoint a Governor, who is a registered voter and resident of the province concerned. The Parliament and the Provincial Assemblies can make laws with respect to criminal law, Criminal Procedure and Evidence as per amended Article 142. This was necessitated because of the deletion of the Concurrent Legislative List from the constitution.¹⁵⁰

As per amended Article 157 the federal government shall consult the provincial government concerned prior to taking a decision to construct hydro-electric power stations in the province. It has also been provided in this Article vide a new clause that in case of any dispute between the federal government and a provincial government in respect of any matter under this Article the Governments shall refer the case to the Council of Common Interests. According to amended Article 160, successive National Finance Commissions have been bound to allocate not less than the share given to the

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ *The Constitution of the Islamic Republic of Pakistan*, 5, 73.

provinces in a previous award. Based on this amendment, it is also the responsibility of the Federal Finance Minister and Provincial Finance Minister to monitor the implementation of the award biannually.¹⁵¹

The amended Article 161 provides that the proceeds of the Federal Duty of Excise collected by the federal government on oil levied at well head shall not form part of the federal consolidated fund but shall be paid to the province in which the well head of oil is situated. According to this Article, earlier the payment of Federal Excise Duty on Natural Gas only was being paid to provinces. By amending Article 172 the ownership of minerals and natural gas within the province and territorial water adjacent thereto has been given jointly and equally to the province and the federal government. Previously, all ownership was vested in the federal government.¹⁵²

Emergency rule in any province on account of internal disturbances can now only be imposed with the consent of the Provincial Assembly concerned. This amendment does not seem to be very practicable.¹⁵³

Political System

1. **Strengthening Democracy**

- a. Article 58(2) (b) has been repealed where under this the president had the discretion to dissolve the National Assembly if, in his opinion, the Government of the federation could not be carried on and appeal to the electorate was thus necessary. A new Article 190A provides for the right of access to information to all citizens in all matters of public importance, subject to regulation and reasonable restrictions imposed by law. This amendment will help in making public decisions transparent which is necessary for a democracy to progress.¹⁵⁴
- b. According to the 18th Amendment, the working days of the Senate have been increased from 90 to 110 and the Provincial Assemblies from 70 to 100. Article 140A has been amended by adding a new Section 10 according to which local bodies elections shall also be held by an independent Election Commission. This will ensure holding of fair elections. A

¹⁵¹ Ibid., 80-83.

¹⁵² Ibid., 83,84-88.

¹⁵³ Ibid., 131.

¹⁵⁴ Iftikhar Ullah Babar, "18th and 19th Constitutional Amendments: A Case Study of Altering Power Sources and Shifting Power Basis," *Senate News*, vol. 2, no. 1 (January 2011): 29-30.

provision has been added to Article 147, stating that if the executive authority of any province is entrusted to the federal government, it shall be subject to ratification by the concerned Provincial Assembly. The Council of Common Interests (CCI) has been strengthened by amendments in Article 153 and 154 by entrusting it with powers to formulate and regulate policies in relation to matters in part II of the Federal Legislative List. Moreover, by amendment of fourth schedule of the constitution where some subjects from the Concurrent List have been added to the Federal Legislative List II, has further strengthened the CCI. A broad based consultative process for the selection and appointment of a Parliamentary Committee which will select the Chief Election Commissioner (CEC) has been laid down by amending Articles 223 and 224. The term of office of the CEC has also been extended from 3 to 5 years to ensure continuity. Another measure which will boost democracy is strengthening political parties by amending Article 226 which provides that all elections under the constitution other than those of the Prime Minister and Chief Ministers shall be by secret vote. The election of the Prime Minister and the Chief Ministers shall be by division. This will also strengthen political parties because no member will be able to vote against the party candidate.¹⁵⁵

- c. According to amended Article 232, where the President has imposed emergency due to internal disturbances, it will now require a Resolution of the Provincial Assembly. In case an emergency is imposed by the President in the country it shall be placed before both Houses of Parliament for approval by each House within 10 days.¹⁵⁶
- d. Amendment in Article 270A sub clause 6 has provided for amendment of laws mentioned in the seventh schedule of the constitution like any ordinary law, which could previously be altered on the lines of a constitutional amendment. According to sub clause 2 of the amended Article 270AA power has been given to the appropriate legislatures to amend laws detailed in sub clause 1 including the LFO 2002 and other laws and amendments introduced by the Chief Executive.¹⁵⁷

¹⁵⁵ Ibid.

¹⁵⁶ *The Constitution of the Islamic Republic of Pakistan*, 131.

¹⁵⁷ Ibid., 160-164.

2. Strengthening the Parliament

- a. Many changes in the constitution have been brought about by the 18th Amendment which would strengthen the Parliament in a major way. According to Article 48, Parliament has been given powers to decide in a Joint Sitting whether the Prime Minister may refer any matter of national importance to a referendum. Previously as per Article 48(vi) the President of Pakistan at his discretion or on the advice of the Prime Minister could refer a matter of importance to a referendum. By amending Article 59, the number of seats of the Senate has been increased from the present 100 to 104 to give representation to one non Muslim from each province. These four members would be elected by the respective Provincial Assemblies. Another big boost to the authority of the Parliament is the deletion of the 6th and 7th schedule from the constitution and placing all laws mentioned herein under the scrutiny of Parliament. Previously laws in the 6th Schedule could not be amended without the previous sanction of the President while laws mentioned in the 7th Schedule could only be amended like amendments to the constitution.¹⁵⁸
- b. According to the amended Article 73, the Senate has been allowed to give its recommendations to the National Assembly within 14 days instead of seven days from the date a copy of the money Bill is transmitted to the Senate. As per amended Article 75 the President has been allowed 10 days to give his assent to a bill instead of 30 days allowed previously. Such assent shall be deemed to have been given in case the President does not give his assent within 10 days. Article 89 has been amended in a major way which requires that the President can now issue ordinances only when both the National Assembly and the Senate are not in session. Previously the President could promulgate an ordinance when the Senate was in session. Re-promulgation of ordinances by the President has also been prohibited by the amended Article 89. Now only the National Assembly by a resolution can extend an ordinance concerning money matters for a further period of 120 days. Also, the life of other ordinances can be extended for further period of 120 days by a

¹⁵⁸ Iftikhar Ullah Babar, "18th and 19th Constitutional Amendments: A Case Study of Altering Power Sources and Shifting Power Basis," 29-30.

Resolution of either House. However, according to Article 89 this extension can be given only once.¹⁵⁹

- c. Amendment of Article 91 has also empowered the Parliament by allowing it to elect without debate one of its Muslim Members to be the Prime Minister of Pakistan. Previously the President had the authority to appoint a Prime Minister from amongst the members of the National Assembly whom he considered most likely to command the confidence of the majority of the Members of that House. Now the President is also required to call the first meeting of the National Assembly on or before the 21st day after the general elections.¹⁶⁰
- d. As per amended Article 91 it has been stated that the cabinet and the Ministers of State will be collectively responsible to the Senate and the National Assembly. Previously the Cabinet was not answerable to the Senate. It has been provided in the Amended Article 104 that in the absence of the Governor for any reason, the Speaker of the Provincial Assembly shall perform the functions of the Governor of that province. Before, the president could nominate any person to act as Governor. According to Article 142 the Parliament has been given exclusive powers to make laws with respect to all matters pertaining to such areas in the federation, which are not included in any province.¹⁶¹

3. Empowering the Prime Minister and Chief Ministers

By amending some Articles of the constitution, the office of the Prime Minister has also been strengthened. By amending Article 48, the President has been restricted to act within 10 days in accordance with the advice tendered by the Prime Minister or the cabinet. Now according to the amended Article 156 the Prime Minister and not the President shall nominate four other Members to the Council of Common Interests. By amending Article 242 the President has also been restricted to appoint the Chairman of the Federal Public Service Commission on the advice of the Prime Minister. Previously, the President had the discretion to make such appointment.

¹⁵⁹ Ibid., 30-31.

¹⁶⁰ *The Constitution of the Islamic Republic of Pakistan*, 53.

¹⁶¹ Ibid., 53-58, 73.

Similarly, the Governors of the provinces have been restricted from appointing the Chairman of the Provincial Public Service Commissions on the advice of the Chief Ministers concerned. According to the amended Article 90, the President cannot exercise the executive authority either directly or through officers subordinate to him but shall exercise the authority through the federal government, consisting of the Prime Minister and the Federal Ministers, who shall act through the Prime Minister who shall be the Chief Executive of the Federation. It has been ensured by amending Article 153 that the Prime Minister is Chairman of the Council of Common Interests. Previously, the Prime Minister was not necessarily a Member.¹⁶² By amending Article 129, the Chief Ministers have been empowered. According to the article 129, the executive authority of the province shall be exercised in the name of the Governor by the Provincial Government, consisting of the Chief Minister and Provincial Ministers, which shall act through the Chief Minister. In the performance of his functions under the Constitution, the Chief Minister may act either directly or through the Provincial Ministers.¹⁶³

The Judiciary

The 18th and 19th constitutional Amendments have introduced sufficient changes which have made the Higher Judiciary more independent by giving it more powers as a whole in the appointment of judges of the Superior Courts.

A new Article 175A, inserted in the Constitution provides for a Judicial Commission, which will nominate Judges of the Supreme Court, High Courts and the Federal Shariah Court to the Parliamentary Committee. This has certainly strengthened the Judiciary wherein six Judges out of a total of nine Members of the Commission shall decide on the appointment of Judges for the Superior Courts.

The Commission has been empowered to make its own rules while the Chief Justice has been empowered to nominate former judges to the Judicial Commission. According to this new Article, the president is required to appoint the most senior Judge of the Supreme Court as the Chief Justice of Pakistan.

¹⁶² Iftikhar Ullah Babar, "18th and 19th Constitutional Amendments: A Case Study of Altering Power Sources and Shifting Power Basis," 31.

¹⁶³ "Constitution (Eighteenth Amendment) Act, 2010," *IPRI Factfile*, vol. XIII, no. 5 (May 2011): 72.

Previously, the words “senior most Judges” were not included in Article 177, which is concerned with the appointment of the Chief Justice of Pakistan.¹⁶⁴

Article 175A carries the provision of constituting a Parliamentary Committee consisting of four members of the Senate and four members from the National Assembly, which shall on receipt of a nomination from the Judicial Commission, confirm the nominee by majority of its total membership within 14 days, failing which the nomination shall be deemed to have been confirmed. According to the provision, the Committee may not confirm the nomination by three-fourth majority of its total membership within the said period, in which case the Commission shall send another nomination.

However, instead of giving absolute powers to the Chief Justice, the Judiciary as an institution has been entrusted with powers to appoint judges to the higher judiciary, which previously was the domain of the Chief Justice.¹⁶⁵

The 19th constitutional Amendment has ensured that the meeting of the Parliamentary Committee shall be held in camera and would record reasons for not accepting a nominee. It also raised the number of the Members of the Judicial Commission from three to five including the Chief Justice; as per amended Article 175 a High Court has been provided for the Islamabad Capital Territory.

By amending Article 198 a bench each of the Peshawar High Court at Mingora and Balochistan High Court at Turbot has also been provided. Article 200 which required that if a Judge of High Court did not accept transfer to another High Court, he shall be deemed to have retired from his office has been deleted. Now, no judge can be transferred from one High Court to another without his consent. Article 203C has been amended by adding clause 4b which provides for the same method for removal of the Chief Justice as is provided for the Judge of the Supreme Court. Previously the removal of the Chief Justice by the Judicial Commission was not mentioned in the Constitution.¹⁶⁶

The Military

The definition of “high treason” has been expanded in Article 6. Now an act of suspending the constitution or holding it in abeyance or any attempt to do so shall also be considered high treason. It has also been added to the article that high treason cannot now be validated by the Supreme Court or a High

¹⁶⁴ *The Constitution of the Islamic Republic of Pakistan*, 89-92.

¹⁶⁵ *Ibid.*, 91.

¹⁶⁶ Iftikhar Ullah Babar, “18th and 19th Constitutional Amendments: A Case Study of Altering Power Sources and Shifting Power Basis,” 32.

Court. This amendment is likely to discourage future military takeovers in Pakistan.¹⁶⁷

Socio-Economic Uplift

A new Article, 25A provides for the right to free and compulsory education to all children of the age from five to sixteen years. This would raise the literacy level of the population. Two Articles namely 27 and Article 38 have been amended. The first provides that under representation of any class or area in the services of Pakistan may be redressed in such manner as may be determined by an act of Parliament.

A new Para (g) added to Article 38 provides that the shares of the provinces in all Federal Services, including autonomous bodies and corporations established by or under the control of the federal government shall be secured and any omission in the allocation of the shares of the provinces in the past shall be rectified.

According to a new provision added to Article 92, the strength of the cabinet has been limited, including the Ministers of State to 11 percent of the total Membership of Parliament. On the same lines, Article 130(6) restricts the Provincial Cabinets to 11 percent of the total Membership of a Provincial Assembly or 15 Ministers whichever is higher. This will curtail the current expenditure of the federal and provincial governments and will thereby release more funds for socio-economic uplift of the people of Pakistan.¹⁶⁸

Implementing the 18th Amendment

Now that 18th Amendment has become part of 1973 Constitution, its proper implementation is needed to realize the true spirit of the 1973 Constitution and the parliamentary system. This is needed to ensure that federal and provincial governments are elected and function smoothly with stability so that these can contribute for development and prosperity of Pakistan and its people.

The implementation commission on 18th Amendment already constituted by the government on May 4, 2010¹⁶⁹ has largely done its job of shifting the concerned ministries and subjects to the provincial governments and left over tasks of the commission are likely to be completed within a short frame of time.¹⁷⁰ Now it will be the responsibility of the federal and provincial

¹⁶⁷ *The Constitution of the Islamic Republic of Pakistan*, 6.

¹⁶⁸ Iftikhar Ullah Babar, "18th and 19th Constitutional Amendments: A Case Study of Altering Power Sources and Shifting Power Basis," 32.

¹⁶⁹ "18th Amendment: Implementation Commission report unveiled," *Express Tribune*, May 4, 2011.

¹⁷⁰ "18th Amendment: Implementation Commission formed," *Pak Tribune*.

governments to make necessary rules and administrative arrangements to operationalise the devolved powers for the development of the country and welfare of its people. In this regard the federal and provisional governments have to understand the challenges facing the implementation of the 18th Amendment and find out the solution to those challenges with a view to ensure implementation of the amendment in the shortest possible time for drawing real benefits for the socio-economic development of Pakistan and welfare of its people.

Challenges to Implementation of 18th Amendment

- Under the 18th Amendment, 40 of the 47 subjects in the old Concurrent List¹⁷¹ have been devolved to the provinces for which they need to legislate and create necessary infrastructure to use those subjects for the benefit of the provinces and their people.
- The charge of an estimated 20 ministries and divisions and 100 autonomous bodies and institutions some of which have already been transferred to the provinces and others are in the process of being handed over to the provinces will require a lot of work in creating new ministries in the provinces and absorbing almost 250,000 federal employees of the dissolved ministries.¹⁷² In this regard, the government is likely to face stiff resistance from bureaucrats with reservations over their transfer to provinces from the federal capital.
- To keep the parliamentary form of democracy and government sustainable the political parties and state institutions have to work within the limits defined by the 18th Amendment. This would demand self-discipline from the political leadership and senior officials of State institutions. It is also important to create an independent election commission and care taker governments with the consent of opposition leaders for conducting fair and impartial elections. federal government and the parliament have also to legislate for making an effective accountability department to end corruption and mal practices in the country.
- The 18th Amendment contains very significant provisions regarding Centre-Provinces relations and measures to give sufficient autonomy to the provinces. These provisions have to be operationalized by the political leadership and governments to make the provinces more autonomous and satisfied. To empower the people at grass roots level, the provinces have also to devolve

¹⁷¹ Muhammad Waseem, "Federalism in Pakistan," 11.

¹⁷² Irfan Ghauri, "Implementation of 18th Amendment package: Another 'uphill task' awaits govt," *Daily Times*, April 12, 2010.

powers to the local governments for which a system has to be evolved quickly in the light of the 18th Amendment.

- In view of the new federation-province equation of relationship the political leadership will have to chart out a new strategy to carry out nation building based on resolving Centre-Provinces issues and Provinces' grievances. This would require well structured and planned regular functioning of Council of Common Interests with the spirit of mutual accommodation in decision making by the federation and the provinces.
- All provisions of the 18th Amendment and the NFC Award affecting the economy have to be translated into a viable economic policy by the central and provincial governments in order to bail out the economy from its present crisis situation and ensure sustained economic development which is necessary for country's sovereignty and prosperity. It is also important for achieving provincial autonomy ensured through cancellation of Concurrent List and alleviation of their grievances through financial self sufficiency to be attained in the light of the NFC awards and 50% share of natural resources.
- According to the 18th Amendment package, the Implementation Commission has to carry out the major task of the restructuring of the Federal Public Service Commission and Provincial Public Service Commissions in each province.
- The implementation of the 18th Amendment would be a test of strong political will of the governments at the Centre and Provincial levels, including bureaucracy's sincerity and efficiency.

Recommendations for Better Implementation of 18th Amendment and Using the Amended 1973 Constitution to the Advantage of Pakistan

- For strengthening democracy the political leadership shall now have to display mature behaviour to do politics based on give and take spirit. The political parties will have to follow traditions of parliamentary system of democracy to avoid political impasses. This is because any future interruption of the political process will signal greater danger than before.
- Provincial governments should now start functioning more efficiently for drawing maximum benefit out of the provisions of cancellation of the Concurrent List, better NFC awards and grant of 50% share for natural resources for the economic development of provinces and welfare of the people.

- Although theoretically, it is good to have an amended 1973 Constitution providing for parliamentary form of democracy in Pakistan, it is more important that the provisions of the constitution are acted upon in practice as well, by the parliamentarians, governments, state institutions and the civil society to make use of the constitution for the good of Pakistan. For this purpose, all are required to be knowledgeable about the Constitution and their responsibilities enshrined therein.
- The central and provincial governments have to work hard to translate provisions of the constitution into policies which are urgently required for socio-political and economic development of Pakistan.
- The Islamic provisions of the constitution should be implemented by the governments in the practical life of the people based on an enlightened view of Islam with a view to eroding the claims of al Qaeda and allied terrorist groups that they are fighting for establishing an Islamic system.
- The Parliament should exert for debating Pakistan's foreign and defence policies co-opting concerned ministries and defence forces to guide the government regarding adoption of policies keeping in view the country's economic and military power, international constraints and sensitivities of Pakistan's security and sovereignty.
- The Parliament should debate and formulate a viable economic plan for rescuing the economy of Pakistan from the current declining state and also formulate future economic development plans by co-opting the concerned ministries.
- The Parliament should also debate and formulate a people's welfare economic plan with a view to providing them relief from the rising prices and should suggest measures to the government to control inflation. The parliament should also fix restrictions on the government for not disturbing the indicators of the economy below a safety level to avoid future economic down turns. This may also be done by co-opting the concerned ministries.
- The state institutions should work within the bounds of the constitution and work efficiently with a view to ensuring stability of parliamentary democracy on a long-term basis and avoiding future military takeovers.
- The Parliament and Government should work hard on a priority basis to create a viable accountability system to end corruption in the country.
- To provide inputs to the government to meet the above mentioned challenges there is a need that academicians, scholars, civil society

and media should continue to provide inputs to the governments on following aspects for better implementation of provisions of the 18th Amendment:-

- Centre-Province relations and provincial autonomy after cancellation of Concurrent List.
- Balance of relations between the President, the Prime Minister/Cabinet and the sovereignty of the Parliament.
- Impact of Provisions of the 18th Amendment on future economic development.
- People's expectations from the independent Parliament in policy making and oversight of the executive and the cabinet.
- Measures for strengthening the Parliamentary democracy in the country.
- Challenges of devolution of powers to the provinces.
- Pros and cons of creating more provinces in Pakistan.
- Impact of independence of judiciary on provision of justice in Pakistan.
- Nation building in Pakistan and strengthening of internal security and national integrity.
- Parliament's role in making foreign and defence policies of Pakistan.
- Role of local Governments/bodies.
- Civil-Military Relations.
- Impact of 18th Amendment on good governance.

Conclusion

The reasons why constitution making was delayed in Pakistan have been discussed together with the subsequent developments that affected the country's constitutional history. The 18th Amendment has emerged as a sign of the country's recuperation from a long period of political turmoil. It has given the incumbent leadership a chance to seize the moment and do all that is needed to recover the losses and make amends for past failures. This would need not only cohesiveness, strong and mature leadership but also total commitment to the national cause so that Pakistan could emerge from the dark shadows of constitutional breakdowns and develops as a moderate, enlightened, progressive and prosperous welfare Islamic State in a sustainable way.

CHALLENGES TO INDEPENDENCE AND SOVEREIGNTY OF PARLIAMENT IN PAKISTAN

Ahmed Bilal Mehboob & Hamza Ijaz

Introduction

Dicey defined the term “*parliamentary sovereignty*” in the sense that the parliament “has the right to make or un-make any law whatsoever”. This principle became the cornerstone of the Westminster style parliamentary systems of governance. Over the course of history, the term has also incorporated functions such as oversight of the executive, which is deemed to be collectively responsible to the Parliament.¹ The concept, which first originated in the United Kingdom, had three essential features:

- (a) A statute which has been duly enacted by Parliament and received the Royal assent cannot be declared invalid by the courts on any grounds, for example that its provisions are contrary to constitutional law or to common law or to international law;
- (b) Parliament may enact any law it wishes; consequently no Parliament is bound by the acts of its predecessors, and any prior statute may be amended or repealed by later statute;
- (c) There is no legislative power in the land save by the authority of Parliament.²

The concept is implemented in its earnest by the UK, Finland, New Zealand etc. However, many other parliamentary democracies such as India, Pakistan, Malaysia etc., also vouch for the sovereignty of the parliament but the laws passed by the parliaments in these countries are subject to judicial review. Another check, in certain countries, such as Pakistan, is the introduction of Islamic provisions in the constitution, which limit the jurisdiction of the parliament.

Philosophical Foundations of Parliamentary Sovereignty

It was Lord Dicey who gave the classic exposition of the doctrine of parliamentary sovereignty:

¹ Jeffrey Goldsworthy, *The Sovereignty of the Parliament: History and Philosophy* (New York: Oxford, 1999).

² Richard North, “Sovereignty and the European Communities,” A Case for Treason (February 17, 2002), <http://www.acasefortreason.org.uk/index.php/sovereignty-and-the-european-communities> (accessed, June 20, 2011).

*“The principle of parliamentary sovereignty means neither more nor less than this, namely, that Parliament... has, under the English constitution, the right to make or unmake any law or whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.”*³

Similarly, John Austin elaborated the views of Bodin, Hobbes and Bentham in his theory of sovereignty. Austin asserted that sovereignty is determinate, supreme and absolute. When the question arose of the modern states, he maintained that in the modern state Parliament is the sovereign.⁴

In terms of legal sovereignty (the law-making power of the parliament), the statement made by Lord Campbell of the British House of Lords is of much interest. He said:

“All that a Court of Justice can do is to look to the Parliamentary role: if from that it should appear that a bill has passed both Houses and received the Royal assent, no Court of Justice can inquire into the mode in which it was introduced into Parliament, nor into what was done previous to its introduction, or what passed in Parliament during its progress in its various stages through any Court in Scotland, but that due effect will be given to every Act of Parliament, private as well as public, upon what appears to be the proper construction of its existing provisions.”

In all democratic states today, the legislature has control over the national finances. It has the power to grant money to the government, which cannot collect or levy taxes without legislature’s prior approval. Furthermore, in the parliamentary form of government, executive is a part of legislature. The cabinet is responsible to the legislature and its members are chosen from within the legislature. The reasoning behind these powers is simple: Legislature, as representative of the people, is the custodian of the interests of the people and is, therefore, the primary watchdog over the functions of the government.⁵

Theory of Separation of Powers

The primary challenge to the concept of parliamentary sovereignty comes from Montesquieu, the celebrated French thinker of the 18th century, who presented his theory of separation of powers in his famous book *The Spirit of Laws*. Montesquieu explained his theory in these words:

³ Carl Gardner, “Parliamentary Sovereignty,” *Insite Law* magazine, (accessed June 20, 2011). <http://www.insitelawmagazine.com/constitutional2.htm>

⁴ Mazher ul Haq, *Theory and Practice in Political Science*, (Lahore: Bookland, 1996).

⁵ Mazher ul Haq, *Theory and Practice in Political Science*, (Lahore: Bookland, 1996).

“In every government, there are three sorts of power: legislative, executive and judicial. The liberty of the individual requires that neither all these powers nor any two of them should be placed in the hand of one man or one body of men.”⁶

Later on, several English and American writers also imitated him in their own ways. For example, the English jurist Blackstone, said

“Whenever the right of making and enforcing the law is vested in the same man or one and the same body of men, there can be no public liberty.”

The American writer Hamilton says,

“Accumulation of powers, legislative, executive and judicial, in the same hands, whether of one, a few or many, may justly be pronounced the very definition of tyranny.”

Perhaps the most successful model that is presented in defence of this theory is the system of governance in the United States of America where separation of powers is applied in its essence. (Haque, 2003)⁷

Parliamentary Oversight

Parliamentary oversight can be defined as

*“Parliamentary oversight is the review, monitoring and supervision of government and public agencies, including the implementation of policy and legislation”.*⁸ (Yamamoto, 2007)

From this definition, the key functions of parliamentary oversight can be described as follows:

- To detect and prevent abuse, arbitrary behaviour, or illegal and unconstitutional conduct on the part of the government and public agencies. At the core of this function is the protection of the rights and liberties of citizens;
- To hold the government to account in respect of how the taxpayers’ money is used. It detects waste within the machinery of government and public agencies. Thus it can improve the efficiency, economy and effectiveness of government operations ;
- To ensure that policies announced by the government and authorized by parliament are actually delivered. This function

⁶ Ibid.

⁷ Ibid.

⁸ Hironori Yamamoto, *Tools for Parliamentary Oversight* (Switzerland: Inter-Parliamentary Union, 2007).

includes monitoring the achievement of goals set by legislation and the government's own programmes; and

- To improve the transparency of government operations and enhance public trust in the government, which is itself a condition of effective policy delivery.⁹ (Yamamoto, 2007)

Tools for Parliamentary Oversight

The parliament can carry out its functions of oversight by employing various tools that are at its disposal. Some of them are discussed briefly as follows:

- The most common and effective mechanism for oversight is the system of committees that exists in the parliament. It can be employed for the oversight of accountability, budgetary mechanism, implementation of laws, drafting of new legislation, formulation of policies and addressing issues of national significance.
- Special inquiry committees can be created by the parliament to investigate into special matters.
- Information from the government will form the basis on which all parliamentary oversight can be carried out. In many countries, the government presents its policy to parliament for the current year or for the whole term of the government. Such presentations are often followed by exchanges in the parliamentary chamber. Questions and debates on these occasions seek clarification of the government's political course, and comparison of the policies announced with the reports on their implementation is the key to parliament's assessment of the performance of the executive branch.
- The parliament can hold the government to account by regular questions. A parliamentary question is, by definition, a request for information. A government is obliged to provide an answer to the question asked.
- Another method of parliamentary oversight is through debates that are held in the parliament. The parliamentary debates provide parliamentary political groups with an opportunity to express their views, while also allowing individual parliamentarians to bring particular issues to attention.
- An extreme measure of oversight may be through the vote of no-confidence. When the government or some of its members seem, in the eyes of parliament, to be failing to carry out their duties, parliament can initiate procedures which have the potential to replace all or part of the government.

⁹ Ibid.

Parliamentary Oversight in Pakistan

Pakistan follows a parliamentary form of government. However, the process of the development of a parliamentary system of governance has been repeatedly hindered by the intervention of military in the political process.¹⁰ The country has had four military rulers who ruled the country for much of its history since independence in 1947.

The Constitution of Pakistan, as amended through the 18th and 19th Amendments, has provided provisions for the parliamentary supremacy. In the case of Pakistan, however, the sovereignty of the parliament is limited by certain provisions. They are detailed as follows:

- Sovereignty of the Parliament is a delegated responsibility as the absolute sovereignty rests with Allah Almighty. (Preamble of the constitution)
- No laws can be enacted which are repugnant to Qur'an and Sunnah (Article 227)
- Judicial Review allows the courts to decide the validity of a law, and its consonance with the Islamic principles (by the Shariat Courts). [203-D(2)]

Provisions for Parliamentary Oversight in the Constitution of the Islamic Republic of Pakistan

The constitution provides for various provisions that establish the supremacy of the parliament and provides guidelines for parliamentary oversight.

Article 5(2) of the constitution states that:

“Obedience to the Constitution and law is the inviolable obligation of every citizen wherever he may be and of every other person for the time being within Pakistan.”

A natural corollary of this is that all laws enacted by the parliament demand obedience from the citizens of this country and violation of any of such laws would be considered a violation of the Constitution of Pakistan.

Similarly, only the parliament has the right to amend the constitution. Article 238 of the constitution states that:

“...the Constitution may be amended by Act of Majlis-e-Shoora (Parliament).”

Furthermore, Article 239(5) states that

¹⁰ Dr Hasan Askari Rizvi, Military, *State and Society in Pakistan* (Lahore: Sang-e-Meel Publications, 2003).

“No amendment of the Constitution shall be called in question in any Court on any ground whatsoever.”

The constitution also provides for means of effective oversight of all matters of the state through the parliament. Article 66 (3) of the constitution states that

“Provision may be made by law for the punishment, by a House, of persons who refuse to give evidence or produce documents before a committee of the House when duly required by the Chairman of the committee so to do.”

Similarly, the Rules of Procedure and the Conduct of Business of the National Assembly, in the rule 201 (4) state that:

A Committee may examine the expenditures, administration, delegated legislation, public petitions and policies of the ministries concerned and its associated public bodies and may forward its reports of findings and recommendations to the Ministry”

Furthermore, the financial powers of the government are also vested in the hands of the parliament. The parliament is the sole authority that can levy taxes. Article 77 of the constitution of Pakistan states that:

“No tax shall be levied for the purposes of the Federation except by or under the authority of Act of Majlis-e-Shoora (Parliament).”

The Article 82 (2), which relates to the expenditures other than the charged expenditure, states that:

“So much of the Annual Budget Statement as relates to other expenditure shall be submitted to the National Assembly in the form of demands for grants, and the Assembly shall have power to assent to, or to refuse to assent, to any demand, or to assent to any demand subject to a reduction of the amount specified therein.”

Powers of the Parliament after the 18th Amendment

The 18th Amendment has, in many ways strengthened the parliament and enhanced its powers. Some major changes are briefly highlighted as follows:

- The discretionary power of the President to dissolve the National Assembly or to refer a question to a referendum has been removed. (Article 58)
- The role of Senate has been substantially enhanced. The president cannot promulgate an ordinance now, while the Senate is in session. (Article 89)
- The Prime Minister and the cabinet will be henceforth collectively responsible to both the Senate and the National Assembly. [Article 91(6)]

- The appointment of the Judges shall be made through the joint approval of the Judicial commission and the parliamentary committee. (Article 175-A)

There are however, a few issues that might have a negative bearing on the democratic system. These include:

- Amendment to the Article 17 of the constitution, which has done away with the provision of intra-party elections, although there exist laws requiring intra-party elections.
- Amendment to article 63-A, which significantly strengthens the powers of the party-heads who can trigger disqualification for defection from political party.¹¹

Committee System in Pakistan

Parliamentary committees have, over the years, become an integral and indispensable part of legislative systems, the world over. The ever-increasing complexity of a legislature's role has resulted in a corresponding increase in reliance on committees. The committees are now recognized to be the "political nerve ends, the gatherers of information, the sifters of alternatives, and the refiners of legislative detail." In some legislative systems, including the US Congress, much of the business is handled by the committees which prompted the observation that: it is not far from the truth to say that Congress in session is Congress on public exhibition while Congress in its committee rooms is Congress at work.

Reliance on the committees is primarily due to the increase in demand on the time of elected representatives, which limits the amount of time left for legislative work and due to practical complications of in-depth discussion in a large House comprising hundreds of members. Legislative Bills and other important issues which warrant in-depth discussion are therefore, referred to the Committees. If it was not for the Committees of parliament, the legislative business transacted by Parliaments would be enacted in summary proceedings thereby defeating the objectives of thorough scrutiny.

The legislative committees are conceived as eyes and ears of a Legislature, and its essential weapon and armory. A dynamic committee system alone can achieve tangible accountability of the Executive to the Legislature and of the Legislature to the people. In a parliamentary democracy, based on Executive accountability, the Legislature is the principal representative institution of the people, their spokesman, and a link between the people and the government. It exists "not only to mirror and articulate the opinions, the

¹¹ "Impact of the 18th Amendment on the Federation-Provinces Relations," Briefing Paper, PILDAT (Islamabad), July 2012.

aspirations and the grievances of the people, it has also to help secure the fulfillments of their wants and expectations, the redressal of their grievances and the solution of the difficulties they face". The committee system has the following specific advantages:

1. Committees facilitate a dispassionate and objective analysis of the issues as they can meet more frequently and for longer periods, the working environment is rather quiet and congenial, they may have on-the-spot inquiry or examination for pertinent evaluation and review, and have the opportunity to benefit from expert advice/opinion.
2. Parliamentary committees form a loop amongst the Legislature, the Executive and the people. Through public participation at various levels, and a meaningful dialogue between the government and the members, the committees stand a chance to have a more clearheaded and rational conclusion/decision. That also saves a lot of precious time of the Legislature and substantially improves and reinforces its performance.
3. Committees can be instrumental in strengthening meaningful control of the Legislature over the finances by an in-depth review of the budgetary proposals/demands, and the scrutiny of the utilization of the budget and financial management *vis-a-vis* the objectives achieved.
4. Committees render invaluable help to the Legislature as well as the Executive towards accomplishing good governance: by constant evaluation of the policies, programmes and working of departments; by exposing inefficiency, irregularities, extravagance and excesses committed by the administration; and by attending to the grievances of the public, advising and guiding the Executive and suggesting remedial steps.
5. Committees, by periodic analysis of the implementation of its own decisions and the decisions of the Legislature, can secure timely implementation of the same.
6. The deliberations and reflections of the Committees: may impart a certain degree of knowledge, insight and expertise to the members, government officials and general public; and may facilitate and guide the Executive in having a better organization and planning.
7. A strong committee system propels the government of the day not to take the Legislature for granted.¹²

¹² "Parliamentary Committee System in Pakistan: Comparison with American, Australian, British and Indian Systems," Berifing Paper , PILDAT (Islamabad), May 2004.

Challenges to Parliamentary Oversight

The major limitations and impediments for the parliamentary oversight in Pakistan are discussed below:

Limitations and Shortcomings of the Committee System in Pakistan

Some major challenges, which also highlight the limitations and inadequacies of the committee system, are listed as follows:

1. **Lack of staff and Research support:** An enormous weakness of the committee system in Pakistan is that committees lack research staff, subject specialists and legal assistance to effectively carry out their duties. They are provided with bare-minimum staff. Similarly, the shortage of proper research staff is a major impediment towards effective functioning of the committees. The committees also do not have the budgetary authority to employ subject specialists on contract in order to carry out independent research on the issues under consideration.
2. **Lack of Physical Infrastructure:** Committees do not have their own offices and meeting rooms. There are only five meeting rooms for more than 70 committees of the Senate and National Assembly. This is a serious constraint on the committees working as a meeting room is not available when a committee wants to meet. Sometimes the bureaucracy uses this constraint to the advantage of the executive when a committee meeting is anticipated to be embarrassing to the executive.
3. **Selection of Committee members and Chairs not based on their interest and experience:** The lack of interest and seriousness of some of the parliamentarians in the committee process is also a major concern. One major reason for such an attitude could be the fact that the chairmanship as well as membership to the committees is made for political appeasement rather than on merit and interest of the parliamentarians. However, certain committees have shown positive performance. Among these the Public Accounts Committee (PAC) is at the forefront which has been effectively taking up issues of accountability within the public sector.
4. **Delay in activation of the Committees:** Another issue is the delay in the activation of committees which is mainly due to delay in electing the committee chair. Unless the chair is elected a committee is not operationalised. Two examples may be cited: The National Assembly's Standing Committee on Defence chairperson was elected after almost 10 months of the formation of the committees. The

chairman of the National Assembly Committee on Foreign Affairs was elected after 04 months of the formation of the committee.

5. **No role of committees in the budget process:** The committees have no role in the federal budget process. For the incorporation of the public demands in the budget, there is an increasing trend to empower committees to give broad input to the budget strategy and policy in the pre-budget phase and carry out a detailed scrutiny of the budget following its presentation in the parliament. For example such powers are available to the Parliamentary Committees in UK, Canada and India. Even the committees in the state legislatures of Orissa and Madhya Pradesh in India have these powers. In Pakistan, both at the federal and provincial level, parliamentary committees play no role in the budget process.
6. **Lack of Transparency in Committees Performance:** The committees do not compile their annual reports and therefore no information is available to the public about the attendance, number of meetings, agenda discussed, decisions made and overall performance.

Strength of the Parliament lies in the Strength of the Parliamentarians

It is only logical that the Parliament derives its strength from its members. It is, therefore, imperative to look into the role and powers of the individuals in the Parliament and factors that affect them. One of the most important factors is the role played by the political parties and the party leadership. It has been observed time and again that these parties lack democracy within them, and no effective means of accountability within these parties exist. The decisions are taken by the Party heads or a few individuals close to the head on behalf of the parties. Inclusive deliberations seldom take place before taking a party decision. Party leadership imposes its decisions on party members in the parliament because any deviation from party line may cause the member's fall from favour or in certain cases, disqualification from membership. The absence of this inclusive process within parties leads to disinterest among the party legislators. This also takes away the incentive from the parliamentarians to actively participate in the political process. One such instance is the debate on the 18th Amendment. Once the amendment was approved by the committee and party leadership, effectively no debate took place within the House.

Constituency and Ethnicity Based Politics

The issue of politics of ethnicity and constituency-based approach has remained at the fore-front of the Pakistani politics. It is important to

understand that majority of the parliamentarians focus on the issues of their constituency and lack a national perspective. The major reason for this could be traced to the lack of development of the political process with the result that the voters vote for those members who promise the initiation of development projects in the constituency, and those who can solve their personal issues such as provision of jobs etc.¹³

This has had a detrimental effect on the parliamentary oversight of matters of national significance. It has paved the way for the evolution of a constituency centric leadership which has little or no incentive to act as a watchdog over matters of national interest. The parliamentarians realize that the national approach would not earn them a re-election to the parliament. Consequently, it has been regularly observed that they focus on local issues even when the parliament is deliberating on national issues such as the federal budget. Needless to state that parliamentarians work extremely hard but most of their energies are spent in catering to the personal problems of their constituents or attending to local constituency issues.

Public Trust in the Political Process

In any democracy, the source of power is the population of that country. Parliament is voted in by the people and is expected to work according to the wishes of the electorate. The parliament, in return, can take strong actions and a hard stance over matters of national interest, knowing that it enjoys the confidence of the people. Public trust, thus, forms the backbone of the parliamentary decision-making.

The PPP-led coalition government is in its fourth year of rule, but a strong perception of corruption, violence and sectarian strife continue to deepen the crisis of governance. Despite significant political achievements – including the passage of the 18th Amendment, the seventh National Finance Commission Award (which governs the distribution of resources between the four provinces) and a Balochistan package (economic and other measures to address provincial sentiment after former President Pervez Musharraf's use of force there) – the political government's public stock has been low on account of its weak governance and inability to solve the deepening energy crisis, rising inflation and joblessness. All this has eroded public confidence in party, government and democracy.¹⁴

¹³ Hamza Alavi, "Politics of Ethnicity in India and Pakistan," in *Perspectives on Modern South Asia: A Reader in Culture, History, and Representation*, ed. Kamala Visweswaran (Oxford: Wiley-Blackwell, 2011).

¹⁴ "IRI Index Pakistan Public opinion survey," International Republican Institute, October 1, 2009, <http://www.iri.org/news-events-press-center/news/iri-releases-survey-pakistan-public-opinion>

Civil Military Relations

According to Dr Hassan Askari Rizvi, the reality of Pakistani politics is such that political stability depends on a trouble-free interaction with the military. Any attempt on the part of civilian leaders to monopolize power by upsetting the “delicate balance of power” is bound to create problems.¹⁵ At the same time, however, the defence sector is an important sector of the government. As said earlier, it has traditionally remained beyond the oversight of the parliament and above accountability to the civilian sector. The oversight of this sector in particular, and the overall dynamics of the relations between these two institutions of the state in general, pose a challenge for the political system and the supremacy of the parliament. Imbalance in civil-military relations is not only a function of the reluctance on the part of the military, it is also a result of the civilian leadership’s failure to establish and strengthen the institutions to take national security decisions with due input by the security sector but with clear supremacy of the elected representatives.

Conclusion and Recommendations

It may be safe to state that all the ingredients for a strong parliamentary oversight are provided for in our political and constitutional set-up. However, the lack of political will and keen interest of the political leadership in maintaining the status quo are factors which prevent the conversion of the theory into practice.

The Committee system needs to be strengthened as it is the fundamental and most effective medium of maintaining oversight over the executive as well as other governmental affairs. It needs to be provided with greater say in the legislative process. Most importantly, the committees need to be empowered with respect to the budgetary process and their input should be sought before the formulation of the budget document as well as after its presentation.

Another important aspect is the empowerment of the individual parliamentarians. They should be provided adequate office space and staff to help them discharge their duties as legislators in a befitting manner. The intra-party process also needs to be made more democratic so as to provide incentive to the party-members to climb their way up the ladder. The politics of inheritance need to be done away with, and genuine merit-based leadership should be promoted.

The political leadership should also put their trust in the people of this country. The true source of power and legitimacy is public trust and not the support of foreign powers and civil-military establishment. Moreover, the

¹⁵ Dr Hasan Askari Rizvi, *Military, State and Society in Pakistan* (Lahore: Sang-e-Meel Publications, 2003).

government needs to put its house in order and the parliament needs to take lead from its Public Accounts Committee (PAC) and put a more stringent check on the performance of the executive.

Finally, the political process should be allowed to evolve. However, at the same time the parliamentarians and the public need to be educated about the roles and various levels of government. The issues and problems of local constituencies should be left for the local governments. The parliament should rather focus on the national and international issues. This would lead to a more focused and more efficient parliament which can better address the issues of monitoring and oversight.

By strengthening the process of parliamentary oversight, the supremacy of parliament can be re-affirmed and the system of accountability made more efficient. The strengthening of the parliamentary oversight would in essence strengthen the democracy within Pakistan and result in an evolution of a more vibrant and representative political system. ■

References

1. Alavi, H. (2011). Politics of Ethnicity in India and Pakistan. In K. Visweswaran, *Perspect* (pp. ives on Modern South Asia: A Reader in Culture, History and Representation). Wiley-Blackwell.
2. Askari, D. H. (2003). *Military, State and Society in Pakistan*. Lahore: Sang-e-Meel Publications.
3. Carl Gardner, B. (n.d.). *Parliamentary Sovereignty*. Retrieved June 20, 2011, from Insite Law magazine:
4. <http://www.insitelawmagazine.com/constitutional2.htm>
5. Foreign and Commonwealth Office. (n.d.). *Sovereignty and the European Communities*. Retrieved June 20, 2011, from Sovereignty Website: <http://www.sovereignty.org.uk/features/eucon/fcosov.html>
6. Goldsworthy, J. (1999). *The Sovereignty of the Parliament: History and Philosophy*. New York: Oxford.
7. Haque, M. u. (2003). *Political Science; Theory and Practice*. Lahore: Bookland.
8. IRI (2009), *IRI Index: Pakistan Public opinion survey 2009*, International Republican Institute. (Askari, 2003)
9. PILDAT. (2010). *Impact of the 18th Amendment on the Federation-Provinces Relations*. Islamabad: PILDAT.
10. PILDAT. (2004). *Parliamentary Committee System in Pakistan: Comparison with American, Australian, British and Indian Systems*. Islamabad: PILDAT.
11. PILDAT. (2011). *Performance of the Parliamentary Committees on Defence and National Security*. Islamabad: PILDAT.
12. PILDAT. (2004). *PILDAT Briefing Paper on the Standing Committees in the Provincial Assemblies of Pakistan*. Islamabad: PILDAT.
13. Shafqat, S. (2011, May). Pakistan's Military. *The Islamic Monthly* , pp. 50-53.
14. Usman, H. (2011). *WikiLeaks: The Truth and Learning from our Mistakes*. Islamabad: Newslite.
15. Yamamoto, H. (2007). *Tools for Parliamentary Oversight*. Switzerland: Inter-Parliamentary Union.

BALANCE OF POWER AT THE CENTRE: THE PRESIDENT, PRIME MINISTER & PARLIAMENT

Amjad Abbas Magsi

The adoption of the 18th Amendment in the Constitution of 1973 on April 19, 2010 is a historic event in the political and constitutional history of Pakistan. The parliament has made a great leap forward towards ushering Pakistan, into a true parliamentary form of government. The Constitution of 1956 provided for power sharing between the president and the Prime Minister. The 1962 Constitution was a purely presidential type: the Constitution of 1973 was the first constitution in which the Prime Minister was the real Chief Executive and the president was merely a figure head¹. The position of the president in the original constitution of 1973 was similar to the British monarch where by conventions the monarch does not act without the consultation of the Prime Minister². Martial Law was imposed in July 1977 and the critics held the parliamentary system responsible for the crisis of Pakistan. They favoured the strong presidency in Pakistan and General. Zia also called for the balance of powers between the president and the Prime Minister. To achieve his plans, he introduced the Revival of the Constitution 1973 Order (RCO) and the 8th Amendment. The extraordinary powers of the Prime Minister were curtailed to the limit that the president assumed most of his powers during Zia era. On the pretext of balancing the powers, the tilt of power went to the side of the president.³ The president was empowered to dissolve the assemblies in his own discretion inserting the Article 58 2(b) under the Eighth Amendment in the Constitution of 1973. The president was also authorized to appoint the chiefs of the armed forces in his discretion.

The sanctity of the parliamentary system is directly linked with the evolution of democratic conventions and not merely the wordings of the constitution.⁴ There is no second opinion among the political parties and legal circles that the Eighth Amendment, had inflicted enormous harm to the working of parliamentary system. In the span of eight years from (29 May 1988 to 5 November 1996) the President used his discretionary powers four times. In 1997 the Nawaz Sharif Government tried to establish the parliamentary sovereignty by adopting the 13th amendment and reversed the

¹ Kamal Azfar, *Pakistan; Political and Constitutional Dilemmas*, (Karachi: Pakistan Law House, 1987), 87.

² Muhammad Munir, *Constitution of the Islamic Republic of Pakistan*, Student's Edition (Lahore: Law Publishing Company, 1978) 104.

³ Hamid Khan, *Constitutional and Political History of Pakistan*, (Karachi: Oxford University Press, 2001), 863

⁴ *Ibid.*, 174.

Article 58(2b). Thus the balance of power went in favour of the Prime Minister. Once again, the president became the titular head with only ceremonial powers as envisaged by the original Constitution of 1973. The Thirteenth Amendment was passed unanimously because both the major parties had suffered at the hands of the President.⁵ The military take-over by General Pervez Musharraf in 1999 and passing of 17th Amendment in 2003 shifted the balance again in favour of the president.

After the elections of 2008, it was the consensus of the political parties to do away with the presidential powers hindering the working of parliamentary sovereignty. A committee of the parliament was established having representation of all the parties present in the parliament to bring about the 18th Amendment. The committee did a Herculean task of bringing back the parliamentary supremacy in the state affairs. The powers originally provided to the Prime Minister were not only restored but also the premier was given with more powers to strengthen his position at the center. The amendment also resulted in a more powerful parliament which also indirectly went to augment the powers of the Prime Minister, as Leader of the House in the Parliament. The novelty of the 18th Amendment is that the leader of the opposition in the National Assembly has been assigned a direct and indirect role in different matters including the appointment of judges and other key positions. The role of the opposition leader has also been recognized in the formation of caretaker governments at the federal as well as at the provincial levels. The role of the Senate has also been enhanced which is going to augur well for provincial harmony.

Parliamentary sovereignty seemed to be a forlorn hope in the political environment of Pakistan. The 18th Amendment has brought the balance of power by enhancing the powers of the Prime Minister and the parliament. Curtailment of some of the vital presidential powers like dissolution of assemblies and appointment of Service Chiefs and other important posts like judges of the superior judiciary and the Election Commission, chairman of the Federal Public Service Commission have been shared by the Prime Minister. Omitting the powers of the President of Pakistan to dissolve the parliament unilaterally is going to turn Pakistan from a semi-presidential state to a republic. In the following lines an attempt would be made to focus on those relevant clauses of the 18th Amendment which has reversed the balance of power at the center in support of the Prime Minister.

⁵ Ibid., 819.

Article-46: President to be Kept Informed

It is no more the “duty” of the Prime Minister to inform the president on all matters of internal and foreign policy and all legislative proposals the federal government intended to bring in front of the parliament. In the original constitution the Prime Minister was required to keep the president informed about important matters.⁶

Article-48: President to Act on Advice and Holding of Referendum

In the original constitution the president was bound to act on the advice of the Prime Minister.⁷ The orders of the president were required to have the counter signature of the Prime Minister.⁸ In the amended constitution before the 18th Amendment the advice of the Prime Minister was necessary but not a binding and the president could also dissolve the National Assembly at his discretion. According to the 18th Amendment the president will only act on advice of the Prime Minister which will be a binding. Now president cannot dissolve the National Assembly at his discretion. If the president dissolves the National Assembly, he will appoint the date for the elections not exceeding 90 days and the president would appoint a caretaker cabinet. If the Prime Minister considers holding a referendum he would refer the matter to a joint sitting of parliament; if it is approved in a joint sitting, the Prime Minister would refer to a referendum⁹ through an act of the parliament.

Article-58: Dissolution of National Assembly

The original constitution provided that the president shall dissolve the National Assembly only on the advice of the Prime Minister.¹⁰ The 18th Amendment revoked the insertion by the 8th Amendment and then the 17th Amendment in which the president could have dissolved the assemblies on his own.¹¹ The powers of the president have been enhanced by retaining that president may also dissolve the National Assembly in his discretion where a

⁶ *The Constitution of The Islamic Republic of Pakistan Article 46, and Eighteenth Amendment to the 1973 Constitution, IPRI Fact File*, vol. XIII, no. 5, May 2011 (Islamabad: Islamabad Policy Research Institute), 55.

⁷ *The Constitution of The Islamic Republic of Pakistan*, Article 48.

⁸ *IPRI Fact File*, 55, and Manzoor Ahmad, *The Constitution of Islamic Republic of Pakistan (Bare Act) 2012*, (Lahore: Kausar Law Publisher, 2012), 25.

⁹ *Ibid.*, 55, and *Ibid.*, 24.

¹⁰ *The Constitution of The Islamic Republic of Pakistan*, Article 58.

¹¹ *IPRI Fact File*, 57, and Manzoor Ahmad, *The Constitution of Islamic Republic of Pakistan*, 30.

‘no confidence’ motion has been passed against the Prime Minister and no other member of the National Assembly commands the confidence of the majority.¹²

Article-63 (A): Disqualification on Grounds of Defection etc.

In the light of the 18th Amendment, the parliamentary leader of a party may write to the Chairman of the Senate or the Speaker of the Assembly and the Chief Election Commissioner about a member of the party who has not abided by the decision of the party during the voting on important matters like the election of the Prime Minister, and the Chief Minister, vote of confidence or no-confidence, a money bill or a constitutional amendment bill and in case the said member resigns from his/her political party or joins another parliamentary party.¹³

Article-89: Power of President to Promulgate Ordinances

The president may promulgate ordinances when the Senate or the National Assembly are not in session.¹⁴ Originally it only related to sessions of the National Assembly.

Article-90: The Federal Government

The executive authority would be practised in the name of the president by the federal government consisting of the Prime Minister and the federal ministers. The Prime Minister would be the chief executive.¹⁵ The RCO 1985 had made the president the real executive.

Article-91: The Cabinet

The Prime Minister would be elected by the majority of the members and the election would be conducted following the elections of the Speaker and the Deputy Speaker, thus ending any chance of maneuvering and horse trading by the president. Unlike RCO 1985, the discretion of the president about the choice of the Prime Minister was scrapped. The 18th Amendment declared the Prime Minister as the head of the cabinet to aid and advise the president¹⁶

¹² Ibid.

¹³ *IPRI Fact File*, 63, Manzoor Ahmad, *The Constitution of Islamic Republic of Pakistan*, 37-38.

¹⁴ Ibid., 66, and Ibid., 50.

¹⁵ *The Constitution of The Islamic Republic of Pakistan*, Article 90, *IPRI Fact File*, 61, Manzoor Ahmad, *The Constitution of Islamic Republic of Pakistan*, 51-52.

¹⁶ *The Constitution of The Islamic Republic of Pakistan*, Article 91, Ibid., 67 and Ibid., 52.

Article -99: Conduct of the business of Federal Government

The amendment has made the Prime Minister the head of the federal government instead of the President who would make rules for the allocation and transaction of its business.¹⁷

Article-101: Appointment of Governors

The 18th Amendment has also made it mandatory for the president to have the advice of the Prime Minister in the appointment of governors who should be a registered voter and resident of the province concerned.¹⁸ Even the original constitution did not require the president to have the advice of the Prime Minister in this matter.¹⁹

Article-153: Council of Common Interests

In the original constitution the Council of Common Interests consisted of the chief ministers of the provinces and equal number of members from the federal government to be nominated by the Prime Minister from time to time. The Prime Minister's presence in the Council was not essential but if he was there he was to chair it. In his absence the president could name a federal minister to preside over the Council.²⁰ But the 18th Amendment declared the Prime Minister to be the chairman of the Council of common interest and the three members from the federal government were to be nominated by the prime Minister.²¹ The amendment also made it mandatory for the Council to submit an annual report to both the houses of the parliament.²²

Article-156: National Economic Council

In the original constitution the president was required to constitute the National Economic Council which would consist of the Prime Minister as the chairman and other members as the president may determine and may nominate one member from each province on the recommendations of the government of the province.²³ The 18th Amendment reconstituted the Council and included the chief ministers as its members along with their nominees.

¹⁷ IPRI Fact File, 68, and Manzoor Ahmad, *The Constitution of Islamic Republic of Pakistan*, 55.

¹⁸ Ibid., 69 and Ibid., 57.

¹⁹ *The Constitution of The Islamic Republic of Pakistan*, Article 99.

²⁰ *The Constitution of The Islamic Republic of Pakistan* Article 153.

²¹ IPRI Fact File, p. 76 and Manzoor Ahmad, *The Constitution of Islamic Republic of Pakistan*, 78.

²² Ibid.

²³ *The Constitution of The Islamic Republic of Pakistan*, Article 156.

Four other members were also required to be nominated by the Prime Minister.²⁴ Now it is necessary for the Council to meet at least twice in a year and the quorum would be one half of its total membership. The Council is also required to be responsible to the parliament and to submit an annual report to each house of the parliament.²⁵

Article-171: Reports of Auditor General

The reports of the auditor general relating to the accounts of the federation would be submitted to the president who will cause them to be laid before both houses of the parliament.²⁶ Originally the report was to be submitted only to the National Assembly but the new amendment has also included the Senate for the submission of the report. It has increased the powers of the parliament.

Article-175: Appointment of Judges to the Supreme Court, High Courts and the Federal Shariat Court

The original constitution of 1973 has authorized the president to appoint the chief justice and the judges of the Supreme Court and the High Court with the consultation of the chief justice of the Supreme Court while the 18th Amendment provided for setting up of a judicial commission of Pakistan for the appointment of judges of the Supreme Court, High Court and Federal Shariat Court. The 18th Amendment under article 175 (A) mentioned the composition of the commission for the judges of the Supreme Court. The Chief Justice of Pakistan is to be the chairman with two most senior judges as members (the 19th Amendment raises the number of most senior judges of Supreme Court to four). A former chief justice or a former judge of the Supreme Court is to be nominated by the Chief Justice of Pakistan in consultation with the four member judges. The federal minister of Law and Justice and the Attorney General will be the other members along with a senior advocate of the supreme court of Pakistan to be nominated by the Pakistan Bar Council for a term of two years. The 18th Amendment also made it necessary for the president to appoint the most senior judge of the Supreme Court as the chief justice of Pakistan. The introduction of the Judicial Commission has balanced the powers between the president, the parliament

²⁴ IPRI Fact File, 77 and Manzoor Ahmad, *The Constitution of Islamic Republic of Pakistan*, 81.

²⁵ Ibid.

²⁶ IPRI Fact File, 79 and Manzoor Ahmad, *The Constitution of Islamic Republic of Pakistan*, 90.

and the Prime Minister as through the federal minister the parliament and the Prime Minister get a say in the appointment of Judges.²⁷

Article-213: Chief Election Commissioner

The 18th Amendment omitted the discretionary powers of the president to nominate the Chief Election Commissioner and authorized the Prime Minister to forward a list of three persons for the nomination of one from amongst them as the Chief Election Commissioner in consultation with the Leader of the Opposition in the National Assembly. The amendment provided for the parliamentary committee to be constituted by the speaker which would comprise 50 percent from the treasury and opposition benches each. The strength would be based on the strength of the parties in the parliament and the nominations would be made by the parliamentary leader. In case of disagreement between the Prime Minister and the Leader of the Opposition each was required to send a separate list to the concerned parliamentary committee for decision. In case of dissolution of the assembly, the parliamentary committee shall comprise of members from the senate only.²⁸ (The 19th Amendment elaborated the total strength of the parliamentary committee to 12 members out of which one-third were to be from the Senate). The amended constitution also mentioned that members of the Election Commission would also be appointed as per the method of Chief Election Commissioner.²⁹

Article-224: Selection of Care-Taker Government

The original constitution did not mention the establishment of a caretaker setup. The 18th Amendment elaborated the appointment of a caretaker cabinet by the president and the governor. The caretaker Prime Minister would be selected by the president in consultation with the Prime Minister and the leader of the opposition in the outgoing assembly. Similar procedure was to be adopted in the provinces where the governor was to appoint the caretaker chief minister in consultation with the outgoing chief minister and the leader of the opposition.³⁰ The appointment of caretaker set up is no more a discretion of the president. Moreover, the members of the caretaker cabinet including the caretaker Prime Minister, caretaker chief minister and their immediate family members (spouse and children) would not take part in the elections.

²⁷ Ibid., 79-80 and Ibid., 93-94.

²⁸ Ibid., 84 and Ibid., 123.

²⁹ Ibid., 85 and Ibid., 125.

³⁰ Ibid., 86 and Ibid., 128.

Article-232: Proclamation of Emergency on Account of War, Internal Disturbance, etc.

If the president acts on his own the proclamation would be placed before both houses of parliament for approval of each house within 10 days. For the imposition of emergency due to internal disturbances beyond the power of provincial governments to control, a resolution of the provincial assembly of that province shall be required.³¹

Article-233: Power to Suspend Fundamental Rights etc. During Emergency Period

The proclamation of emergency for suspension of fundamental rights would have to be laid before both houses of the parliament separately to be approved by each house of the Parliament.³² The original constitution did not require sanction by each house separately.

Article-234: Power to Issue Proclamation in Case of Failure of Constitutional Machinery in a Province. (Proclamation in case of financial emergency)

Power to issue proclamation by the president in case of failure of constitutional machinery in a province may be issued by the president if he is satisfied that the situation had arisen in which the government of the province cannot be carried on in accordance with the provision of the constitution or if a resolution in this behalf is passed by each of the house.³³

Article-242: Public Service Commission

The 18th Amendment omitted the discretionary powers of the president to appoint the chairman of the Public Service Commission who was to be appointed by the President with the consultation of the Prime Minister. Moreover, the Chairman of the Public Service Commission would be appointed by the governor on the advice of the Chief Minister.³⁴

Article-243: Command of Armed Forces

The President would appoint the services chiefs on the advice of the Prime Minister and not in his discretion as inserted by the RCO, 1985.³⁵

³¹ Ibid., 87 and Ibid., 133.

³² Ibid., and Ibid., 136.

³³ Ibid., and Ibid.

³⁴ Ibid., 88, and Ibid., 141-142.

³⁵ Ibid.

Conclusion

Parliamentary sovereignty seemed to be a forlorn hope in the political environment of Pakistan. The 18th Amendment has brought about the balance of power at the Centre with greater powers for the Prime Minister and the parliament, by curtailing the powers of the president and enhancing the role of the Prime Minister and the parliament. The restoration of the powers of the Prime Minister regarding the dissolution of assemblies and appointment of services chiefs has greatly augmented the position of the office of the Prime Minister in the affairs of parliamentary form of government, being practised in Pakistan. The amendment has also provided indirect new roles for the Prime Minister in the appointment of judges to the superior courts. He, as the Leader of the House, has to nominate members of the Committee from the Treasury benches as well as the Law minister to sit in the committee as a member of his team. The role of the premier as Leader of the House in the appointment of the Chief Election Commissioner and members of the election commission has gone a long way to elevate the position of the Prime Minister. Similarly he has been assigned a role in the formation of caretaker set up, which is a contribution of the 18th Amendment in increasing his authority. He has been given the role to head the Council of Common Interests (CCI) and the National Economic Council (NEC). All these steps are meant to make him the real chief executive of the country.

The role of Parliament has also been increased under the 18th Amendment. The role of the parliamentary committee in the appointment of judges too is a great step towards strengthening the role of Parliament. The parliamentary committee has been provided a role in the appointment of the Chief Election Commissioner and members of the Election Commission. Moreover, the reports of the Council of Common Interest, National Economic Council, and National Finance commission are required to be submitted before the Parliament. The 18th Amendment has also enhanced the role of the Senate which has been given a share at par with the National Assembly in the parliamentary committees for the appointment of judges and the Chief Election Commissioner. The proclamation of emergency by the President has to be passed by each house of the Parliament. The amendment has comprehensively dealt with the issue of balance of power at the Centre. It has set in motion the direction for Pakistan on the track of a real democratic federal parliamentary country which is necessary for national unity and sustainability of democratic norms. The amendment has restored the balance of power at the center in favour of the Prime Minister as the real Chief Executive along with more powers for the Parliament.

The framers of the amendment have visualized a stable and balanced parliamentary democracy for the future of Pakistan in view of the country's heterogeneity of population, its division into linguistic, ethnic groups. The

balance of power at the Centre may guarantee a stable democracy in Pakistan. The smooth functioning of parliamentary system depends not only on wordings of the constitution but on the growth of democratic conventions and the parliamentary spirit.■

CHAPTER II

18TH CONSTITUTIONAL AMENDMENT & NEED FOR PASSAGE
OF THE 19TH CONSTITUTIONAL AMENDMENT

Babar Sattar

Introduction

The 18th constitutional Amendment introduced more than a hundred changes, both big and small to Pakistan's constitution. It was not simply a move to restore the Constitution of 1973 to its original form or transfer powers usurped by dictators back to the Prime Minister. In fact, it introduced normative, substantive and procedural changes to our fundamental law that can heal and strengthen the constitution and provide a more sustainable framework to strengthen the relationship between the three institutional pillars of the state, the federating units and the centre, as well as the citizens and the state.

As a normative measure this amendment strove to heal the injured morality of our constitution by removal of contradictions introduced into the text by various military dictators. In this regard the amendment of Articles 6 and 270 are noteworthy. Article 6 now explicitly prohibits judges from validating or justifying unconstitutional interventions into the working of an elected civilian government¹. Article 270 now clarifies that unconstitutional actions of dictators purportedly endorsed and underwritten by self-serving judges were never valid². Removal of validation clauses that justified 'extra-

¹ **6. High treason.**—(1) Any person who abrogates or subverts or suspends or holds in abeyance, or attempts or conspires to abrogate or subvert or suspend or hold in abeyance, the Constitution by use of force or show of force or by any other unconstitutional means shall be guilty of high treason.

(2) Any person aiding or abetting or collaborating the acts mentioned in clause (1) shall likewise be guilty of high treason.

(2A) An act of high treason mentioned in clause (1) or clause (2) shall not be validated by any court including the Supreme Court and a High Court.

(3) Majlis-e-Shoora (Parliament) shall by law provide for the punishment of persons found guilty of high treason.

² **270. Temporary validation of certain laws, etc.**—(1) Majlis-e-Shoora (Parliament) may by law made in the manner prescribed for legislation for a matter in part I of the Federal Legislative List validate all Proclamations President's Orders, Martial Law Regulations, Martial Law Orders and other laws made between the twenty-fifth day of March, one thousand nine hundred and sixty-nine and the nineteenth day of December, one thousand nine hundred and seventy-one (both days inclusive).

(2) Notwithstanding a judgment of any Court, a law made by Majlis-e-Shoora

constitutional' changes to the constitution cleanses our fundamental law and makes it internally integrated.

The 18th Amendment also introduced certain procedural or clean-up changes. Inclusion of strict time frames for deciding the issue of disqualification of a member of parliament or limiting the size of the cabinet are examples. Amongst the substantive changes, the four most consequential amendments are (i) introduction of the fundamental right to education and freedom of information, (ii) strengthening the independence of judiciary and prescribing an institutional mechanism for appointment of judges, (iii) transferring discretionary powers of the president back to the Prime Minister, and (iv) move towards realizing the promise of effective provincial autonomy.

Judiciary Composition and Appointments

The 18th Amendment attempted to strengthen the independence of the judiciary by introducing a consultative, thorough and transparent mechanism for judicial appointments. The appointments are to be handled by a two-tier system – a Judicial Commission will propose nominees and a special parliamentary committee split evenly between the government and the opposition will confirm them (Article 175A). The Judicial Commission will be chaired by the chief justice and comprise the senior-most judges of the Supreme Court, who will together control the Commission.

While the composition of the judicial commission gives serving judges a dominant say in selecting future judges, the process will ensure that no one individual has arbitrary authority to determine who gets to wear the robes in

(Parliament) under clause (1) shall not be questioned in any Court on any ground, whatsoever.

(3) Notwithstanding the provisions of clause (1) and a judgment of any Court to the contrary, for a period of two years from the commencing day, the validity of all such instruments as are referred to in clause (1) shall not be called in question before any Court on any ground whatsoever.

(4) All orders made, proceedings taken, and acts done by any authority, or any person, which were made, taken or done, or purported to have been made, taken or done, between the twenty-fifth day of March, one thousand nine hundred and sixty-nine and nineteenth day of December, one thousand nine hundred and seventy-one (both days inclusive), in exercise of powers derived from any President's Orders, Martial Law Regulations, Martial Law Orders, enactments, notifications, rules, orders or bye-laws, or in execution of any order made or sentence passed by any authority in the exercise or purported exercise of power as aforesaid shall, notwithstanding any judgment of any Court, be deemed to be and always to have been validly made, taken or done, so however that any such order, proceeding or act may be declared invalid by Majlis-e-Shoora (Parliament) at any time within a period of two years from the commencing day by resolution of both Houses, or in case of disagreement between the two Houses, by such resolution passed at a joint sitting and shall not be called in question before any Court on any ground, whatsoever.

Pakistan. The new Article 175A is a major improvement over the previous mechanism for judicial appointments. To that end, the Parliamentary Committee on Constitutional Reforms has attempted these various rational amendments into the Constitution that regulate the discretionary authority vested in holders of various constitutional positions liable to be abused and capable of fermenting political crises.

Limits on Presidential Powers

Further, the 18th Amendment has limited the presidential powers following years of a strengthened presidency under the previous military regime in a number of different ways. These include (i) removing presidential powers to circumvent the normal legislative process and limiting the amount of time the president may consider bills passed by parliament before approving them (Article 75), (ii) transferring the power to submit matters directly to parliament for a yes or no vote to the Prime Minister (Article 48), (iii) removing the infamous Article 58-2(b), which granted the power to unilaterally dismiss parliament under vague emergency provisions, and (iv) consulting with the outgoing Prime Minister and opposition leader on presidential appointments of caretaker governments to manage the transition to a new government when parliament is dismissed (Article 224).

These changes are incremental steps that will fortify the national consensus against praetorianism. With the continuity of the political process and democracy, performing civilian governments that become conduits for transmitting the fruits of democracy to ordinary citizens, and dexterous baby steps in reclaiming the political and economic turf that the military has annexed to itself, these amendments will prevent military intervention in politics.

Greater Role for Parliament and the Prime Minister

The landmark constitutional Amendment has also strengthened the role for the parliament and the Prime Minister by (i) establishing the Prime Minister and his ministers as the federal government and transferring the position of chief executive of the nation from the president to the Prime Minister (Articles 90 and 99), (ii) reducing the requirement for the Prime Minister to consult with the president to a duty to keep him “informed” of policy matters (Article 46), (iii) requiring that the president consult with the Prime Minister – whose recommendations are binding – on all choices for provincial governors (Article 101) and military service chiefs (Articles 243 and 260), though the president remains the office charged with their appointments, and (iv) removing limits on Prime Ministers serving more than two terms (Article 91).

Federal and Provincial Balance of Powers

To further provincial autonomy, the 18th Amendment has enhanced the administrative and legislative authority of the federating units. By erasing the concurrent legislative list, granting provinces greater control over their natural resources and proceeds, enhancing the role of the Senate and the Council of Common Interests, making it harder for the president to clamp emergency rule over a province and requiring that governors be residents of their respective provinces, the 18th Amendment has rejected the doomsday predictions of ensuing chaos due to a loosening of the centre's control. How effectively provincial assemblies will use the exclusive authority to write laws on subjects listed in the concurrent list (which they previously shared with the centre) is debatable. But this change was essential symbolically as the demand for greater provincial autonomy in Pakistan had become tied to abolition of the concurrent list.

Constitutional Review – 18th Amendment and the Basic Structure Theory

The 18th Amendment was challenged³ before the Supreme Court largely on the basis that (i) the apex court has the authority to consider amendments to the constitution on their merit and strike them down if they are found inconsistent with the constitution's "basic structure", and (ii) the new mechanism for appointment of judges undermines the independence of the judiciary and should thus be declared invalid.

While reasonable minds can disagree over the merit of legal arguments, the grounds taken in the petitions challenging the 18th Amendment derived no support from logic or Pakistan's settled jurisprudence. Over the past three-and-a-half decades, the Supreme Court has generated a plethora of unambiguous case laws refusing to incorporate India's basic structure theory into Pakistan's constitutional law. India's basic structure theory – extremely controversial even within India, which led to a simmering confrontation between parliament and the court for almost two decades⁴ – is a flawed and

³ Around 15 petitions were filed in the apex court against the 18th Amendment. Some of the petitioners included Nadeem Ahmed advocate, the Rawalpindi District Bar Association, the Watan Party, the Supreme Court Bar Association, Muhammad Ejazul Haq and others, making the Federation as respondent. Overall, the petitioners challenged the judicial commission for the appointment of superior courts' judges provided in the 18th Amendment and called for immediate annulment of Article 175-A by terming it a 'law against the freedom of the judiciary'.

⁴ "The majority verdict in *Kesavananda Bharati* recognized the power of Parliament to amend any or all provisions of the Constitution provided such an act did not destroy its basic structure. But there was no unanimity of opinion about what appoints to that basic structure... Seven of the thirteen judges in the *Kesavananda Bharati* case, including Chief Justice Sikeri who signed the

inherently confused judicial concoction.

The argument in simplistic terms is this: the constitution can be amended by parliament through a super-majority in accordance with its provisions, but parliament's amendment powers do not give it the right to alter the basic structure of the constitution as determined by the judiciary. This theory raises two fundamental questions: (i) how is a written constitution to be amended, and can a parliament bind successor parliaments; and (ii), what are the limits of judicial review powers and whether judges make law or interpret it.

In Pakistan's case, Article 239⁵ of the constitution unequivocally states that (i) there is no limitation on the authority of the parliament to amend the constitution, and (ii) the court must not entertain legal challenges against constitutional amendments. Now, adoption of the basic structure theory would have required that the court disregard unambiguous provisions of Article 239 under the garb of constitutional interpretation, inject judicial assumptions into the constitution that are not backed by its explicit words or provisions, and call such reliance on the personal likes and dislikes of individual judges comprising the court in giving meaning to our fundamental law as the will of the constitution.

In doing so, the Court would be affirming at least three unconvincing

summary statement, declared that Parliament's constituent power was subject to inherent limitations. Parliament could not use its amending powers under Article 368 to 'damage', 'emasculate', 'destroy', 'abrogate', 'change' or 'alter' the 'basic structure' or framework of the Constitution"; The Basic Structure of the Indian Constitution; Venkatesh Nayak.

⁵ **239. Constitution amendment Bill.**-(1) A Bill to amend the constitution may originate in either House and, when the Bill has been passed by the votes of not less than two-thirds of the total membership of the House, it shall be transmitted to the other House.

(2) If the Bill is passed without amendment by the votes of not less than two-thirds of the total membership of the House to which it is transmitted under clause (1), it shall, subject to the provisions of clause (4), be presented to the President for assent.

(3) If the Bill is passed with amendment by the votes of not less than two-thirds of the total membership of the House to which it is transmitted under clause (1), it shall be reconsidered by the House in which it had or originated, and if the Bill as amended by the former House is passed by the latter by the votes of not less than two-thirds of its total membership it shall, subject to the provisions of clause (4), be presented to the President for assent.

(4) A Bill to amend the constitution which would have the effect of altering the limits of a Province shall not be presented to the President for assent unless it has been passed by the Provincial Assembly of that Province by the votes of not less than two-thirds of its total membership.

(5) No amendment of the constitution shall be called in question in any Court on any ground whatsoever.

(6) For the removal of doubt, it is hereby declared that there is no limitation whatever on the power of the Majlis-e-Shoora (Parliament) to amend any of the provisions of the Constitution.

propositions. One, the legislative assembly that promulgated the Constitution of 1973 was omnipotent, and some of the provisions that it has inscribed into the constitution are akin to divine pronouncements that can never be altered by parliament. Two, the Constitution of 1973 is an inflexible document that cannot be changed in certain respects, even if that is what the people of Pakistan wish to do through their chosen representatives. And, three, while the judiciary derives its authority to interpret the words of the constitution from the constitution itself, it also has an inherent power to disregard unattractive provisions of the constitution or determine at will that some of its provisions will trump others.

The fact that we needed a constituent assembly to draft the Constitution of 1973 after the break-up of Pakistan was a historical need, and not a legal one. The constituent assembly was no more representative than the parliament presently in place. More importantly, the constituent assembly did not presume that it was omnipotent. It thus incorporated Articles 238⁶ and 239 in the constitution to specifically empower future parliaments to facilitate the evolution of our fundamental law in accordance with changing needs and wishes of the society.

If the basic structure theory is to be accepted, would it not mean that our constitution-makers were so mindless that they neither specified the basic features of the constitution that were to be protected for all times to come nor created a mechanism to convene a constituent assembly in case the basic structure needed to be reconsidered? Does this mean that irrespective of how unsuccessful our experience with parliamentary democracy might turn out, we can never switch to a presidential system? Or that if after ten, twenty or fifty years an overwhelming majority of Pakistanis believes that religion should be separated from law and politics, the only way out would be to bring a revolution, overthrow the constitution, convene a new constituent assembly and alter the court-determined “basic structure”?

Within our constitutional system of separation of powers, the legitimate power of judicial review cannot be confused with the non-existing right to undertake a constitutional review. The court can strike down laws in exercise of judicial review powers not because a law is good or bad, but only if it is in conflict with provisions of the constitution. But when parliament exercises its authority to amend the constitution itself, the court’s role is limited to interpreting the words inscribed therein, and not whether or not they should be in there in the first place.

In refusing to uphold India’s basic structure theory, the Supreme Court had previously laid out a two-fold salient feature doctrine: (i) the court has no authority to strike down a constitutional amendment, and while parliament has

⁶ **238. Amendment of Constitution.**-Subject to this Part, the constitution may be amended by Act of Majlis-e-Shoora (Parliament).

limited authority to amend the salient features of the constitution, it is not for the court but for the people of Pakistan to enforce this limitation; and (ii) the court would apply the rule of interpretation to reconcile seemingly conflicting provisions of the constitution, instead of using a basic structure theory to strike down one part of the constitution for being in contradiction with another part. Even the first leg of this salient features doctrine – that parliament’s authority to amend the constitution is limited – has no textual basis. But this doctrine is still better than India’s basic structure theory where the court has usurped the right to regulate parliament’s constituent powers.

As constitutional principles are designed not for a given era but for the vicissitudes of time, the need for establishing the right rule in matters of constitutional interpretation cannot be overstated. In being seized of challenges to the 18th constitutional Amendment, it was for the Supreme Court to determine (a) whether it had the authority to strike down a constitutional amendment and (b) if so, whether the 18th Amendment introduced changes into the constitution that call for such judicial intervention, and in the course of doing that, the court had the opportunity to address certain fundamental questions that could help elucidate the doctrines of constitutionalism, democracy and limited power authored by it in the recent *PCO judges case*⁷ and the *NRO case*⁸.

One, if the Supreme Court adhered to its doctrine of limited power whereby the constitution is the source of all authority and all institutions and individuals must exercise authority within the limits prescribed by the constitution, can it rely on any legal principles or arguments while undertaking constitutional interpretation that require it to disregard the ordinary meaning of the provisions of the constitution? The superior courts of Pakistan have traditionally disregarded provisions of law that limit their jurisdiction. It is understandable if in doing so courts are relying on the text of the constitution that gives them wider jurisdiction than that prescribed under statutory law. But can courts disregard restraint on their competence to adjudicate certain matters when the constitution itself applies such restraint?

Two, if Article 239(5) says that “*no amendment of the Constitution shall be called in question in any court on any ground whatsoever*” and Article 239(6) says that “*for the removal of doubt it is hereby declared that there is no limitation whatever on the power of parliament to amend the constitution*” could the Supreme Court author a theory of implied limitation of powers which basically stated that when the constitution explicitly limits the jurisdiction of the courts it doesn’t really mean that, and when it provides that the constitution amending authority of parliament is unlimited, it again doesn’t really mean that?

Three, could the court disregard the explicit words of a constitutional

⁷ PLD 2009 SC 879.

⁸ PLD 2010 Supreme Court 265.

provision on the basis that they were inserted into the constitution by a dictator and are consequently not worthy of allegiance? Thus, could sub-clauses (5) and (6) of Article 239 be disregarded for being inserted into the constitution by General Ziaul Haq? But in doing so could it also proclaim judicial independence to be the foundational principle or salient feature of the Constitution on the basis of language included in Article 2A, which was also included into the constitution by General Ziaul Haq through the same amendment that introduced sub-clauses (5) and (6) into Article 239?

Four, are there any circumstances in which the court could ignore certain provisions of the constitution or declare them to be less weighty than other provisions as opposed to following the golden rule of interpretation and interpreting seemingly competing provisions of the constitution in a manner that they seem integrated? If the text of the constitution doesn't state itself that provisions of our fundamental law are arranged in a certain hierarchical order, could the judges deciphering the meaning of words written in the constitution determine that in fact certain provisions are more important than others and are to be deemed as salient features of the constitution?

Five, do judges that comprise the apex court believe that they are a court of law functioning in accordance with the mandate of the constitution or are they members of a court of justice that requires them to do what they deem is right as wise men even if that means traveling beyond the provisions of the constitution? "*This is a court of law, young man, not a court of justice,*" Oliver Wendell Holmes, Jr., had famously remarked once. Do our judges believe that they are obliged to travel beyond the scope of law and do what they think is right if strict application of the law doesn't seem to mete out justice in their estimation? Is propagation of a basic feature doctrine any different from a doctrine of necessity in the sense that both theories are judicial inventions not backed by text of the constitution?

In the *NRO ruling*, Justice Jawwad Khwaja had succinctly noted that, "*the court, while exercising the judicial function entrusted to it by the Constitution, is constrained by the Constitution and must therefore perform its duty in accordance with the dictates of the Constitution and the laws made there under. If the court veers from this course charted for it and attempts to become the arbiter of what is good or bad for the people, it will inevitably enter the minefield of doctrines such as the law of necessity, with the same disastrous consequences... Decisions as to what is good or bad for the people must be left to the elected representatives of the people, subject only to the limits imposed by the Constitution...*" Was the court then competent in the first place to engage in a discussion of the 18th Amendment's desirability?

Six, in propounding a basic structure doctrine, could the Supreme Court have relied on precedents from Indian courts that are in conflict with established precedents of our own courts? Are judicial precedents – rulings of superior courts – binding in this country as law because our legal institutions have a historic affiliation with the common law tradition or are they binding

because Articles 189⁹ and 201¹⁰ of the constitution state that decisions of the Supreme Court and the High Court shall be binding? On what legal basis are Indian court precedents – that interpret a different document i.e. the Indian constitution, in a different socio-cultural and political context – cited as authoritative sources of law by our superior courts?

It might be understandable for a court to use a foreign precedent as food for thought when faced with a difficult question of law with no local guidance available. But can it be used as an authoritative precedent? India's basic structure theory was propounded to hold that parliament couldn't override fundamental rights in giving effect to principles of policy enshrined in the Indian Constitution. Could Pakistan's Supreme Court endorse such foreign ruling as persuasive source of law, after consistently rejecting it for almost four decades, especially in a situation where cynics could describe the alleged problem with the 18th Amendment as a turf war between the judiciary and the parliament?

The 19th Amendment – A Propitious Compromise

While the case remains pending, the Supreme Court, through an interim order¹¹, provided parliament a window of opportunity to re-amend the constitution and created an opportunity for parliament to help develop cooperative institutional norms within our fledgling democracy and prevent the emergence of circumstances that could encourage the Supreme Court to formally endorse the basic structure theory – a fictional concept that will pollute our constitutional jurisprudence for times to come. By identifying concerns over how the 18th Amendment could impinge on the independence of judiciary, making recommendations on how to prevent that from happening and throwing the ball back in parliament's court, the Supreme Court exercised some restraint even where self-interest seemed to be at stake.

Legal purists and strict constructionists of the constitution can legitimately criticize the 18th Amendment interim order. There has been a long-standing debate amongst legal philosophers about what judges do in courts: do they determine what the law is or do they say what it ought to be? A purist can thus convincingly argue that by deliberating upon and

⁹ **189. Decisions of Supreme Court binding on other Courts.**-Any decision of the Supreme Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all other Courts in Pakistan.

¹⁰ **201. Decision of High Court binding on subordinate Courts.**-Subject to Article 189, any decision of a High Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all courts subordinate to it.

¹¹ "18th Amendment Order," Supreme Court of Pakistan, October 21, 2012, <http://www.supremecourt.gov.pk/web/page.asp?id=398>

recommending what the law ought to be, the Supreme Court's interim order fell beyond the red line. The interim order did not determine the source of the apex court's authority to undertake judicial review of a constitutional amendment duly approved by parliament – as opposed to judicial review of ordinary legislation to determine its compatibility with the constitution itself – and strike down the new constitutional provisions found undesirable.

It must however be acknowledged that theoretical debates do not necessarily shape the reality of what transpires in courts. The line dividing a discussion over what the law is and what it ought to be is not clear either. The responsibility of interpreting written text – be it scriptural or legal – falls within a zone of discretion. This automatically gives the interpreter some leeway in determining what words mean. Then there is the whole process of interpreting the spirit of a law, which makes the interpretive project even more subjective. When the constitution gives the courts the right to interpret what the law is, it also gives them soft discretion. Whether or not such discretion has been abused in any instance is determined in the immediate term by public opinion and in the long term by subsequent judgments of courts.

While the courts are supposed to block out all extraneous considerations in determining legal controversies, it is a fact of life that the political context matters. For example, in the *Al Jibad case*¹² the Supreme Court for all practical purposes interpreted the need to consult with the chief justice over appointment of judges as seeking his consent. And the ruling was still hailed as epochal for it was seen as promoting the desirable cause of separating the judiciary from the executive. Likewise, Article 175-A incorporated into the constitution through the 18th Amendment changes in the manner in which judges are to be appointed.

While it is definitely an improvement over the previous system wherein the chief justice monopolized the judicial appointment process, the Supreme Court's order raised some genuine concerns as well.

The court's fundamental concerns or apprehensions seemed to be twofold. One, the executive could use its nominees within the Judicial Commission and the Parliamentary Committee to blackball genuine candidates as a negotiation tactic to get some of the ruling government's favorites or cronies appointed. And two, at times when the relationship between the executive and the judiciary is not necessarily amicable the government could use the Judicial Commission and the Parliamentary Committee to bring the conduct of judges in question and selectively reveal discussions taking place at these forums to malign the judiciary. These apprehensions could not be dismissed outright.

Our democracy is nascent and the interaction between the executive, the legislature and the judiciary is not presently moderated by entrenched

¹² PLD 1996 SC 324.

institutional norms. Further the prevailing political culture does not counsel elected representatives and public office-holders to exercise restraint while exercising state authority. In this backdrop, the recommendations of the Supreme Court to (i) increase the number of serving judges on the Judicial Commission from three to five in order to give the apex court (not the chief justice) a predominant voice in the appointment of judges, and (ii) mandate that proceedings of the Parliamentary Committee shall be in camera in order to limit the possibility of entangling the judiciary into political controversies, made sense.

The object of the new Article 175-A was to make the process of appointment of judges transparent, deliberative, and consensual. The recommendations included in the interim order did not dilute this underlying objective. By referring the matter to parliament together with its suggestions, the Supreme Court acknowledged the primary role of the legislature in determining what the law ought to be. The Supreme Court explained that, “*by making this unanimous reference to parliament for reconsideration, we did not consider the sovereignty of parliament and judicial independence as competing values. Both institutions are vital and indispensable for all of us and that do not vie but rather complement each other...*” Through such tempered tone, the Supreme Court proposed a collaborative model of institutional interaction that the parliament could build on.

The parliament accepted the Supreme Court’s counsel and promulgated the 19th constitutional Amendment in consonance with the interim order passed by the apex court while deliberating on the *vires* of the 18th Amendment. Notwithstanding the 19th Amendment, the Supreme Court seemed unwilling to allow the Parliamentary Committee to perform any meaningful role in the process of appointment of judges. Unfortunately, the judicial reasoning and outcome in *Sindh High Court Bar Association vs. Federation of Pakistan (Judicial Nominations case)*¹³, whereby the Supreme Court has struck down the Parliamentary Committee’s decision not to confirm certain nominations of the Judicial Commission, has multiple problems.

To start with, it is disingenuous, for while interpreting provisions of the Constitution introduced through the 19th Amendment it disregards the fact that these recommendations were actually proposed by the Supreme Court itself through its interim order while hearing cases challenging the 18th Amendment. It seems logically inconsistent for it relies on flawed deductions, and the mechanics employed by the Constitution to give effect to principles are mistaken for principles themselves. The changes introduced to the constitution by the latest amendments are underplayed and the court forces old wine into new bottles.

While expounding provisions of the constitution to delineate the respective scope of authority of the Judicial Commission and the

¹³ PLD 2009 SC 393.

Parliamentary Committee, the court didn't rely on settled principles of textual interpretation. As a consequence, disparate treatment has been meted out to the role and importance of the Judicial Commission and the Parliamentary Committee. In defending the authority of the Judicial Commission (essentially run by the five senior most judges of the Supreme Court) the apex court didn't apply restraint or take into account the age-old maxim that no one should be the judge in his own cause.

And while the court seemed conscious of the principle of separation of powers and the limitation it applies to the scope of judicial authority, such consciousness did not shape the operative part of the ruling.

Conclusion

In striking down the Parliamentary Committee's rejection of a few judicial nominations, the *Sindh High Court Bar Association vs. Federation of Pakistan (Judicial Nominations case)* ruling states that as law doesn't explicitly oust the court's jurisdiction, it can question the merit of the Parliamentary Committee's decision. This logic would be fine if it was uniformly applied. The court however didn't state that accordingly the recommendations of the Judicial Commission were also subject to judicial review.

The ruling in the *Judicial Nominations case* lacks rigor. First, its deductions do not flow logically. While allegiance to the principle of judicial independence is a cornerstone of our constitution, why assume that if serving judges were not to have a veto over who adorns the judicial robes, judicial independence will be compromised? What about all those countries that boast independent judiciaries with judges having absolutely no role to play in the appointment of future judges? Second, the ruling confuses principles enshrined in the constitution with the mechanics adopted to realize them.

Judicial independence can be secured through multiple ways. Appointment of judges through a rigorous, consultative and transparent mechanism is imperative to safeguard such independence. But while discussing who should play the lead role in such process – members of the executive, judiciary or legislature – we are talking mechanics, not principles. And then the ruling doesn't follow the established principles of textual interpretation and makes no attempt to give plain words their ordinary meaning. It approvingly refers to the *Al Jibad case* in which the Supreme Court declared that in the select context of seeking the chief justice's views regarding the appointment of judges, the word "consultation" would mean "consent".

The *Al Jibad case* was celebrated, not for its approach to constitutional interpretation, but as a mark of the Supreme Court's desire to break from the past and stop functioning as an appendage to the executive. It wasn't right but it became acceptable in such socio-political context. Today, there is no such context. The independence of the judiciary was secured through a mass

national movement and the last thing our Supreme Court can be accused of is being an extension of the executive. Why is it impossible to contemplate that the constitution was amended to introduce bipartisan parliamentary oversight over crucial appointments such as those of judges and the election commissioner? What would be the point of making such drastic changes if the Judicial Commission and the Parliamentary Committee were merely meant to step into the erstwhile shoes of the chief justice and the federal government respectively, with the former having decisive control over who becomes a judge?

The court believes that the work of the Judicial Commission will be rendered 'nugatory' if the Parliamentary Committee has the right to question its recommendations. Can reasonable minds not reach different conclusions based on the same information? The test prescribed by the Supreme Court is that it is illegal for the Parliamentary Committee to consider any information about judicial nominees that has been deliberated upon by the Judicial Commission. What independent stream of information does the Parliamentary Committee have for the consideration of which the Constitution specially created it?

In effect, each time the Parliamentary Committee disagrees with the Judicial Commission, it would have travelled beyond the zone of legality according to the Supreme Court test. Why have the Parliamentary Committee at all then? To discuss the antecedents of proposed judges, we are told, and nothing else. And the court purportedly is not even encroaching upon the vast powers of the legislature, as the eight member bipartisan parliamentary committee is actually a part of the executive according to this ruling.

The Supreme Court opted to hear challenges against the 18th Amendment despite the constitutional prohibition that "*no amendment of the Constitution shall be called in question in any Court on any ground whatsoever*", and gave parliament an opportunity to re-amend the constitution in accordance with the court's recommendations. Consequently, the parliament passed the 19th Amendment; it abided by the court's 'recommendation' that the Parliamentary Committee should give reasons if it doesn't endorse the Judicial Commission's advice, but it didn't write in the constitution that such reasons shall be justiciable as the court wanted. Since then, through the *Judicial Nominations Case* the court has now had its way.

The interim ruling in the 18th Amendment case was not a marvel of jurisprudential merit. But those who followed the proceedings of the case feared that the dreaded adoption of the basic structure theory and striking down of a provision of the constitution was imminent. When the court found a pragmatic solution to avert such outcome, there was relief. One hoped that if parliament responded with maturity and addressed the concern that the turf of the apex court was being encroached, the court would also back off. By

adopting the 19th Amendment, parliament rose up to the expectation. Unfortunately, the court did not retreat.■

WILL ENHANCED POWERS OF JUDICIARY STOP FUTURE MILITARY TAKEOVER IN PAKISTAN?

Dr Iram Khalid

*“Real democracy can function, only with interactive understanding of the people,
their representatives and their judges together”.*

John Agresto

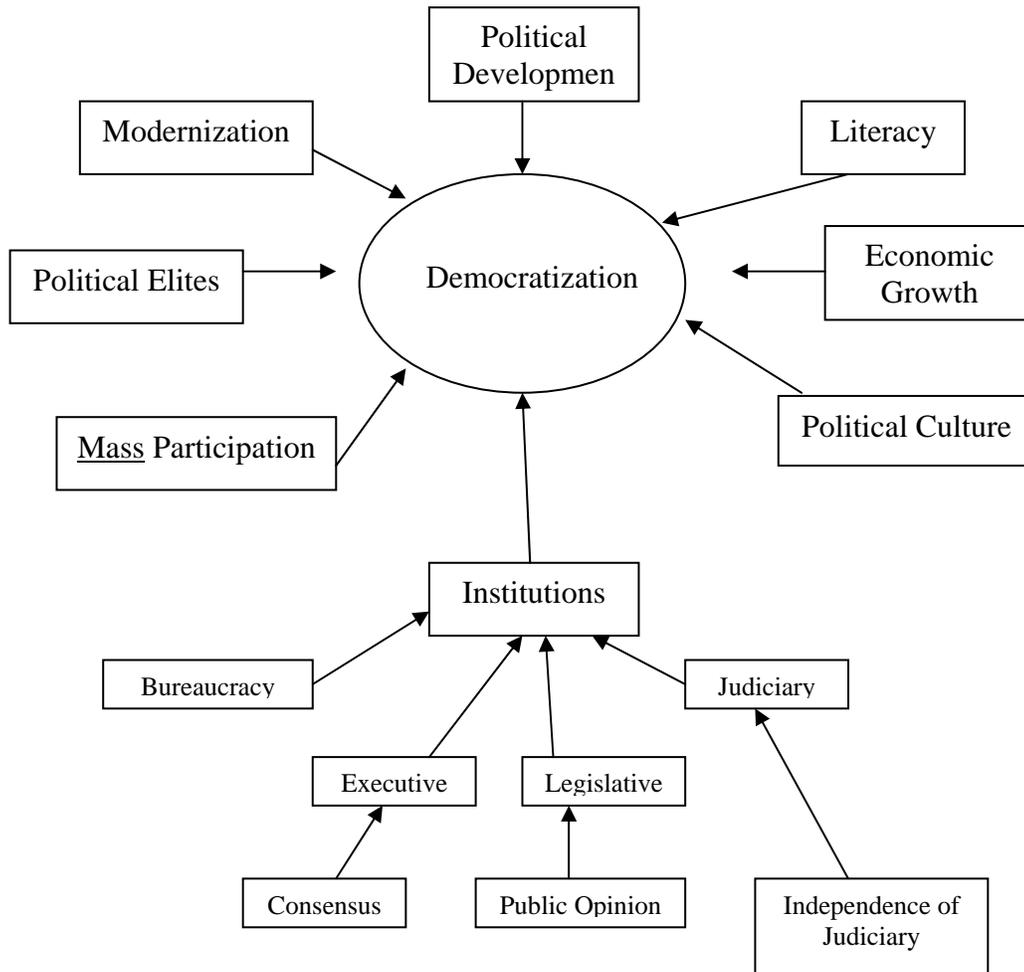
Consistent democratic practices create legitimate rule while non-consolidated democracies descend into illegitimacy. Pakistan is one of the glaring examples of non consolidated democracies where the issue of legitimacy is at its peak. The chequered history of democracy in Pakistan has created institutional weaknesses, so the state is still countering them. After the introduction of the 18th Amendment, there are new hopes and expectations from the judiciary. The judiciary has a momentous role to play in the course of democratization. This state institution can do commendable service in building up a democratic society. Thus, for this purpose it should work as a free institution which has its own network as far as rules and regulations are concerned and work without any pressures from the executive as well as from any other institution.¹

There are different approaches to the relationship of democracy and institutions. Specially, the structural approach, which focuses on the changes within the power structure. These provide opportunities to political leaders to move towards liberal democracy.²

¹ Mazher Ul Haque, *Political Science Theory and Practice* (Lahore: Bookland, 2005), 118. See also, “Role of Judiciary in the Politics of Pakistan,” Wikibin, <http://wikibin.org/articles/role-of-judiciary-in-the-politics-of-pakistan.html> (accessed May 22, 2011).

² David Potter, David Goldblatt & Others, *Democratization*, (USA: The Open University, Walton Hall, Milton Keynes MK 76 AA, 1977), 21.

Some of these core factors can be shown under the following structure:-



Democratic Experience of Pakistan

Pakistan's political instability today is the reflection of the constant struggle for power between different institutions. A power structure based on weak political institutions was inherited by Pakistan in 1947. The state tried to accommodate differences by focusing on institutional and constitutional framework. During this process the conflict between various actors contending for power and influence remained the main feature of Pakistan politics.

However, while observing the democratic experience, one has to understand the divergence between theory and practice. Unfortunately, the experience of democratic process in Pakistan has been most irregular, fragile

and unsatisfactory. As a matter of fact, democracy in Pakistan was not allowed uninterrupted time to work which was indispensable for its success. In order to understand why Pakistan has such an experience, it seems necessary to pin down the root cause. For the commencement of democratization, holding of periodic elections is most important. Unfortunately, the first general elections could only be held in 1970. This delay created an imbalance which resulted in the creation of Bangladesh.

Another most important reason is military intervention. Wrangling for power among civilian leaders provided a chance to the Army to intervene which remained in power most of the time preventing the introduction and development of true democratic values. However, to put all the blame on the military is not rational as the civilian rulers left much to be desired.³

Role of Institutions

“An institution is a network of structures, procedures and shared values within a social system, of a relatively permanent nature, which is concerned with some social function or group of functions.”⁴ The role of institutions for the success of democracy is pivotal. The Executive, Legislature and Judiciary are the pillars of a democratic state. While the legislature in a democratic state comprises of the elected representatives of the people and entrusted with the task of making laws according to the wishes of the people, the executive takes charge of governance and runs the work of the state. However since this study deals with the responsibilities of the judiciary in a democracy, we will discuss that in greater detail.

“The judiciary cannot fight the dictators. We require strong political institutions which are lacking in the country.”⁵ (Justice Qazi Muhammad Jamil)

The institution of judiciary is a vital organ of the democratic state. It is the mainstay of the liberal democratic system. It plays the vital role of defining and even widening the scope of mass liberties and rights when these rights are violated. In a democratic state, the judiciary is assigned a dual role: it not only protects the individual’s rights but also acts as a custodian of the Constitution. Therefore, it can be asserted that among all organs of the state, the role of judiciary in upholding the spirit of democracy is of great importance. However, for performing its role in a befitting manner, the presence of a democratic society is inevitable which can preserve its independence.

³ C. Christine Fair, “Why the Pakistan army is here to stay: prospects for civilian governance,” *International Affairs* 87 (Published by Blackwell Publishing 2011): 571-588.

⁴ Geoggrey K. Roberts, *A Dictionary of Political Analysis* (Great Britain: Hazell Watson & Viney Ltd., 1971), 61.

⁵ Op.cit., 136.

“Nothing touches the welfare and security of the citizen more than the judiciary.”⁶

The judiciary is an institution of the highest value in every society. The Universal Declaration of Human Rights Art.10 and the International Covenant on Civil and Political Rights Art.14 (1) proclaim that everyone should be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. An independent judiciary is indispensable to the implementation of this right.

The judiciary shall decide matters before it in accordance with its impartial assessments of the facts and its understanding of the law without improper influences, direct or indirect, from any source. The judiciary has jurisdiction, directly or by way of review, over all issues of a justifiable nature and exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law. The judiciary is entrusted with the responsibility for the enforcement of Fundamental Rights. This calls for an independent and vigilant system of judicial administration so that all acts and actions leading to infringement of Fundamental Rights are nullified and the rule of law is upheld in the society.

Simply stated, judicial independence is the ability of a judge to decide a matter in an atmosphere that is free from pressure or inducements. Additionally, the institution of the judiciary as a whole must also be independent by being separate from government and other concentrations of power. The principle role of an independent judiciary is to uphold the Rule of Law and to ensure the supremacy of the law. If the judiciary is to exercise a truly impartial and independent adjudicative function, it must have special powers to allow it to keep its distance from other governmental institutions, political organizations, and other non-governmental influences, and to be free of repercussions from such outside influences.

It is important to emphasize the judges do not claim to be special people, “but they do claim to hold a special office to which is assigned the function of guarding, separate and independent from other government institutions, the principle of the Rule of Law.”⁷

Nowadays, in our setting, the line of action and the jurisdiction of the institutions are not clear. We are following the personalities not strengthening the institutions. So a tactful control is much needed because there are many hurdles which can create problems in the way of judiciary when it might try to control the role of the army for instance. If the political system needs maturity

⁶ H. Rahman, Introduction to Pakistan Constitution, (East Pakistan: Narayan Machine Press, 1958), 189.

⁷ Personal Interview of Raja Muhammad Yasir; Advocate Lahore High Court, Lahore, October 17, 2005, Monday, 21/14 Lytton Road, Lahore, Raja Farrukh Afrasiab Law Company.

then it has to create accommodation, acceptance, flexibility, transparency and accountability. In the army, the socialization process can be helpful in accepting the supremacy of civilian institutions. That change will determine the lines of action in different institutions and it will determine the jurisdiction of all the institutions.

Role of Judiciary in Crisis Management in Pakistan Politics

In the tortuous constitutional and political history of Pakistan, whenever any constitutional crisis has arisen, the superior judiciary has been asked to play its role in resolving it. The court's judgment in such constitutional cases has had far reaching effects. It is tragic to note that the role of judiciary in setting the destiny of the country towards the road to democracy has remained controversial and sensitive to deal with, as we shall see in the following review of our political history.

On 24th October, 1954 the then Governor General, Ghulam Muhammad dissolved the first constituent assembly claiming it had lost the confidence of the masses and was unable to work. The speaker of that very assembly, Maulvi Tamizuddin Khan, filed a petition against the action. The Sindh Chief Court issued a writ of mandamus to the appellants and ordered for the restoration of the assembly holding its dissolution as illegal. The Governor General then filed an appeal before the federal court against the verdict of the Sindh high court that it had no jurisdiction to issue writs under Article 223A. The court decided in favour of Ghulam Muhammad and set aside the decision of the Sindh Chief Court by alleging that it did not have a jurisdiction to issue writs, as the bill for this had not received the assent of the Governor General.⁸

Much criticism has been levelled against this decision on the grounds of its incompatibility and inappropriateness for democratization and setting the direction of the country on the right lines. As a matter of fact it was for the first time in the history of Pakistan that an assembly was dissolved and deemed valid by the apex court. As a consequence it set a worst precedent for future autocrats. In fact it was this judgment which affected the prestige and credibility of the superior judiciary in the eyes of the common people.

Shortly thereafter another case, "*Usif Patel and other VS Crown*," was presented before the court. This case was the result of the aforesaid case. The core issue was regarding the validity of "*Section 92-A*" of the government of India Act, 1935. It was argued that the insertion of any section into India Act, 1935 would be invalid without the assent of the Governor General, as was held in Maulvi Tamizuddin Khan case. They demanded their liberty under that

⁸ Mushtaq Ahmad, *Government and Politics in Pakistan* (Karachi: Zaki sons Printers, 2009), 80-120.

law which had not received the assent of the Governor General. The court upheld the detention of the petitioners as illegal and set the appellants at liberty. An emphasis was also laid that the Governor General could not substitute the constituent assembly, therefore, it was asked for the immediate need to form another representative body, so that invalid legislation could be validated.⁹

The research over this case showed that it had both a negative and a positive influence in the political and legal spheres. But deeper analysis reveals that it created many complications. A number of governmental actions were challenged. But a helpful result was that the Governor General was asked to form a constituent assembly of elected representatives. Therefore, it can be said that by questioning the unlimited powers of the governor general, the Federal Court took a bold decision and played its constructive role for the sake of democracy. Besides it kept the then Governor General within certain limits, as he intended to formulate a constitution according to his own whims and desires.

As an outcome of this aforesaid case a large number of laws became invalid for not having the assent of the Governor General. As a consequence, Ghulam Muhammad made a reference before the Federal Court under section 213 of India Act. He raised various questions before the superior court to seek its vantage point. The apex court relied on the “*Doctrine of State Necessity*” in order to avert the legal and political gap. That was how the doctrine of state necessity cropped up in the constitutional and political history of Pakistan. It can be described as a kind of compromise on the part of judiciary with the prevalent government. But it was due to the absence of a constitution that all this came about.

Whatsoever the apprehensions of judiciary, the fact remains that it proved a turning point in the haphazard history of Pakistan. Unfortunately after this, the country could not relinquish this doctrine of state necessity for giving validity to everything illegal. The future rulers and power seekers used it with impunity as a pretext for taking extra-constitutional steps.

On October 7, 1958 Martial Law was proclaimed, assemblies were dissolved and General Ayub Khan took the office as Chief Martial Law Administrator. The validity of this takeover was challenged in a constitutional case entitled, *The State Vs Dossa and Others*. The core issue before the court was about the validity of the law of Continuance in Force Order, 1958. They strongly asserted that their appeals should be decided according to 1956 Constitution. In fact by this they challenged the validity of Martial Law.

The apex court validated this very imposition of Martial Law under Kelson’s Pure Theory of Law. The apex court held that the victorious

⁹ Khalid B. Sayeed, *Politics in Pakistan* (New York: Praeger Publishers, 1980), 90-100

revolution or successful coup de etat is an internationally recognized legal method of changing a constitution. After a change of that character as has taken place, the national legal order must depend for its validity upon the new law creating organ. It further stated that even the courts lose their existing jurisdiction and can function only to an extent and in a manner determined by the new constitution.¹⁰

The court's verdict in this case has had profound consequences for the political and legal life of the country. It was for the first time that Martial Law was imposed in Pakistan. It was a novel situation for the courts. Their verdict exerted a strong impact on the future course of the country's political life and proved destructive for the process of democratization.

President Ayub Khan abrogated the Constitution of 1956 and introduced a new concept of 'Basic Democracy' which could not be called a substitute for the national and provincial assemblies. It opened the door for one-man government who was the source of all powers. Though the judgment in Dossa case has been universally criticised it is also said that it was justified in those conditions as had it gone against the imposition of Martial Law it might have not been implemented and new crises of conflict between judiciary and executive would have been created. The doctrine of necessity was meant for such situations, it is said. Nevertheless, Pakistan has since had to face the Martial Law again and again.

There was Martial Law again in 1969 and the 1962 constitution was abrogated. It was challenged in the famous Miss Asma Jilani Vs the Government of the Punjab case giving the judiciary another chance to clear the way for democracy. In this case the handing over of power to Yahya Khan by Mr Ayub Khan was declared illegal. It was also decided that all the legal and administrative measures taken by this unauthorized and unconstitutional regime could not be upheld. Moreover, the court used the power of judicial review and over ruled the courts' verdict in Dossa Case.¹¹

The judgment in Asma Jilani case has an important place in jurisprudence history of Pakistan as it allowed Zulfiqar Ali Bhutto as the first Civil Martial Law Administrator to lift Martial Law and return the country to democratic rule after a long period of dictatorship. But it is important to note that the court could give such a verdict only after Yahya Khan's dismissal.

The 1973 Constitution made military intervention unlawful through 'Article 6' yet in spite of all these precautionary measures there was again the imposition of Martial Law in 1977¹² which was again challenged in the constitutional case namely *Begum Nusrat Bhutto Vs Chief of Army Staff*. The

¹⁰ Hamid Khan, *Constitutional and Political History of Pakistan* (Karachi: Mas Printers, 2003), 200-250.

¹¹ Ibid.

¹² Ibid.

Supreme Court dismissed it as un-maintainable relying on the Doctrine of State Necessity. Then followed another period of dictatorship spanning 11 years.

On October 12th, 1999 there was again military take over which was challenged in the Constitutional case entitled, “Zafar Ali Shah and General Pervaz Musharaf Chief Executive of Pakistan”. The Doctrine of State Necessity was invoked again to justify the military intervention. However, restrictions were imposed that General Elections should be held within three years and that the salient features of the Constitution of 1973 would not be changed.

Political stability is essential for democracy. After the enforcement of 1973 Constitution there was only Bhutto’s government which could complete its tenure. After that the country had to face frequent dissolutions of assemblies on charges of corruption, horse-trading and nepotism etc.

General Zia-ul-Haq being the Chief Martial Law Administrator (CMLA) and President of Pakistan had given protection to all the orders and ordinances during his regime by invoking the 8th Amendment to the constitution which was ratified by National Assembly headed by Mr Junejo. Through this amendment the President was empowered to dissolve the assembly under Article 58(2) (b) of the constitution. This power was used for the first time by General Zia in 1988.¹³

This was challenged in the case entitled, “Federation of Pakistan Vs Hajji Muhammad Saif Ullah Khan”. The court gave the verdict that although the dissolution of assembly was unconstitutional and illegal yet as the schedule of elections had been announced, therefore the assembly could not be restored. This verdict was also challenged in the Supreme Court of Pakistan. The apex court upheld the Lahore High Court’s verdict.

The major contribution of this judgment was that it declared the dissolution of the assembly as unjustified and unreasonable. It checked the Presidents’ power to dissolve the National Assembly. Yet the Supreme Court refused to restore the assembly. One wonders if the judiciary could have declared the dissolution of assembly as unconstitutional if the same petition had been filed in the life of Gen. Zia? Yet the judgment had a positive side to it.

The National Assembly headed by Benazir Bhutto was again dissolved by President Ghulam Ishaq Khan under Article 58(2) (b), in 1990 on allegations of corruption, irregularities, malpractices, nepotism, horse-trading, worst law and order situation and clashes among the Premier, the President and Chief Minister of Punjab, Nawaz Sharif. This order of the dissolution of assembly was challenged by Khawaja Ahmed Tariq Rahim before the Lahore

¹³ Ibid.

High Court. A full bench of Lahore High Court upheld the order of dissolution of assembly by the then President.

An appeal was then filed before the apex court in the case entitled “Khawaja Tariq Rahim Vs Federation of Pakistan”. This appeal was heard by a full bench which announced its verdict on 1st November 1991. The Supreme Court upheld the decision taken by the Lahore High Court and dismissed the petitions. Although the court justified the circumstances under which the National Assembly headed by Miss Benazir Bhutto had been dissolved, it created instability and people’s faith in political institutions was shaken. It only strengthened the position of the future President.¹⁴ The next assembly under Mr Nawaz Sharif following general elections of 1990 was also dissolved in 1993 by the then President Mr Ghulam Ishaq Khan under Article 58(2) (b) of the constitution. The reasons cited were massive misuse and wastage of public funds, not convening the council of common interests, corruption, nepotism and malpractices etc.

The order of dissolution of the assembly was directly challenged by Mr Nawaz Sharif under Art 184 (3) of the constitution before the Supreme Court of Pakistan entitled “Nawaz Sharif Vs Federation of Pakistan”. The court restored the National Assembly saying no critical circumstances existed that could justify the dissolution.

The court’s verdict in Nawaz Sharif case is a landmark on the democratic path as a check on the powers of President to dissolve the assemblies without solid grounds. However, such circumstances were created after the restoration of the National Assembly that Mr Nawaz Sharif had to resign within two months.

The next assembly under the premiership of Benazir Bhutto was again dissolved by President Farooq Ahmed Laghari under Article 58(2) (b) of the constitution. The main allegations were worst law and order situation, corruption, malpractices, misuse and wastage of public funds etc.

The dismissal was challenged before the apex court in the case entitled, “Benazir Bhutto Vs President of Pakistan”. The Supreme Court upheld the order of dissolution. Justice Zia Mahmood Mirza was the sole dissenter who wanted the assembly restored.

The decision made democratic institutions shaky. It was deemed inside and outside the country that no assembly could complete its legal duration as long as ‘Article 58(2) (b)’ of the constitution was in place.

¹⁴ Dr Inayat Ullah, *State and Democracy in Pakistan* (Lahore: Vanguard Books Pvt. Ltd. Edition, 1997), 96-97.

An Overview: Role of Judiciary and its Impact (1947-1977)

Sr. No.	Name of the Case	Main Issue	Decision	Role & Impacts
1	Maulvi Tamizuddin Khan Case	Dissolution of Assembly	Decided in favour of Government	Negative
2	Usif Patel's Case	Consent of Governor General essential or not for the sanction of the Bill	Consent is necessary for the approval of every Bill	Both positive and Negative
3	Reference by Governor General	Court Opine about the Legislative Powers of Governor General	Retrospective effect was given to laws	Both Positive and Negative
4	Dossa Case	Imposition of Martial Law is valid or not	Decided in favour of Government	Prevailing was Negative
5	Asma Jilani's Case	Imposition of Martial Law is valid or not	Decided in favour of Government	Both Positive and Negative

Constitutional Amendments: Impact on Judiciary

Much criticism has been levelled against these amendments with particular reference to judiciary. Dr Inayat Ullah in his book *'State and Democracy in Pakistan'* is of the view that these amendments minimized the judicial independence which was guaranteed in the original text of the constitution. He further states that opposition and other critics interpreted these amendments as an attempt of Mr Bhutto to 'Shackle the Judiciary' and to restrain the judiciary from becoming an obstacle in his drive towards creating a bi-party system or conversion of parliamentary system into a presidential one.¹⁵ What effect these amendments exerted on this state organ is briefly analysed below:

As far as the 1st Amendment is concerned, its prime purpose was not directly related with judiciary but with the recognition of Bangladesh. However, an amendment was made in 'Article 200' which was regarding the transfer of judges from one court to another¹⁶ that required the President to consult the Chief Justices of the Supreme and the concerned High Court. Although this did not create any serious effect on the powers of the judiciary one may wonder why so early on the process of amending the constitution had

¹⁵ *The Constitution of Pakistan 1973*, Article 200.

¹⁶ General K. M. Arif, *Khaki Shadows (Pakistan 1947-1997)* (New York: Oxford University Press, 2001), 283.

started. The third amendment which curtailed judicial authority in the matter of preventive detention came under much criticism. It is an open secret that Mr Bhutto was very intolerant towards his opponents. General K.M. Arif in his book *'Khaki Shadows'* equated Mr Bhutto's style with authoritarian attitude of tribal sardars.¹⁷ The detenus had to rush to the judiciary to seek relief which the government resented. This resulted in this amendment.¹⁸ It allowed government free hand in harassing its opponents as the courts watched helplessly.

The 4th Amendment further restricted the power of the judiciary. Now judiciary could neither grant bail to the detenus nor issue an order concerning preventive detention. During the parliamentary debate members of the opposition were physically thrown out by the security force. In the absence of opposition this amendment was passed.¹⁹

The 5th Amendment also weakened the power of the judiciary as it opened the doors for executive meddling in its affairs. The amendment should be seen in the background of a contempt of court case against 'Hakam Qureshi and two others. The President granted pardon against the judgment of Supreme Court.²⁰ This was humiliating for the judiciary. The introduction of 5th Amendment added fuel to the fire. During the debate on the 5 Amendment bill, Mr Bhutto made the following remarks about the judiciary on the floor of the House on 4th September, 1976:

“The judiciary can't become parallel executive by wholesale misapplication, misrepresentation and misinterpretation of the laws. This must be very clearly understood ... and anyone who does not understand it does so at his own peril ... Each organ must remain in its sphere of influence, in its own orbit. It cannot transgress in to the orbit of others. The judiciary can't transgress into the executive function, into the executive organ.”²¹ He further asserted that... “it has been necessary to introduce the 5th Amendment as a result of the transgressing by the judiciary of its function into the executive branch”.

Another effect of this amendment was that it made it easier for the government to appoint any judge as the Chief Justice without taking into account the seniority order. Consequently, Aslam Riaz was appointed as the Chief Justice of Lahore High Court though he was at eight number in the order of seniority.²² Dorab Patel in his book *“Testament of a Liberal”* highlighted another appointment made by Mr Bhutto in an arbitrary manner. An advocate

¹⁷ Hamid Khan, *Constitutional and Political History of Pakistan* (Karachi: Oxford University Press, 2001), 522.

¹⁸ Ibid.

¹⁹ PLD 1976 SC 713.

²⁰ *Dawn*, September 5, 1976.

²¹ General K. M. Arif, *Khaki Shadows (Pakistan 1947-1997)*, 281.

²² Dorab Patel, *Testament of A Liberal* (Karachi: Oxford University Press, 2000).

whose election to the Provincial Assembly was rejected on charges of malpractices during election campaign was appointed as judge of the High Court. These two appointments made by Mr Bhutto undermined the independence of judiciary to a great extent.²³

The amendment in 'Article 200' made it possible for government to transfer a judge to another court without his assent. This hung as the 'sword of Damocles' over the heads of the judges.²⁴ Moreover, the amendments to 'Article 179 and 195' by specifying the term of office for the Chief Justice of both the Supreme Court and the High Court made it possible for the President to appoint his favourites to the office after the retirement of Chief Justices from their office.

The ejection of 'Clause 3-A' from Article 199 and addition of 'Clause A to C' manifestly curtailed the power of the judiciary. Moreover, 'Article 175' was amended to increase the duration for the separation of judiciary from executive from three to five years.²⁵ Another attempt to minimize the powers of judiciary was made by introducing an amendment in 'Article 204.'²⁶ By this amendment the punishment for contempt of court could be pardoned by the President.

By the 6th & 7th Amendments another effort was made to restrict the powers of the judiciary. The effect of the sixth amendment was that the Chief Justice Yakub Ali remained in office even after reaching superannuation.²⁷ Mr Bhutto could amend the constitution to please a friend.²⁸ Moreover, by the seventh amendment the judiciary was restrained from exercising its powers where the armed forces had been brought in aid of civil power.

General K.M. Arif in his book '*Kbaki Shadows*' commented that these amendments gave grounds to successive governments to play politics with the judiciary negating and ignoring the rightful status of the judiciary as a pillar of state.²⁹ This is how a popular government treated the judiciary after coming into power.

The 8th Amendment introduced major changes in the constitution of 1973 by granting permanent sanction to all the acts of the President and

²³ Judge Gustaf Petre et al., *Pakistan: Human Rights after Martial Law* (Karachi: Study Circle, 1987), 44.

²⁴ *The Constitution of Pakistan 1973*, 5th Amendment, Article 175.

²⁵ *Ibid.*, Article 204.

²⁶ Judge Gustaf Petre et al., *Pakistan: Human Rights after Martial Law*, 44.

²⁷ Hamid Khan, *Constitutional and Political History of Pakistan*, 538.

²⁸ General K. M. Arif, *Kbaki Shadows (Pakistan 1947-1997)*, 282.

²⁹ Mohammad Waseem, *Patterns of Conflict in Pakistan: Implications for Policy* (Washington D.C.: The Brookings Institution, 2011), 5.

CMLA which were made a part of the constitution. It could not be challenged before the courts. Only Parliament could annul it with two-third majority.³⁰

The 9th Amendment was presented in the National Assembly in 1988 but it could not be approved. The 10th constitutional Amendment became effective on March 29, 1987. The 11th Amendment was tabled in 1988 but it could not be passed. In that amendment bill, the restoration of special seats for women was proposed. Through the 12th constitutional Amendment, Nawaz Sharif established special courts to ensure speedy trial of accused involved in heinous crimes.

The 13th constitutional Amendment became effective on April 4, 1997. Through this amendment the power of dissolving the assemblies was taken back from the president and vested in the Prime Minister. This amendment was made with mutual agreement of the government and the opposition. The 14th Amendment became effective on June 30, 1997. Through this amendment the political parties were empowered to terminate the Parliament membership of their members involved in floor crossing to strengthen the political parties.

The 15th amendment was about the Shariat Bill, which was approved on August 28, 1998. Through this amendment, the Holy Qur'an and Sunnah were declared the guiding principles for running government. Under the banner of Islamic system, Nawaz Sharif tried to get absolute powers. This amendment was passed by the National Assembly but could not be passed in the Senate. The 16th constitutional Amendment became effective in 1990. Through this amendment the quota system was extended up to 2013. Only the Muttahida Qaumi Movement (MQM) voted against the move. The 17th Amendment became effective in December 2003 in which the president got back the powers of dissolving the assemblies and LFO was made part of the constitution. The 17th Amendment was undone by the parliament.³¹

Era of Uncertainty

“The civil-military conflict has incrementally worsened the institutional imbalance in Pakistan. The top brass ruled the country for thirty-three years (1958-1971, 1977-1988, and 1999-2008) and put a dent in the authority and authenticity of the constitutional state by assuming an informal but substantive role as the supreme political agency. The army dissolved the National Assembly four times (1958, 1969, 1977, and 1999). General Ayub Khan (1958-1969) reduced parliament to a weak and ineffective institution by curtailing its powers of legislation, and General Muhammad Zia-ul-Haq (1977-1988) renamed the parliament the *Majlis-Shura* (Advisory Committee), lowering its

³⁰ “Chronology of constitutional amendments in Pakistan,” Maverick Pakistanis, April 6, 2010, <http://www.maverickpakistanis.com/?p=1942>

³¹ Ibid.

status to a consultative body to serve the president. The parliament is still perceived as having a secondary position in the political system”.³² This uncertainty further divided the society into different segments. On the whole the image of Pakistan suffered badly by the constitutional experiments.

Revival of Democracy; Role of Judiciary after 18th Amendment

Though the present era of revival of democracy is threatened by the rise of religious extremism and militant groups. And there is less space to perform because of the internal and external challenges. In such prevailing circumstances the elected government introduced the 18th Amendment to the constitution. This effort is welcomed by different circles. Many circles expect that enhanced power of judiciary will counter the intervention of army in politics. Different amended clauses provide indirect way to counter military intervention, like judicial independence, education to all is now right to everyone, and steps towards provincial autonomy, they are the pre-requisites of democracy. With this confidence building measures democratic political culture can be created. But the basic issue is to implement the changes with their true spirit. There is no direct change in article 6 and 245; those are directly linked with the role of army.

The long-awaited 18th constitutional Amendment represents a rare political phenomenon of consensus among the political parties. No member voted against the amendment in both houses of parliament. The major reason that it did not face problems in the two houses was the long-drawn deliberations in the constitutional reforms committee that included all political parties represented in parliament.

“The 18th Amendment is a detailed document that makes several significant changes in the constitution and removes the distortions caused by two military rulers, i.e. Generals Zia-ul-Haq and Pervez Musharraf. It is comparable to the 8th and 17th constitutional Amendments of 1985 and 2003 respectively that introduced far-reaching changes in the constitution. However, there is one key difference between these amendments. The 8th and 17th constitutional Amendments were meant to civilianize military rule and provide constitutional and legal cover to the actions and policies of the military regimes. The 18th Amendment represents the triumph of the democratic political forces because they joined together to promulgate an amendment that has made the constitution more democratic, shifted the balance of power in favour of the Prime Minister and parliament and expanded the scope of provincial autonomy.”³³

³² Dr Hasan Askari Rizvi, Judicial Appointments and Constitutional Amendments, *Daily Times* (Lahore) May 16, 2010.

³³ Ibid.

There is important clause 175 A, which gives the procedures that provide for sharing the power of appointment of judges of the superior courts by the judiciary and the executive. The discretion of the executive varies from country to country but it is not bound to accept the recommendations of the chief justice.

“Only a few countries give exclusive power of appointment to the chief justice and his senior colleagues. In India and Pakistan, this power was acquired by the Supreme Court through its judgments. This was not originally written down in the constitution. In the case of India, the chief justice and senior judges of the Supreme Court exercise this power. In the case of Pakistan, one person — the chief justice — exercises this power because his recommendation has been made binding on the president by the judgment of the Supreme Court going back to 1996 and the Legal Framework Order (LFO) of 2002. The third method, adopted in the US, provides for no role for the chief justice or other judges in the appointment of judges. The US president recommends the name and the Senate approves or rejects the name. Similarly, a judge of the US Supreme Court can be removed from office through impeachment by Congress.”³⁴

No single method of appointment is more suited to the independence of the judiciary than the other. It is not correct to assume that the independence of the judiciary is undermined if the superior judiciary is not given the exclusive right to appoint its judges. “This type of exclusive power does not exist even in the UK. The method of appointment cannot be the sole criterion to judge the judiciary’s independence. As a matter of fact, no single person should have the exclusive power to appoint judges to the superior courts. This should be a shared responsibility, perhaps with some weight to the opinion of the chief justice and his senior colleagues.”

Pakistan’s experience suggests that complaints have surfaced about some judicial appointments under both systems of the pre-amendment period. The new system maintains the primacy of the judiciary for the appointment of the judges of the superior courts. The chief justice, two senior judges of the Supreme Court and a retired judge nominated by the chief justice constitute a majority in the Judicial Commission. The parliamentary committee comprises of eight members with equal representation of the government and the opposition and both houses would not be able to stop the recommendations of the Judicial Commission. The only step it can take is to return the recommendation back to the Judicial Commission provided at least six out of eight members favour such an action. Democracy and constitutionalism are needed more than anything else for the independence of the judiciary.

The 18th Amendment eliminates the “Concurrent List,” an enumeration of areas where both federal and provincial governments may legislate but

³⁴ Ibid.

federal law prevails. Laws governing marriage, contracts, firearms possession, labour, educational curriculums, environmental pollution, bankruptcy, and 40 other diverse areas will now devolve to the provinces with the list eliminated, and each provincial assembly will be responsible for drafting its own laws on the issues. Reformers have touted this measure as a necessary shift for a more federal system, but there are some concerns about the ability of provincial governments to assume effective regulatory authority in these areas, which they are now bound to do by June 30, 2011.

Pakistan's parliament has institutionalized a new political consensus on the country's legal and political framework with the 18th Amendment's passage. It gives the parliament, Prime Minister, judiciary, and the provincial governments' greater autonomy under the constitution. These changes represent an opportunity for Pakistan's political parties to begin seriously addressing the country's critical economic and security problems.

Analysis of Change

Like so many other conflicts, the role of the judiciary has also been controversial in Pakistan. Quest for legitimacy of the army governments has earned this institution the reputation of 'helping hand' for the establishment of dictatorships in Pakistan. Judiciary has given room to the army governments under the umbrella of the law of necessity. This law has badly affected the Pakistani politics, political system and process. Hence, it has made this institution unpopular in public.

On the other hand, endorsement of these judicial steps has made the constitution and political process rather intricate. There arise some important questions when this scenario is linked with the present circumstances. The answers of these questions can provide meanings to the topic under discussion. There are questions that: Can amendments provide a practical basis to an institution? Can constitutional powers halt the army intervention? Can we run the political process of Pakistan by bringing institutions in confrontation with each other? Should one institution be declared better by bringing the other institution in vogue?

Presently, two things are greatly affecting the system and society of Pakistan; there are, growing expectations regarding judiciary and dependence on media. Information is being delivered speedily but the process of filtration is not being done. That is why, confusion is spreading rapidly. Converting the matters of institutions into a public debate, that are vital for the defence and the consolidation of the state, is not the right direction. Constitutional amendments can convert the judiciary into a strong institution. However, it should not be established that without bringing together all aspects of political process and unless the course of army intrusion into politics cannot be halted, the judiciary cannot gain strength.

The way external powers and internal elements are exerting pressures on the army; this can only create conflicts rather than bringing them down. To look towards judiciary to halt the way of army's involvement in the politics, is not possible unless we develop traditions like; to keep within the prescribed jurisdictions, rule of law and coherent policy by all institutions.

These are only steps in order to halt the army involvement into politics. There is dire need of coordinated efforts between political process, political system, political institutions, leadership and political parties. Media must restrict itself to the obligation of the provision of information and creating awareness rather than passing judgments. Media and judiciary are the sources of accountability. In particular, the judiciary can hold accountability of political powers when they are in government otherwise the court of public is enough for their accountability. Likewise when media will provide comprehensive information, it will facilitate the public in order to reach at accurate decisions.

Whenever some institution will cross its jurisdictions it will definitely result in chaos. First the army will try to manage this chaos through intervention but if army would become controversial, there will be a complete state of anarchy. It is the collective responsibility of the political system to avoid and manage this situation. If there will be constitutional and legal relationship between the institutions, within prescribed limits then the situation will remain under control.

There are certain concerns regarding the prevailing situation,

1. People are also not satisfied with the performance as delayed justice and corruption remain main features of the history of the institution of judiciary. So lack of trust by the people of Pakistan also remains important.
2. The nature of role is also different because the judiciary does not possess the power of implementation of its decisions. So the limited role and limited power has lessened the scope of the role of judiciary in Pakistan's political culture.
3. Ascribing expectation with media and judiciary is a wrong trend as they are not the key institutions to tackle the intricate situation. As a matter of fact, the media is a source of information and awareness but it has certain limitations. Same is the case with the judiciary. Hence, it is wrong to bring the political and administrative institutions in competition rather than to an accommodating position.
4. The role of judiciary in Pakistan politics or to contain the role of military has two dimensions; the legal and the situational factors. No single factor can manage the issue.
5. The basic role of judiciary is to perform legal and constitutional duties .The political issue can be linked with the parliament. Leadership should provide the policy principles and the whole state machinery

has to follow those policy instructions to establish a mature political system.

This institution of judiciary had to face severe criticism for playing its controversial role. Probably, the core thing which the judiciary put behind her was to save the very existence of its own and not the democracy. Indeed, if there would be no judiciary, there would be no one to stop the authoritarian trends. In other words, the judiciary deems it well to sustain the democratic institution. Moreover, while peeping into the country's politics one can observe that the military ruler may even destroy this very institution, when the case is not decided in his favour. Perhaps, it was these circumstances under which judiciary deems it appropriate to heed less to democratization.

The research over this topic showed that there were some serious and grave troubles which this institution had to face. These problems badly affect its role and efficiency for democratization. Simultaneously, one could not ignore this very fact, whenever the judiciary considered that the circumstances were appropriate, it played its conducive and contributory role for upholding the democratic values. The core reason which the judiciary had to face was related to its very independences. As a matter of fact, no judiciary can play its effective role towards democratization in the absence of judicial independences. A strong institution of judiciary is inevitable for democratization. This amendment is a step towards the destiny.

We do not need any dispersion right now because as a nation and as a state we cannot afford it. Few instruments are required for viable survival and they are;

- Continuity of political process
- Rule of law
- Implementation of judicial decisions
- To keep prescribed institutional jurisdictions.
- Civilian institutions have to perform
- The security profile may be re evaluated, only then the role of army may be controlled

These trust building measures will not only revive the public trust but by practicing them the way of army intervention into politics will also be halted. So, constitutional amendments are just one element, they are not an absolute elucidation. Considerable time is needed for the political leadership to establish reliance on judiciary. It seems that all of us are not ready to sanction this time. There is a strong possibility that this over speeding can put this nation and its institutions into a yet another trial.■

CHAPTER III

THE 18TH AMENDMENT AND THE NEW NFC AWARD: IMPLICATIONS FOR PAKISTAN'S ECONOMY

Prof. Dr Ashfaq H. Khan

NFC Award

- In Pakistan, about 93 percent resources are generated at federal level and the remaining 7 percent at the provincial level.
- Provinces, thus rely heavily on federal resources for meeting their expenditure requirements.
- To maintain inter – governmental fiscal relations, Article 160 of the constitution provides for setting up the NFC at intervals not exceeding five years.
- NFC recommends to the President for the distribution of resources between the federal and provincial government.
- The President, through the Presidential Order, provides legal cover to the recommendations of the NFC.
- The 5th NFC gave the Award in 1996.
- The 6th NFC was constituted in 2000 but could not give the Award and its life expired in July 2005.
- The 7th NFC was constituted in July 2005 which gave the Award in the year 2010.
- Hence, we have a new Award after 14 years.

Provincial Share in Federal Revenue Receipts

NFC Award 2010

- Distribution of Revenues: Divisible pool taxes consist of the following taxes levied and collected by the federal government in that year.
 - Taxes on Income
 - Wealth Tax
 - Capital Value Tax
 - Taxes on Sales and Purchase of goods
 - Export duty on Cotton
 - Custom Duty

- Federal Excise Duties excluding the Excise Duty on Gas charged at well head
- Any other Tax which may be levied by the federal government
- One percent of the net proceeds of divisible pool taxes shall be assigned to the government of KP Province to meet the expenses on War on Terror.
- After deducting the collection charges of 1.0% the net proceeds of divisible pool taxes will be distributed between the provinces and federal government

	Provincial Governments	Federal Government
2010-11	56%	44%
2011-12 onwards	57.5 %	42.5%

Allocation of Shares to the Provincial Governments

- Balochistan = 9.09%
- Khyber Pakhtunkhwa = 14.62 %
- Punjab = 51.74%
- Sindh = 24.55 %

Share of Provinces in Federal Revenue Receipts

(Billion Rs)

	Revised 2010-11	Budget 2011-12	% Increase
Punjab	463.6	576.9	24.4
Sindh	277.9	324.4	16.7
Khyber Pakhtunkhwa	156.9	191.8	22.2
Balochistan	99.3	110.2	11.0
Total	997.7	1203.3	20.6

New NFC and Implications for the Economy

- A sound fiscal position is an essential for preventing macroeconomic imbalances, achieving macroeconomic stability which is increasingly recognized as a critical ingredient for promoting strong and sustained economic growth and lasting poverty reduction.

New NFC Award is a Disaster for Pakistan: Why?

- No proper homework was done.
- No research was carried out.
- The Award lacks economic foundation.
- This was purely a Political Award.
- Revenue projection was grossly unrealistic.
 - Substantial resources are being transferred to provinces.
 - Provinces lack capacity to spend money prudently.
 - Provinces lack fiscal discipline.
- The burden of maintaining fiscal discipline has now been shifted to provinces which lack discipline and capacity to spend money prudently.
- No budget deficit target can be achieved without provinces behaving in a fiscally prudent manner: Examples, last two budgets.
- New NFC Award has sowed the seed for perpetual macroeconomic crisis in the country.
- The sequencing of the 18th Amendment and the NFC Award has been wrong. The 18th Amendment should have come first followed by the NFC Award.
- Under the 18th Amendment many ministries/divisions are being transferred to provinces. The provinces needed additional resources to manage new ministries/divisions assigned to them.
- Through the New NFC Award additional resources are given to provinces to meet additional responsibility.

How to Salvage the New NFC Award?

- The damage has already been done. How to minimize its adverse effect on the economy is a challenge.
- Either we postpone its implementation for the next three years.
- Or, we must impose hard binding constraint on the part of the provincial governments to generate a targeted surplus consistent with the overall fiscal deficit target.

OFD = Federal Govt. Deficit + Provincial Governments Surplus **OFD**
= 4.0% of GDP = - 4.6% of GDP + 0.6% of GDP surplus

- We may either take the case to the Council of Common Interest (CCI) or get its approval from the National Economic Council (NEC) – the highest economic policy making body, chaired by the Prime Minister. ■

DOES AMENDED 1973 CONSTITUTION PROVIDE A MECHANISM TO END CORRUPTION AND ENSURE ECONOMIC SECURITY OF PAKISTAN?

Dr Pervez Tahir

Part I

Introduction

*T*he constitution (Eighteenth Amendment) Act, 2010 is aimed to restore the basics of original 1973 Constitution. It has enhanced the quantum of provincial autonomy significantly by devolving 18 federal ministries, abolition of the Concurrent Legislative List and assigning additional taxation powers. A reversal of federal-provincial shares in federally collected taxes and the incorporation of a multiple criteria for apportionment among the provinces under the Seventh National Finance Commission Award reinforced the idea that the strength of the federation lies in the provinces and not vice versa. This is how it should be in a diverse and pluralistic state like Pakistan. The decentralizing spirit of the Lahore Resolution of 1940 was scuttled by the Objectives Resolution of 1949, leading first to the creation of One Unit in 1955 and the subsequent military takeover in 1958 which laid the basis of a security doctrine focused on strengthening the centre. Lessons learnt from the breakup of the state in 1971 and incorporated in the 1973 Constitution were unlearned after the 1977 coup. The 1999 coup makers devolved some power and authority to the local level. Provincial powers were devolved to local level, without devolving any federal powers to the provincial level. The framers of the Eighteenth Amendment devolved federal powers to the provinces, but the provinces have undone the devolution to the local level.

In essence, the Eighteenth Amendment has been motivated by the desire to restore the rights of the provinces as self-governing entities and to enhance their participation in the affairs of the federation. Ending corruption and ensuring economic security were not the stated objectives. It cannot be described as part of the global trends towards devolution, as these trends are associated mainly to the devolution of power to the local level. Pakistan has experienced a rollback of local governance, with the provincial governments leveling charges of massive corruption on the defunct local governments. The literature on local devolution looks at its consequences on corruption and, to some extent, economic security. Devolution of power to the provinces, or provincial autonomy, and a smaller federal government also has consequences for corruption and the economy.

While devolution under the Eighteenth Amendment is politically correct as it rights historic wrongs, there may be concerns that the new institutional architecture might only devolve corruption and weaken economic security of the state. This paper is an attempt to understand whether or not this might be the case. Part II outlines the changes brought about by the Eighteenth Amendment to extend provincial autonomy in the social, economic and fiscal sectors. It also looks at the larger role of the provinces in national economic decision making that has been brought about by the amendment. Part III looks at the likely impact on corruption and broaches the subject in the context of the constitutional development in Pakistan. Part IV focuses on issues related to economic security of Pakistan. Concluding remarks are given in Part V.

Part II

The Amended Economic and Developmental Clauses

The Eighteenth Amendment has amended 102 articles in all. The economic features of the 1973 Constitution are largely contained in Part V relating to relations between federation and provinces and Part VI relating to Finance, Property, Contracts and Suits. The Eighteenth Amendment has changed many of the provisions in these Parts. Thus the Fourth Schedule comprising Legislative Lists has seen drastic revisions. The Federal Legislative List, Part I, over which the federal government has exclusive jurisdiction, had 59 entries; it now has 53 entries, with 4 revisions of 4 sub-entries. Four subjects, including major ports, census and national planning together with economic and scientific research coordination have been moved to Part II. Five new subjects have been added to the Federal Legislative List, Part II: all regulatory authorities established under a Federal Law; supervision and management of public debt; legal, medical and other professions; standards in institutions for higher education and research, scientific and technical institutions; and inter-provincial matters and coordination. The Federal Legislative List, Part II, also lies in Federal jurisdiction but matters pertaining to it are regulated by the Council of Common Interests (CCI) which has full representation of the provinces; the responsibility is shared. From eight entries, the Federal Legislative List, Part II, has now gone up to 18 entries, indicating the expansion of the participatory space in the federal decision making. The Concurrent List, with joint Federal and Provincial jurisdiction, had 47 entries; it has now been completely abolished. Except for entry 29 (boilers) moved to the Federal List Part I and entries 34 (electricity), 43 (legal, medical and other professions) moved to Federal List, Part II, all other subjects now fall in the jurisdiction of the provinces as per Article 142 (c), which allows the provinces

exclusive jurisdiction “with respect to all matters pertaining to such areas in the Federation as are not enumerated in the Federal Legislative List.”

These changes brought about by the Eighteenth Amendment have profound implications for provincial autonomy and the relations between the Federation and the provinces. By abolishing the Concurrent List and deleting certain items from the Federal Legislative List, Part I, the Eighteenth Amendment has substantially increased the quantum of provincial autonomy. Second, the role of the provinces in the decision making of the federation has been substantially enhanced by the enlargement of the Federal Legislative List, Part II, and the strengthening of the institutional mechanisms conducting the business between the federation and the provinces.

Provincial Autonomy

Provinces now have more subjects to deal with than was the case before the Eighteenth Amendment. In the first place, they have been given full and effective control of the social sectors, especially education, health, population, labour, social welfare, Zakat, Auqaf, environment, tourism, print media and cinematograph films, culture and archeology.

Social Sectors

Education: Education was mainly a provincial subject, but with an overbearing Federal presence in higher education, curriculum, syllabus, planning, policy, centres of excellence, Islamic education and standards of education. After the Eighteenth Amendment, the Federal Government can set up Federal agencies or institutes for research, professional or technical training or promotion of special studies (Entry 16 of the Federal Legislative List, Part I). It is also concerned with “Education as respects Pakistani students in foreign countries and foreign students in Pakistan” (Entry 17 of the Federal Legislative List, Part I). But the subject of “Standards in institutions for higher education and research, scientific and technical institutions” has been placed under the Federal List, Part II (Entry 12).

Other than standards of higher education and international student exchange, the provinces are responsible for the education sector. It obviates the need for the Ministry of Education and the Higher Education Commission in its pre-Amendment form. The student exchange function can be performed by the Economic Affairs Division, which already handles overseas scholarships and bilateral agreements. Standards of higher education and science can be regulated by a leaner Higher Education and Science Commission, responsible to the CCI.

Provinces are now free to have their own education policies to meaningfully reflect the socio-cultural diversities of the country.

Elementary education was already a provincial subject. But the insertion of the new Article 25A - Right to Education under CEAA makes it free and compulsory. The said Article states: "The State shall provide free and compulsory education to all children of the age of five to sixteen years in such manner as may be determined by law." The Constitution requires this law to be enacted by the Provincial Assemblies within a maximum period of two and a half years.

Health: Like education, health has largely been a provincial subject. Overtime, however, the federal government had assumed a much bigger role than the constitution envisaged. Except for port quarantine, the Federal Legislative List, Part I contained nothing related to health. The position remains unchanged after the Eighteenth Amendment. With the abolition of the Concurrent List, three key changes have occurred. First, the subjects of drugs and medicines, poisonous and dangerous drugs move to the provinces. Secondly, the provinces are now responsible for "prevention of the extension from one province to another of infectious or contagious diseases or pests affecting men, animals or plants." Thirdly, the subject of "Mental illness and mental retardation, including places for the reception or treatment of the mentally ill and mentally retarded" now fall in the provincial domain. Finally, the regulation of medical professionals has been moved to the Federal List, Part II.

Effective implementation of CEAA would mean that the Federal Ministry of Health would cease to be a regulator of drugs and medicines. It would no more be responsible for vertical programmes. There would be no need for a federal health policy. As a matter of fact, this Ministry would have no reason to exist.

Population Welfare: Although the provinces have their own separate Population Welfare Departments, the federal government has been fully funding the development budgets of the provinces. The Federal Ministry of Population Welfare administered this development programme. As a result of the Eighteenth Amendment, the subject stands fully devolved. With the subject of health going to the provinces in its entirety, the devolution of the population programme is only natural. With a view to ensuring effective delivery, the expert opinion for a long time has suggested the merger of the two ministries at the federal level, without any success. Better sense would perhaps prevail at the provincial level.

Labour and Manpower: All matters related to labour have been entrusted to the provinces. In addition to the functions already performed by the provincial departments of Labour, the Eighteenth Amendment has given the following subjects to the provinces:

- Welfare of labour; conditions of labour, provident funds; employers' liability and workmen's compensation, health insurance including invalidity pensions, old age pensions
- Trade unions; industrial and labour disputes
- The setting up and carrying on of labour exchanges, employment information bureaus and training establishments
- Regulation of labour and safety in mines, factories and in oilfields
- Unemployment insurance

In view of this comprehensive devolution, the Federal Ministry of Labour and Manpower becomes completely redundant. Provinces are empowered to have their own labour policies, with different minimum wage levels. Organizations like the Employees Old-age Benefits Institution (EOBI) and the Workers Welfare Fund (WWF) will have to be provincialized. Same will be the case with various skills and vocational training schemes and institutions. Workers and their unions have brought out a number of concerns here, particularly in regard to pensions and post-retirement benefits. These are genuine concerns and there are ways to address them without compromising the spirit of the Eighteenth Amendment.

Environment and Special Initiatives: Environmental pollution and ecology was on the Concurrent List. After the Eighteenth Amendment, environment is the sole responsibility of the provinces. This will be a great challenge, as the indivisibility of environment will require cooperation between and among the provinces. The provinces will have to implement policies related to forests, environmental degradation, sanitation and drinking water. Clean Drinking Water for All, an initiative originally based in Ministry of Environment, was moved to a specially created Ministry of Special Initiatives to speed up implementation. This Ministry will devolve along with Ministry of Environment. Energy conservation, presently part of the Ministry of Environment, will have to move to Ministry of Petroleum and Natural Resources.

Social Welfare, Zakat: Ministry of Social Welfare and Special Education dealt with social transfers to the disadvantaged sections of the society. Ministry of Zakat and Ushr oversees the discharge of this religious obligation to help the poor and the indigent. The two stands

devolved. The Benazir Income Support Programme is a scheme of social assistance falling conceptually under the purview of Social Welfare. This will have to devolve, too.

Culture, Tourism and Others: The care and protection of ancient and historical monuments and archeological sites and remains, the subject of Ministry of Culture, stands devolved. Production and censorship and exhibition of cinematograph films also belong here. The provinces already deal with newspapers, books and printing presses. The implication here is for Federal Ministry of Information to leave it entirely to the provinces. The Eighteenth Amendment makes cinematograph films and print media the exclusive domain of the provinces. *Auqaf*, administered by the Ministry of Religious Affairs, also moves to the provinces. With the subject of Islamic Education devolved to the provinces, the justification for this Ministry at the federal level is doubtful. The Council of Islamic Ideology is a constitutional body and should exist independent of this Ministry. Haj will be better organized by an autonomous regulatory body.

Economic Sectors

Business Regulations: There were a number of entries on the Concurrent List relating to transactions that form part of the business environment for the smooth functioning of the economic sectors, especially private investment. These included the following:

- Wills, intestacy and succession, save as regards agricultural land
- Bankruptcy and insolvency, administrators-general and official trustees
- Arbitration
- Contracts, including partnership, agency, contracts of carriage, and other special forms of contracts relating to agricultural land
- Trusts and trustees
- Transfer of property other than agricultural land, registration of deeds and documents
- Actionable wrongs

As is obvious, the Eighteenth Amendment makes the provinces the pivot of legislation relating to the above areas to ensure sanctity of contracts and clarity of property rights. (Regulation of legal professions, previously on the Concurrent List, has been moved to the Federal Legislative List, Part II). In addition, the provinces have also been allowed exclusive jurisdiction on shipping and navigation on inland waterways as regards mechanically propelled vessels, and the rule of the

road on such waterways; carriage of passengers and goods on inland waterways. The same is now the case for mechanically propelled vehicles.

Appropriation Subjects: The subjects mentioned so far have fallen in the Provincial domain following the termination of the Concurrent Legislative List. It must be remembered that over a period of time and under one pretext or the other, the federal government had appropriated many other subjects not mentioned in the Federal Legislative List. These include food and agriculture, livestock and dairy development, industries, local government and rural development, sports, textile, women development, youth, parts of petroleum and natural resources.

Resources

The addition of a large number of subjects in social and economic sectors to the provincial responsibilities increases the quantum of autonomy. Whether the provinces have a corresponding increase in resources to spend on these matters, is another subject. The subject needs to be examined at three levels. First, the addition to the provincial resources contained within the Eighteenth Amendment. Second, the additionality in resources provided by the Seventh National Finance Commission Award. Third, the permission granted to the provinces to incur domestic and international debt under the Eighteenth Amendment.

Revenue Sources Added by the Eighteenth Amendment: The abolished Concurrent List, in devolving subjects to the provinces, also devolved the power to levy fees in respect of any of these subjects. Further, a number of revenue sources/taxes included in the Federal Legislative List Part I, have been deleted by the Eighteenth Amendment. This means that the provinces now have the power to exploit their revenue potential. These include:

- State lotteries
- Duties in respect of succession to property
- Estate duty in respect of property
- Taxes on capital value of immovable property

State lotteries are an important source of financing specific public services in other countries, especially in the field of art and culture. It remains unexploited in Pakistan for religious reasons as well as the lack of transparency witnessed in some cases in the past. The other three

taxes, with their incidence largely on the well-to-do people, had become dormant at the federal level. Like the wealth tax, federal government had not been using them as revenue sources. The Eighteenth Amendment has provided the provinces an opportunity to exploit their potential. However, the two budgets announced by the provinces since the Eighteenth Amendment for 2010-11 and 2011-12 took no steps in this direction. The federal government considered levying a tax on gross assets in the budget for 2011-12, but was advised that capital gains related to immovable property could only be taxed by the provinces.

Sales Tax: Due to the burning nature of the topic, the General Sales Tax (GST) on services merits a separate discussion. Historically, the sales tax belonged to the provinces. In 1948, the provinces let the newly established, under-funded Government of Pakistan to declare it to be a federal subject. In 1951, the subject was permanently transferred to the government of Pakistan. The same position was repeated in the original 1973 Constitution, and the entry 49 of the Federal Legislative List, Part I, stated thus: "Taxes on sales and purchases." This tax was understood to be charged on goods only. However, the wording in the entry 49 did not make it clear. In 1976, the Fifth Amendment to the constitution clarified the position by changing the wording to "Taxes on the sales and purchases of goods imported, exported, produced, manufactured or consumed." In spite of this, the federal government started to levy it on services, in various ways including the excise mode. The provinces began to take issue with this towards the close of the 1980s when the federal government accepted the levy of a value added tax (VAT) under the Structural Adjustment Programme with the International Financial Institutions. By now the services had started to become big revenue spinners. A new Sales Tax Act was passed in 1990 with a view to eventually moving into the VAT mode fully. While this movement was slow and not very steady, the entry into another International Monetary Fund (IMF) programme in 2008 resulted in a commitment to impose a full VAT mode, called the General Sales Tax. Those who signed the agreement on behalf of the federal government failed to foresee that the provinces might assert their authority to levy and collect GST on services themselves. Having different jurisdictions for goods and services is against the very spirit of a VAT. The provinces reclaimed their jurisdiction over the sales tax on services in the Seventh National Finance Commission award given before the promulgation of the Eighteenth Amendment. The Award explicitly recognized that the sales tax is a provincial subject and there was no bar on them if they wanted to collect it themselves. The Government of Sindh declared its intention to do so. Hence the talk about a Reformed GST to get around this

difficulty to satisfy the IMF requirement. To add to the vows of the federal government and its team negotiating with the IMF, the Eighteenth Amendment made the right of the provinces crystal-clear by adding, at the end of entry 49 of the Federal Legislative List, Part I the following words: “except sales tax on services.”

National Finance Commission (NFC): Two new clauses added in Article 160 relating to the NFC make the provincial share in the vertical distribution irreversible and the implementation of the NFC awards subject to regular monitoring. These are: “(3A) The share of provinces in each Award of National Finance Commission shall not be less than the share given to the provinces in the previous Award. (3B) The Federal Finance Minister and the Provincial Finance Ministers shall monitor the implementation of the Award biannually and lay their reports before both houses of Parliament and Provincial Assemblies.”

Natural Resources: The ownership of natural resources and the related revenues have been a bone of contention between the federal government and the smaller provinces. The Eighteenth Amendment has made a number of amends in this regard.

Before the Eighteenth Amendment, the federal excise on natural gas was paid to the province of origin but not on oil. Article 161 (1) has been amended. It now has these two sub-clauses: “(a) the net proceeds of federal duty of excise on natural gas levied at well-head and collected by the federal government, and of the royalty collected by the federal government, shall not form part of the Federal Consolidated Fund and shall be paid to the province in which the well-head of natural gas is situated; (b) the net proceeds of federal duty of excise on oil levied at well-head and collected by the federal government, shall not form part of the Federal Consolidated Fund and shall be paid to the province in which the well-head of oil is situated.

Article 172 has been amended to allow the provinces 50 per cent of the ownership of mineral oil and natural gas within the province or the territorial waters without prejudice to the existing commitments and exclusive right to other natural resources within the territorial waters. The latter, among other things, means that fish stock in territorial waters belongs to the provinces. Accordingly, clause (2) of Article 172 has been amended and a new clause (3) added. These now read as follows: “(2) All lands, minerals and other things of value within the continental shelf or underlying the ocean beyond the territorial waters of Pakistan shall vest in the federal government. (3) Subject to the existing

commitments and obligations, mineral oil and natural gas within the province or the territorial waters adjacent thereto shall vest jointly and equally in that province and the federal government.”

Water and power is another area impacted upon by the Eighteenth Amendment. Article 155 previously protected interests in water affected prejudicially by the supply from a natural source. It now covers “reservoirs” as well. Article 157 (1) permits federal government to construct power stations anywhere in Pakistan. The Eighteenth Amendment has introduced an obligation to consult the host province by inserting this proviso: “Provided that the federal government, prior to taking a decision to construct or cause to be constructed, hydro-electric power stations in any province, shall consult the provincial government concerned.” A new clause (3) has been added for dispute resolution, which states: “In case of any dispute between the federal government and a provincial government in respect of any matter under this Article, any of the said governments may move the Council of Common Interests for resolution of the dispute.”

Provincial Debt: A radical change introduced by the Eighteenth Amendment is the freedom, within limits, allowed to the provinces to raise domestic as well as foreign loans and issue guarantees. Article 167 related to borrowing by provincial governments now has a new clause to this effect, which states: “(4) A province may raise domestic or international loan, or give guarantees on the security of Provincial Consolidated Fund within such limits as may be specified by the National Economic Council.”

The argument for denying this freedom in the past was to ensure the smooth conduct of monetary, financial and debt management policies. All banks set up by the provinces in the past have had problems. Mehran Bank was closed down, Bank of Punjab failed to follow prudential rules and Khyber Bank operations leave much to be desired.

Institutional Architecture

In theory as well as practice, the intergovernmental relations have not received the attention they deserve. Formal rules and terms of engagement between the federal government and constituent units are still evolving, among the constituent units even less and between the constituents units minimally. A novel feature of the Eighteenth Amendment is the institutional framework provided for an expanded and effective participation of the provinces in the decision making of the Federation. The Federal Legislative List, Part II,

comprises of subjects requiring Federal-Provincial interaction. The much ignored CCI provided in the original 1973 Constitution has been made a pivot of the reform in this sensitive area. The Parliamentary Committee on Constitutional Reform (PCCR) “built on the basic idea of the 1973 Constitution, in terms of Article 153, i.e. the Council of Common Interests, in order to promote joint supervision of federal resources and dispute management while providing a collective leadership to further strengthen the Federation” (Para 21).

Before the Eighteenth Amendment, the Federal Legislative List, Part II, consisted of 8 entries, the most important being railways, mineral oil and natural gas, public sector enterprises set up by declaring federal control by federal law in public interest and the CCI. Article 155 also authorized the CCI to deal with complaints regarding interference with water supplies. Now it includes electricity and legal, medical and other professions from the defunct Concurrent List. National planning and national economic coordination including planning and coordination of scientific and technological research, major ports and census have been added from the Federal Legislative List, Part I. New entries include all regulatory authorities established under a federal law, supervision and management of public debt and inter-provincial coordination matters.

Council of Common Interests (CCI)

Not only the scope of the Federal Legislative List, Part II, becomes larger, the CCI has also emerged as the most important forum in the new institutional framework. Its function, under Article 154 (1) remains unchanged: “The Council shall formulate and regulate policies in relation to Part II of the Federal Legislative List and shall exercise supervision and control over related institutions.” Provisions that it could make its own rules of procedure and majority rule for decisions already existed. It was also provided that dissatisfaction with the decision of the CCI could be taken to a joint sitting of the Parliament and the Parliament in joint sitting could also issue directions to CCI. Under the Eighteenth Amendment, its composition has been strengthened. It consists of the Prime Minister as Chair, the Chief Ministers of provinces and three members from the federal government to be nominated by the Prime Minister. Before CEAA, any cabinet member could be the chair. The constitution of the CCI now cannot be delayed; it has to be constituted within thirty days of the Prime Minister taking oath of office. A meeting is mandated at least once in ninety days. It shall have its own secretariat. The Parliament shall have to be informed about the activities of the CCI by submitting an Annual Report to both houses.

National Economic Council (NEC)

By moving the NEC from Federal Legislative List, Part I to Part II, the function of national planning has become the joint responsibility of the federal government and the provinces. Broadly, Article 156 (2) keeps its function unchanged except the italicized part: “The National Economic Council shall review the overall economic condition of the country and shall, for advising the federal and provincial governments, formulate plans in respect of financial, commercial, social and economic policies; and in formulating such plans it shall, *amongst other factors, ensure balanced development and regional equity* and shall also be guided by the Principles of Policy set out in Chapter 2 of Part II.” There are, however, important changes made under the Eighteenth Amendment on the pattern of CCI. Article 156 (1) specifies its composition. It is to be chaired by the Prime Minister, and the membership consists of the Chief Ministers and one member from each province to be nominated by the Chief Ministers, and four other members nominated by the Prime Minister. The meetings of the NEC can be summoned by the chairman or on a requisition made by one-half of the membership. But meeting at least twice a year is mandatory. An Annual Report has to be submitted to each House of the Parliament. The spirit of this new role of the NEC requires Planning Commission as its secretariat, with its members nominated by the provinces.

Implementation Status

The Implementation Commission set up for the Eighteenth Amendment has made steady progress. Set against the deadline of June 30, 2011 the Commission has devolved 10 ministries, nine selected functions of six federal ministries that fall under the abolished Concurrent list and proposed a Capital Administration and Development Division to cater for the needs of the federal capital. The National Economic Council has been notified according to the new composition. Instructions have been issued to the Federal Board of Revenue to avoid taxation proposals about a subject that is not included in the Federal Legislative List or was part of the Concurrent Legislative List.

A committee set up by the commission prepared options on the financial aspects involved in the devolution process. New rules of procedure of Council of Common Interests (CCI) have been approved. The Commission examined the activities of 34 ministries and proposed revisions in the Rules of Business-1973 as per the requirement of devolution.

The Council of Common Interests has decided to constitute a committee comprising of the secretary finance and four chief secretaries to work out the financial impact of the devolution and the liability of the federal government or provinces.

Part III

Impact on Corruption

Pakistan has remained among the countries perceived to be most corrupt since it was first covered by the Corruption Perception Index (CPI) of Transparency International in 1995. This consistent performance is reflected in other governance indicators as well, suggesting a systematic prevalence at all levels of government and society. Whether a function is performed by federal, provincial or local government makes no difference. The National Corruption Perception Survey 2009 ranked police, power, health, land and education as the top five corrupt departments. Except for power, all others are mainly provincial functions. The Eighteenth Amendment gives additional powers to the provinces in health and education. Electoral competition limits political interest in these sectors to job creation for friends and relatives profiting from construction contracts. Statutory regulatory bodies set up to protect public interest are also perceived to be corrupt. Their movement from Federal Legislative List, Part I to Part II is no guarantee against corruption. The same survey finds that the local government system declared corrupt by the Government of Punjab and therefore sent packing was perceived to be less corrupt than the bureaucratic system replacing it.

Corruption, defined as the pursuit of private gain through the abuse of public office, reflects failed governance, which may or may not be the result of the complex set of compromises enshrined in the constitution. A constitution provides the overarching framework for governance, but not a mechanism to end corruption. An effective mechanism to control corruption requires good policies and functioning institutions managed by accountable public servants in a transparent manner and by ensuring public participation. There is, however, a link between centralization of authority and corruption. The source of authority and power is the constitution. To the extent centralization of authority provides powers that are abused, corruption can be traced back to the arrangements under the constitution.

Devolution is a more comprehensive concept than decentralization. It makes the lower level of government fully responsible for policy, financing and execution. The general case made for devolution is that it takes government closer to the people. The pressure of those to be serviced adds another mechanism of accountability for the deliverers of services. With financing also devolved, resources are expected to be allocated more efficiently and cost recovery is much better. If the processes are also transparent, corruption is likely to reduce. This expectation is not always realized. Those opposed to devolution argue that devolution neither improves economic performance nor governance. However, the evidence presented in support of this line of argument is known to be weak. A critical issue is that these studies are agnostic to the form of devolution. Factors impacting upon corruption

include power, boundaries, capacity and differential socioeconomic characteristics. Devolution of regulatory powers and taxation may encourage irrational policy making and a mere decentralization of corruption. It also increases the danger of elite capture. Low and poor coverage of sub-national policies and politics makes this danger more real. Federal states are more corrupt than the unitary states (Triesman 2000). Most anecdotal evidence finds abundant corruption at local levels. One thing is common between theory, empirical work and anecdotes – the extent of corruption depends on design of the decentralization scheme and institutional arrangements to carry it out. Devolution works better in a democratic framework at local level. The best functioning local democracies, however, have homogeneous populations. Applied to the provinces of Pakistan, none has a homogeneous population. Not only that, the provinces are very large in size, territorially or population-wise. In the proceedings of the Implementation Commission, the issue of variable capacities of the provinces to deal with the devolved departments also came up. Taxation powers lead to what are called vertical externalities. An example of it is the increase in token tax in Punjab, which creates an incentive to car owners to register in other jurisdictions. Devolving of environment will generate its own externalities.

No wonder, Besley and Coate (1999) found little theoretical support for improved service delivery with the change in the level of government. Political economy, rather than economics, has to justify devolution. The difference for instance, may be caused by accountability and behaviour of civil servants. Another explanation is the quality of citizens' information and their voting behaviour. Some recent models based on close monitoring of civil servants or competition between jurisdictions find corruption-reducing devolution. One such model goes to the extent of suggesting corruption-free zones (Wei 2000). Models based on coordinated rent-seeking or quality of civil service reach the opposite conclusion. In the case of Pakistan, while subordinate bureaucracy is recruited from within the provinces, the leadership positions are monopolized by the centralized service groups controlled by the federal government. The Parliamentary Committee on Constitutional Reform had recommended restructuring of this system. As devolution can take different forms, this is also a factor in influencing the corruption-devolution relationship. Devolution under the Eighteenth Amendment devolves expenditures, not any significant revenue sources. Sizeable additional revenues have been transferred through the Seventh NFC, but the collection of major taxes remains with the federal government. Authority to spend without the responsibility to generate revenue affects the behaviour of civil servants towards corruption. Empirical studies also exist which suggest consistently lower corruption associated with fiscal decentralization of expenditure.

An interesting political economy model is due to Persson and Tabellini (2000), who see civil servants as agents minimizing effort and maximizing the

probability of re-election in a decentralized framework. This is the argument of decentralization bringing government closer to the electorate. Corruption is reduced if the principles, i.e. the politicians are held directly accountable. In contrast, a centralized framework delinks bureaucratic effort and reward. As opposed to this, there are studies suggesting that decentralized regimes may not be able to attract high quality civil servants because of lower rewards and prestige. (Tanzi, 1996; Brueckner, 1999; Persson and Tabellini, 2000).

It is obvious that the relationship between devolution and corruption is not clear-cut. As Shah (2008) put it, devolution “as a means of making government responsive and accountable to the people can help reduce corruption and improve service delivery.... [But] in the absence of rule of law [devolution] devolution may not prove to be a potent remedy for combating corruption.”

Part IV

Consequences for Economic Security

Economic security has various meanings in the literature. There is the narrow economic view, taken by authors like Poirson (1998), where the security factors for private investment such as risk of expropriation, civil liberties and an independent bureaucracy are considered important. In the long run, economic growth is influenced by corruption and repudiation of contracts. A commonsense view of economic security is the capacity of a nation-state to develop its economy in a self-sustained manner. It is also seen as an important part of national security. Centralization of economic decision-making and control over resources in Pakistan, within a national security paradigm, led to growth which was cyclical, with upturns sustained by foreign economic and military assistance. According to Thurow: "military power does not lead to economic power. Quite the reverse, if a country is to be a military superpower (that is, use up a lot of human and economic resources on military activities - a form of public consumption), it must be willing to be self disciplined enough to cut its private consumption to levels that insure it is not cutting back on the investments needed to keep civilian productivity growing.”

Devolution under the Eighteenth Amendment provides an opportunity to shift from state-centric security to people-centric security by bringing economic development closer to their needs and preferences. In other words, the country can move towards achieving human security by investing more in education, health and a just society to improve the material and nonmaterial life chances of citizens. Security is much more than the military defence of territory and national interest. As the latest report of the Commission on Human Security observes: “According to the traditional idea, the state would

monopolize the rights and means to protect its citizens. State power and state security would be established and expanded to sustain order and peace. But in the 21st century, both the challenges to security and its protectors have become more complex. The state remains the fundamental purveyor of security. Yet it often fails to fulfill its security obligations - and at times has even become a source of threat to its own people. That is why attention must now shift from the security of the state to the security of the people - to human security.”

The Eighteenth Amendment provides a framework for nurturing effective institutions of economic governance responsible for conceiving and executing strategies for human development strategy. The context of devolution must change the ways of converting strategy into policy. National economic planning is no more an exclusive domain of the federal government. The newly constituted National Economic Council now has effective provincial representation, and its mandate now specifically includes balanced regional development. Similarly, the Council of Common Interests is the forum for coordinating economic, development and regulatory policies. Provinces have a larger share of 57.5 per cent in the federal divisible pool of taxes. Some taxes, including the revenue spinner sales tax on services, have been devolved. The process of recognizing their rightful share in the natural resources has also begun. If need be, they are also able to borrow domestically and abroad. Before that, the provinces should mobilize their own revenue potential fully by meaningful taxation of agricultural incomes and property. Economic security is not just a matter of economic factors. An effective institutional architecture improves economic performance and human security. In time, the new institutions of economic governance will enhance the capacity of the provinces to act in their own diverse interests as well as to cooperate with each other and the federal government for maximizing collective gains.

Part V. Concluding Remarks

Enacted in the backdrop of a deteriorating economy and rising corruption at all levels of government, the Eighteenth Amendment to the constitution has done four things. First, it has allowed maximum autonomy to the provinces, giving them greater opportunities to spend. Second, the provinces have more tax powers of their own and an enhanced share in natural resources. Third, they have the power to borrow in the country and from abroad. Fourth, development planning and economic policy making is now a shared responsibility of the federal government and the provinces.

All these are landmark steps in the right direction. But greater opportunities to spend, tax and borrow also provide more avenues for corruption, which is already rampant in the provinces. The Eighteenth Amendment *per se* is no mechanism to end corruption. It is more in the nature

of an enabler for politicians to respect their constituents, who are now better positioned to monitor those charged with service delivery, i.e. the civil servants. The Eighteenth Amendment is no substitute for anti-corruption strategy and merit-based recruitment of service deliverers.

They provide a framework for moving the country from a national security state to a human security state. By taking government closer to the people, there is hope that their needs will be reflected in the governance structures. A satisfied population, free from hunger, ill-health and illiteracy is the greatest guarantee against economic insecurity. It is also the most reliable strategic asset for national security.■

References

1. Azfar, Omar, *et al.* 2004. 'Decentralization, governance and public services: The impact of institutional arrangements.' In *Devolution and Development: Governance Prospects in Decentralizing States*, ed. Mwangi S. Kimenyi & Patrick Meagher, 19-62. Burlington: Ashgate.
2. Besley, Timothy., Coate, Stephen. 1999. Centralized versus decentralized provision of local public goods: a political economy analysis. National Bureau of Economics Research, Working Paper no. 7084,
3. http://www.nber.org/papers/w7084.pdf?new_window=1
4. Brueckner, J. 1999. Fiscal decentralization in LDCs: the effects of local corruption and tax evasion. Mimeo, Department of Economics, University of Illinois at Urbana-Champaign.
5. Chattopadhyay, Rupak & Karl Nerenberg. 2010. *Dialogues on Intergovernmental Relations in Federal Systems*. Ottawa: Forum of Federations and IACFS.
6. Fisman, Raymond & Roberta, Gatti. 2002. "Decentralization and corruption: evidence across countries," *Journal of Public Economics* 83: 325–345.
7. Keefer, Philip E., Ambar, Narayan & Tara, Vishwanath. 2003. The Political Economy of Decentralization in Pakistan, <http://sticerd.lse.ac.uk/dps/decentralisation/Pakistan.pdf>
8. Liotta, P. H. 2002. "Boomerang effect: the convergence of national and human Security," *Security Dialogue* 33: 473-488.
9. Paris, Roland. 2001. "Human Security: Paradigm Shift or Hot Air?" *International Security* 26: 87-102.
10. Persson, T., Tabellini, G., 2000. Constitutional determinants of government spending.
11. Poirson, Helene. 1998. Economic Security, Private Investment, and Growth in Developing Countries. IMF Working Paper, WP/98/4 Shah, Anwar. 2008. "Corruption and decentralized public governance." In *Handbook of Fiscal Federalism* eds. Ehtisham Ahmad & Giorgio Brosio. 478-498 Cheltenham: Edward Elgar.
12. Tahir, Pervez. 2006 "Problems and Politics of Fiscal Federalism." In *Problems and Politics of Federalism in Pakistan*, eds. Pervaiz Iqbal Cheema and Rashid Ahmad Khan. Islamabad: Islamabad Policy Research Institute.
13. Tahir, Pervez. 2010. The Economics of the 18th Amendment. Presentation at the Conference on Pakistan Constitutional Reforms Process: Prospects for Inclusive Federalism. Kathmandu, May 1-2.
14. Tahir, Pervez. Re-building Institutions. Presentation at the Multi-stakeholders Conference on Floods and Beyond, organized by Pakistan Institute of Labour Education and Rsearch, Karachi, November 11-12.

15. Tahir, Pervez and Nadia Saleem. 2010. *Federalism: NFC Award, Financial Autonomy and Economic Matters in the Eighteenth Amendment*. Lahore: Human Rights Commission of Pakistan.
16. Tanzi, V., 1996. Fiscal federalism and efficiency: a review of some efficiency and macroeconomic aspects. In: Bruno, M., Pleskovic, B. eds. Annual World Bank Conference on Development Economics 1995. World Bank, Washington, D.C.
17. Thurow, Lester. 1992. *Head to Head: The Coming Economic Battle among Japan, Europe, and America*. New York: Warner Books.
18. Transparency International.
http://www.transparency.org/news_room/latest_news/press_releases_nc/2009/2009_06_17_pakistan_cps_2009
19. Treisman, D. 2000. "The causes of corruption." *Journal of Public Economics* 76: 399-457.
20. UNDP. *Human Development Report 1994: New Dimensions of Human Security*
21. Wei, S.J., 2000. Special governance zones: a winnable entry strategy for an anti-corruption reform.

18TH AMENDMENT: FINANCIAL IMPACT ON PROVINCES

Dr Razia Sultana

Introduction

The 18th Amendment is a watershed development in the politico-constitutional history of Pakistan. Many thought that in Pakistan the key to major problems was centralization of the federal system but over the years they were proved wrong as the sense of deprivation in the smaller provinces grew strong and they started demanding autonomy to secure their economic and political rights. The continued strong hold of the centre ultimately led to strengthening of nationalist groups who demanded complete autonomy and the extremists among them even raised the slogans of independence. In the economic sphere the policy made the provinces financially dependent on the center to the extent the local sources of revenue went dry.

After the 18th Amendment this position has reversed. Now the provinces would be required to raise their own finances to meet their developmental and recurring expenditure needs. The practice of receiving grants from the divisible pool affects their economic efficiency and they have to levy taxes to finance each public expenditure item.

As the concurrent list has been dissolved and all 47 items have been transferred to the provinces, there has been a huge hue and cry that perhaps provinces lack the capacity and the funds to handle and run them. The case of education, culture and environment ministries is in point.

To deal with the problems of devolution of subjects in the concurrent list to the provinces, the role of the NFC and the Council of Common Interest (CCI) has become central. As conflict resolution mechanisms these bodies would play the role for settling the matters. The recent NFC Award has raised hopes that even in the future it would play the role of an arbiter. Though there would be problems in the enforcement of the 18th Amendment however, it is one powerful way to resolve long standing center-province issues.

Historical Background of the 18th Amendment

The 18th Amendment is considered as a landmark in the constitutional history of Pakistan as it is a big step towards meeting the long awaited demand of the provinces for autonomy. Many people do not even know that it is not just security and economy related issues, but constitutional matters have equally hampered political and economic development in Pakistan. The nine years' delay in making the first constitution resulted in political chaos in the country

and several governments were dismissed after remaining in power for short spans of time. The story does not end here though. When the first constitution was promulgated in 1956 there was so much dissatisfaction and heart burning in the smaller provinces that the first martial law was imposed in the country on Oct 7, 1958 on the plea of law and order situation.

After the imposition of martial law, President Ayub introduced a presidential and federal constitution in 1962 as a solution to the political and economic disparities between the federating units especially the smaller ones. That constitution introduced three tiers of governance -- the center, provinces and local, to provide an opportunity to the people to receive services at the door step. Lack of public legitimacy and failure of President Ayub's regime to deliver on promises to the public eventually led the country to experience another martial law in 1969. One of the first steps the new martial law administrator General Yahya Khan took was the abrogation of the 1962 Constitution. Deprivation of the provinces, particularly of smaller provinces, played a central role in the agitation against President Ayub Khan. Lack of providing the constitutional safeguards led, not only to the second martial law, but the tragedy of East Pakistan in 1971.

In the aftermath of 1971 debacle, the framers of the 1973 Constitution took special steps to safeguard the rights of the smaller provinces by including a list of three subjects in the constitution that were federal, provincial and concurrent. On the concurrent list both the central and provincial governments could legislate, but in case of dispute the right of the center would prevail.

It was enshrined in the 1973 Constitution that after ten years, autonomy would be extended to the provinces. However, till the 18th Amendment provinces remained deprived of their constitutional right to autonomy.

To resolve the finance-related grievances, the NFC and CCI were put in place. The Council of Common Interest and especially the NFC, to an extent, have been successful in tackling deadlocks between the Center and Provinces. That makes the role of these two bodies very crucial. Although CCI has been ceremonial so far in practical terms, its role can be strengthened by including technocrats in its composition instead of three federal ministers.

Financial Impact on Provinces

The financial impact of the 18th Amendment cannot be fully ascertained at this point. However, some of its aspects can be understood. Surely, the 18th Amendment cannot single handedly accomplish the long cherished dream of the provinces to be autonomous unless financial autonomy is achieved by them. The current situation is that the revenue raising authority largely vests with the federal government at around 92 per cent and the provinces can raise

only 8 per cent. In terms of expenditure, the center's expenditure is at 72 per cent leaving only 28 per cent to the provinces.¹

The 18th Amendment has transferred the concurrent list to the provinces which means functional responsibilities belong to provinces now, but for fiscal responsibilities the provinces would rely on the center at least in the foreseeable future. As long as fiscal responsibility is not borne by the provinces for delivering services, autonomy in the real sense will not be achieved by them. They are used to dependence on the revenues provided by the center.

The central government provides them revenues in three modes: the divisible pool, straight transfers and grants/subventions.

The 2006 and 2009 NFC Awards have tried to enhance the provincial share in the divisible pool of taxes. Under the 7th NFC Award the provincial share in the divisible pool will increase from 47.5 per cent to 56 per cent. Under the formula agreed by provincial chief ministers, Punjab will receive 51.74 per cent of the divisible pool, Sindh 24.55 per cent, Khyber Pakhtunkhawa 14.62 per cent, and Baluchistan 9.09 per cent. In this way the share of Punjab is 1.27 points lower than the one received in 1997, Sindh is lower by 0.39 points, Khyber Pakhtunkhawa by 0.26 point and Baluchistan is the only province that has got an increase. Its share will be 1.92 points higher than the 1997 award.²

The straight transfers from federal to provincial governments are from development surcharges on gas, excise duty on gas and crude oil and net hydel profits on the basis of collection initiated in the 1991 NFC Award which has been followed by the subsequent NFCs. In addition, Khyber Pakhtunkhawa has been receiving net hydel profits from Water and Power Development Authority in round figures of Rs. 6 billion annually since 1991. The 2009 NFC Award resolved the outstanding arrears' issue of net hydel profits and development surcharges on gas. In this award the proportion of straight transfers has displayed significant increase.³

Prior to the 1991 NFC award, the provinces were given grants to finance their revenue deficits. It created incentives for provinces to increase revenue deficits, undermining major principles of financial responsibility and fiscal understanding. The 1991 and 1996 NFC awards promoted the concept of grants for fiscal parity between smaller provinces. Special grants were given to two smaller provinces equivalent to Rs.3.3 billion to Khyber Pakhtunkhawa and Rs. 4 billion to Balochistan. These grants were inflation indexed and were

¹ "The State of the Economy Devolution in Pakistan," Fourth Annual Report, Institute of Public Policy, Braconhouse National University,(Lahore) 2011, <http://ippbnu.org/files/4AR2011.pdf>

² Shahid Javed Burki, "Provincial Rights and Responsibilities," *Journal of Economics*, 15:SE (September 2010) : 12.

³ "The State of Economy Devolution in Pakistan," 2011, 91.

given for five years. Incentives of matching grants for higher fiscal effort to provincial governments was also introduced, subject to own revenue growth exceeding 14.2 per cent. A maximum limit however, was prescribed for the matching grants. In the 2006 revenue sharing arrangement, total grants for provinces were enhanced from Rs.8.7 to Rs.27.7 billion with provision for further increase linked to the growth of net proceeds in the divisible pool. Punjab and Sindh, which were not given any grants in 1996 award, were entitled to receive Rs 3.1 and Rs 5.8 billion respectively. Besides, Rs.9.7 billion and Rs.9.2 billion respectively were given to Khyber Pakhtukhawa and Baluchistan. By 2009-10 these grants increased to almost Rs 58 billion. The 2009 NFC Award has discontinued the transfer of grants to the provinces. Only Sindh is getting Rs 6 billion grant in lieu of abolition of zila tax.⁴

Similarly, transfers to provinces have increased by Rs.222 billion in 2010-11 because of the 7th NFC award. In fact transfers would have been lower by over 27 per cent if revenue sharing in 2010-11 had continued to take place according to the previous revenue sharing arrangements. The revenue gains are those budgeted at the start of the fiscal year 2010-11. An important emerging issue is the realization of the gains. Indicators after the first eight months in the current year are of a shortfall of close to about Rs 75 billion.⁵

Impediments and Prospects for Improvement of Governance at Provincial Level

Despite the 18th Amendment under which 47 subjects in the concurrent list stand transferred to the provinces such as population, planning, electricity, tourism, trade unions, trusts, arms and explosives, transfer of property and registration of property, arbitration, bankruptcy, adoption, marriage and divorce, general sales tax on services⁶ the autonomy so provided will not necessarily lead to economic efficiency. It is too early to expect from the provinces to foot their development plans or arrange to finance governance related measures. While according to Wicksellian law, each public expenditure item should be coupled with a tax to finance it so that the public knows how much it is paying for the services provided,⁷ the lack of such an arrangement thus far will be a major hurdle in transferring autonomy in letter and spirit. The case of Khyber Pakhtunkhwa is in point as it has imposed no tax in the current budget for 2011-12. Even the federal budget has imposed no agriculture tax to enhance sources of revenue.

⁴ Ibid.

⁵ Ibid., 92.

⁶ Shahid Javed Burki, "Provincial Rights and Responsibilities," 6, See also, "18th Amendment: Implementation Commission Report Unveiled," *Express Tribune* (Islamabad) May 4, 2011.

⁷ Ibid., 10.

Corruption is rampant in the financial sectors of provincial governments. According to Amnesty International, Khyber Pakhtunkhwa and Baluchistan are the most corrupt governments in Pakistan. Allotting fiscal autonomy and expecting the allocation of that money fairly for public services seems next to impossible. How and when corruption can be controlled cannot be pledged in at least the foreseeable future.

Of course, the 18th Amendment is a milestone in redressing the grievances of the federating units against the centre; however, there is a need for taking a series of steps to fully implement the act. Also it is a quantum leap in the right direction which will implicitly make the provincial governments more efficient and capable to deliver services to the local people. The cases of security, education and health are in point. It is believed that services are better delivered as much as the government of whatever level is closer to its beneficiaries.

The Role of NFC and CCI for Strengthening Financial Position of Provinces

The systematic way to transfer revenues to provinces is workable through the National Financial Award, which is constituted under Article 160(1) of the constitution. Its charter includes distributing tax receipts, issuing random transfers such as grants and recommending the borrowing of funds. Several awards have been issued to streamline the share of the divisible pool of tax receipts essentially on the basis of population. Awards issued under military governments, in 1961 and 1964 under Ayub Khan, 1979 and 1985 under Gen Zia and in 2000 and 2006 under Gen. Musharaf have failed to develop a consensus between provinces and thus ended up in deadlock. But the 1974 Award under Bhutto and the 1991 and 1996 Awards under Nawaz Sharif were based on consensus. The latter increased the share of provinces from 28 to 45 per cent of the federal revenue. Among provinces Punjab got 57 per cent, Sindh 23.28, NWFP (Khyber Pakhtunkhwa) 13.54 per cent and Baluchistan 5.50 per cent.⁸

In 2006 after NFC failed to reach a consensus, President Musharaf declared the provincial share at 45 per cent with an increase per annum up to 50 per cent in 5 years. A major breakthrough came in 2009 when the 7th NFC Award increased the provincial share of the divisible pool from 47 per cent to 56 per cent for 2010-11 and to 57.5 per cent for the following four years. To ensure equality among the provinces in terms of distribution of revenue from the divisible pool, new criteria for the award has included population 82 per cent, poverty 10.30 per cent, revenue generation 5 per cent and inverse

⁸ Dr Mohammad Wasim, *Federalism in Pakistan*, Forum of Federations, (August, 2010), 13.

population density 2.7 per cent.⁹ So far this has been the most fruitful step in the direction of fiscal federalism in Pakistan.

The 18th Amendment has made mandatory the prior consultation of the federal government with the provincial government where hydro-electric power plant is to be established. Secondly, the share of the provincial governments should not be less than what it was in the previous award. Thirdly, there would be biannual monitoring of implementation of the award by federal and provincial finance ministers and lastly, their reports would be presented to the National and Provincial assemblies.¹⁰ In the 7th NFC award, a comprehensive effort has been made to deal with financial disputes and issues of the provinces in an amicable way. Under Article 153 of the 1973 Constitution the Council of Common Interests (CCI) has been created to take care of disputes between the Center and provinces. It is sometimes understood to be a quasi-executive body because it comprises the Prime Minister and Chief Ministers of provinces and their representatives. CCI is powerful in theory, but weak in practice. The meetings of CCI are few and far apart. This makes CCI ineffective as an institutional mechanism for conflict resolution. The 18th Amendment provided for the periodical presentation of the CCI report to both the houses of the parliament. It enhanced the membership of CCI by adding 3 federal ministers, made its quarterly meetings compulsory, provided for a permanent secretariat and expanded its mandate to include supervision and control over related institutions. These changes have increased the importance of CCI. Although it is as a conflict resolution mechanism that its role will have to be seen, whether it will deliver or get bogged down. in disputes between the center and the provinces.¹¹

Conclusion

Given the turbulent situation in Baluchistan and militancy in Khyber Pakhtunkhwa as well as continuous wave of violence in Karachi, the 18th Amendment seems to be a timely step forward not only to handle grievances of provinces, but to provide instant relief to people. The 18th Amendment and the 7th NFC Award are the accomplishments of the current government and there are high hopes that the chronic demand of provincial autonomy has been redressed as the concurrent list, through which the central government used to dominate the provinces, has been transferred to the provinces.

However, reliance of provinces on the divisible pool for provision of revenues does not empower them to attain financial autonomy. Many experts believe that as long as financial capacity of the provinces is not created to tax

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid., 12.

and generate their finances to fund services to the people, full autonomy that is envisaged in the 18th Amendment will not be exercised by the provinces. The menace of financial corruption, especially in the provinces, will hamper the transfer of fiscal autonomy to provinces and their reliance on federal government for funding will continue under such circumstances.

The test of the 18th Amendment will lie when it is fully implemented.. At present, only functional responsibility has been transferred and for financial support provinces will have to depend on the central government.

As may be understood from the tone of the act, that it is an attempt to readdress the longstanding governance issues in the federating units which have aggravated with the passage of time it is yet to be seen if it solves all the related issues or only proves itself to be a step in that direction.■

CHAPTER IV

CHALLENGES OF DEVOLUTION OF POWER TO THE PROVINCES

Zafarullah Khan

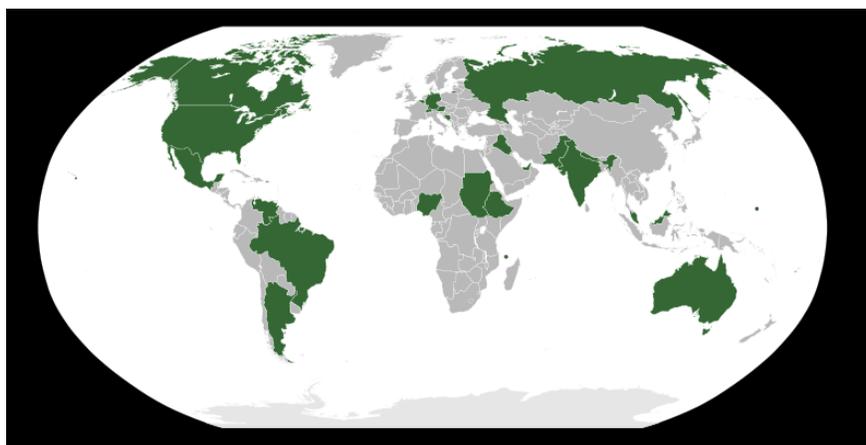
Vision of the Founding Father

- ▶ *“The theory of Pakistan guarantees that federated units of the national government would have all the autonomy that you will find in the constitutions of the United States of America, Canada and Australia. But certain vital powers will remain vested in the Central Government such as the monetary system, national defence and other federal responsibilities.”*

Quaid-i-Azam Muhammad Ali Jinnah

(An interview with the Associated Press of America 8th November 1945)

Federally Organized Countries



Federally Organized Countries

- ▶ Two to three **orders** of Government (on same set of people)
- ▶ Written **constitution** – amended in **consensus or 2/3**
- ▶ Some genuine **autonomy** for each order. Respect for diversity.
- ▶ Representation of **provinces in key federal institutions** (Examples: The Senate, Council of Common Interest, National Finance Commission, civil service, armed forces etc)

- ▶ Procedures to rule constitutional disputes (Courts)
- ▶ Rules and institutions for conducting relations (CCI, NEC)
- ▶ Only 28 out of 193 countries are federally organized i.e. 40% of the world population (Coming together & Holding together Federations)
- ▶ Federal diversity is different from uniformity
- ▶ Pakistani experience “Centralist Federation.” Now democracy is trying to create a democratic and participatory federation. Coercive to Co-operative.

Pakistani Federalism

- ▶ Federalism as an aspiration figures in the Pakistan Resolution of 1940.
- ▶ The adoption of the Government of India Act of 1935 as the provisional constitution at the time of independence undermined the original federal vision for the country.
- ▶ The introduction of the parity formula and the creation of the One Unit (1955), under which the provinces of West Pakistan were merged into one unit further frustrated the federal dream.
- ▶ The Constitution of 1956 created a formal federal polity but was abrogated by Ayub Khan in 1958. The 1962 Constitution created by a military regime further centralized the governance structure.
- ▶ The Constitution of 1973 enshrined a federal structure with three tiers of governance - local, provincial and federal but the constitution was substantially amended by military rulers, Zia-ul-Huq and Pervez Musharraf.

Odd Center-Province Experiences

- ▶ “Federally planned” and “Provincially executed” [Donor dependent, policy errors, non-utilized development budgets, etc]
- ▶ Failed Local Government Initiatives (Basic Democracy, National Reconstruction Bureau’s system.
- ▶ Federal bureaucrats (CSS) down to Tehsil.
- ▶ Paramouncy of Federal over Provincial due to Concurrent List
- ▶ Blurred boundaries of Residual Power (Article 142). Central encroachments.
- ▶ Governor Rule and emergency.

Post-18th Amendment Situation

- ▶ Out of the 47 subjects of the Concurrent list one item Boiler (no. 29) has been shifted to the Federal Legislative List-I. And two items i.e. Electricity and Legal, medical and other professions to the Federal

Legislative List-II (Participatory management both by the Federation and the Federating units through Council of Common Interests)

- ▶ Four subjects have been shifted from part one of the Federal Legislative List to part two (shared responsibility). These subjects include:
 1. Major ports, that is to say, the declaration and delimitation of such ports, and the constitution and powers of port authorities therein.
 2. Census
 3. Extension of the powers and jurisdiction of members of police force belonging to any province to any area in other province to exercise powers and jurisdiction in another province without the consent of the government of that province; extension of the powers and jurisdiction of members of a police force belonging to any province to railway areas outside the province.
 4. National planning and national economic coordination including planning and coordination of scientific and technological research.
- ▶ Five entries omitted from Federal List-1
- ▶ Four new subjects have been added to the Federal Legislative List-II (Shared responsibility).
 1. All regulatory authorities established under a Federal Law
 2. Supervision and management of public debt
 3. Standards in institutions for higher education and research, scientific and technical institutions
 4. Inter-Provincial matters and coordination
- ▶ Shared ownership in oil, gas and territorial waters (Article 172). Say in water management (Article 155) Power generation (Article 157)
- ▶ Resource distribution for provinces (7th NFC, Control over natural resources, GST on Services, duties in respect of succession to property, estate duty in respect of property, Capital gains, powers to raise loans etc)

Democracy Delivers

- ▶ There was a commitment to abolish the Concurrent List within 10 years after the enactment of the Constitution of Islamic Republic of Pakistan on August 14, 1973. The deadline passed as on August 14, 1983, the Constitution was in abeyance under military regime.
- ▶ Practically the original and cleaned Constitution of 1973 has worked only for five years. (From August 14, 1973 till July 5, 1977 i.e. 4-year and now from April 20, 2010 till today i.e. one year and two months).

In this way Pakistani democracy can rightly take pride that it is fulfilling its commitment to the people of Pakistan within only 5-years.

- ▶ Rest of the period was either an era of suspended Constitution or hybrid military regimes and diluted democracy under the infamous 8th Amendment during Zia regime.

Is There Anything New?

- ▶ Questions of Commitment (political), Capacity (administrative) and Capital (fiscal)
- ▶ No new institutional architecture. Already line ministries/ department exists at provincial level.
- ▶ Policy and legislative autonomy to provinces
- ▶ July 1 symbolism (On July 1, 1970 centralized One Unit was abolished). Designated as Day of Provincial Autonomy

The Way Forward

- ▶ Trust provinces (transfer to be completed by June 30, 2011, transition *institutional and human capital i.e. provincial services*, transformation)
- ▶ Take democratic devolution down to districts (Article 140-A)
- ▶ Provinces can come to federation (Article 147 to be endorsed by the Provincial Assembly)
- ▶ Constitutional Amendments
Sanctity (*can't change even a full stop or a coma*) and Flexibility (*amendments through prescribed mechanism*)
- ▶ Facilitate transition (Cost of devolution, hand-holding etc. The CCI has done it.)
- ▶ Allow ‘*de facto* concurrency’ and “Federalism Test” for future national projects
- ▶ Create Federal culture and mindset
- ▶ Reform politics and parties
- ▶ Strengthen provincial civil services
- ▶ Pro-active civil society and media

New Pakistan is in Making

- ▶ Understand it, grasp the opportunity and contribute to realize it
- ▶ Perform or perish
Federalism/democracy is always a work in progress. Countries are not carved on stone, rather they are organic and dynamic. They always reform to respond to new challenges.

Remember Dinosaurs were huge, but they perished when they lost their compatibility. ■

AFTER 18TH AMENDMENT: FEDERATION AND PROVINCES

Akbar Nasir Khan

As we are waiting for the first dawn of 2012 and entering into the fifth year of democratic rule in Pakistan, we see that Pakistan is undergoing a dual Transition: from Military rule to Civilian government and from transfer of powers from Central to Provincial governments. The first transition has been marred by the investigations against Mr Hussain Haqqani over his alleged involvement in writing a memo to authorities in the United States. Any guess about the second transition will be too early to make despite all the hopes which have been pinned on the passage of The Constitution (Eighteenth Amendment) Act, 2010 (CEAA) by the National Assembly on April 8, 2010¹. My premise is based upon experiences in the neighboring countries, including creation of Pakistan itself some 65 years ago. If these transitions are not peaceful, timely and inclusive then they may embitter the relationships among the federating units in the years to come.

Starting a debate on federalism versus provincialism is one of the many other valuable contributions of IPRI. In 2006, Mr Hasan Askri Rizvi presented his views about “Problems and Politics of Federalism in Pakistan”. He enumerated six pre-requisites for a federation:

1. A written Constitution and its supremacy
2. Division of powers between federal authority and governments of constituents units with constitutional guarantees
3. A participatory political system
4. Independent Judiciary
5. Processes and institutions to facilitate inter-governmental collaboration in the areas of shared interests
6. Shared political goals and positive experience of working together

¹ Human Right Commission of Pakistan “The Constitution (Eighteenth Amendment) Act, 2010 (CEAA) was passed by the National Assembly on April 8, 2010. In its original form and up to the seventeenth amendment, the 1973 Constitution contained a number of economically relevant features. The most important among these formed part of Part V relating to Relations between Federation and Provinces and Part VI relating to Finance, Property, Contracts and Suits. Under the CEAA, significant changes have been made in both Parts. As a result, the Fourth Schedule comprising Legislative Lists has undergone major changes. There are significant changes in Federal Legislative Lists Part I and Part II. Concurrent List, over which both the Federal and Provincial Governments exercised jurisdiction, had 47 entries; it has now been abolished. According to Article 142 (c), the provinces have exclusive jurisdiction “with respect to all matters pertaining to such areas in the Federation as are not enumerated in the Federal Legislative List.”

We know that the federal system is a “Governance arrangement marked by unity in diversity”. This governance arrangement is executed in the light of a mutually agreed written constitution which exists in Pakistan. However, the question of the supremacy of the constitution is closely linked to the existence of such a document. During the two longest periods of military rule in Pakistan after 1979, the existence and supremacy of the 1973 Constitution was seriously affected. Arbitrary changes in the constitution were made by the military rulers without any meaningful agitation by the people who could have believed in the supremacy of this sacred social contract. This tampering with the document was deliberate to belittle its significance and ensure that democracy never found roots in the minds of the people. So, the first and foremost element of a democratic federation was weakened over time.

All political parties, because of one main characteristic—provincial autonomy, accepted the Constitution of 1973. The experience of One Unit taught the people to devolve the powers from federation to provinces. Regional and nationalist parties welcomed this more than other parties. The existence of the concurrent list gave the federation the leverage to over ride provinces. There were no constitutional guarantees for redressal of grievances of provinces. In Zia’s regime, article 58-2(b) gave the president enormous powers and he was putting his weight with national assembly and federation rather than the provinces. Due to lack of constitutional guarantees, the federation was excessively using its mandate to legislate on provincial subjects due to the overlapping in the concurrent list. Legislation at the centre was totally without provincial input and provinces could not recommend, alter or object to the legislative process effectively. At the time when change of government was required or when it suited some people at the helms of affairs, the question of consulting provincial governments and their representatives was never raised and provincial governments were considered to be tied with an umbilical chord with the federal government. Very few times in the country’s history, when two different parties happened to be ruling at the center and the provinces the, outcome was re-elections within three years in an effort to control both the centre and provinces. Hence working together of different political parties governing in the centre and provinces were never a good experience.

Without going too much back into the history of Pakistan, we can see that the over centralized and dictatorial decision-making process in Zia and Musharraf eras resulted in eliminating the democratic process even from the so-called parliaments. Not only that, political parties, due to the repressive regimes, did not do enough to promote the culture of democratic representation at the grass root level. Therefore, political representatives were always looking for ways to gauge the direction of the wind to join a party, which would form the government. When such a breed of politicians entered the parliament they did not work for the development of a participatory

political system which could have strengthened the federation. They had no role models to follow in this regard at the provincial or federal levels. The outcome was a political system based on appointing favourites as advisors. No matter which party formed the government, essentially it was always a coterie, which was making all policies and reaping the benefits.

This attitude of politics for personal benefits vis a vis institutional development was not limited to political leaders only. With this kind of leadership, it was naïve to expect that they would focus on developing some institutions like judiciary and Election Commission of Pakistan or other key institutions, which could have established the rule of law. The judicial system was also unable to act as a forum to solve the constitutional issues and act as a watchdog and safety valve for parties to avoid any undemocratic adventures. The justification for martial laws and validation of military coups provided by the higher judiciary deepened the mistrust of public about the judiciary. The lack of independent judiciary, widened the gap between the federating units and resentment of provinces increased over issues like distribution of assets, elections, census and NFC awards.

The fifth element of federation was the presence of processes and institutions for inter provincial collaboration and cooperation. External pressures in the shape of Afghan crises and internal security situation did not let anybody to work on the strategic issues of Pakistan. Provinces next door to the theater of war were already too much stretched and their internal economy was badly affected. On top of it, the centre was more engrossed in external affairs and foreign policy for some unforeseen long term fruits. The Council of Common Interests was in the constitution but nowhere on the ground. No meaningful decisions were taken in this forum. Good experiences were few and far between. The NFC Award of 1991 was much appreciated where water distribution formula among the provinces was accepted by all. There were always complaints by the provinces about census and their representation in jobs. It seemed that the interests of the units were not mutually accepted and respected. Bitter debates on issues like Kala Bagh Dam are just one example where controversies were taken too far because of the perception that Punjab was trying to push for its interests at the cost of others like Sindh and KPK. Balochistan had always complained about not receiving its share in federal resources and neglect from other provinces. Voices of complaints turning into anger and now demands of separation are no secret. These experiences of provinces working under one constitutional arrangement have convinced all political actors to rectify the situation and at least take immediate steps towards that. The passage of the Seventh NFC Award was first right step towards that direction. Resentments were on the rise among the federation and provinces so it was the need of the time to address the demands of provincial autonomy. In this backdrop the CEAA is an effort to make amends

for the unpleasant history of acrimonious relations between provinces and the centre.

Much ink has been spilled over the pros and cons of this historical development but I will be cautious to mention that these jubilations will last only if processes are carefully mentioned during the implementation of this “new social contract” under independent institutions. I will explain briefly what is meant by processes and independent institutions. As in the past, again in the constitutional change process, provinces were not involved. It is not that there is not much attraction in CEAA for them but it was an excellent opportunity to give them all they wanted and satisfying their needs and it could have given them time to adjust and also understand their limitations and seek their cooperation with the centre. However there was no discussion with provinces or parties about conditions or prerequisites of such changes from the centre. It could have been a good time for separatists in Balochistan to offer an olive branch and bring them on the table for legitimacy and participatory process. Although it is one view and it can be said that with such extreme efforts the possibility to reach consensus could have been compromised.

After the negotiation process there is much more to come. There is a debate in the provinces about the role, scope and even existence of any local government system. The last few months have seen whimsical decisions about local governments system’s enactment and repealing that over night and more than once in Sindh. Similarly in all other provinces there is no local government system of elected representatives in existence. Did the provincial autonomy mean the shifting of one centre of concentration of power to four others? If the fruit of devolution of power as a result of CEAA are not reaching at local district level, then the whole exercise becomes questionable. At present, the whole development sector, almost forty subjects have been transferred from the centre to the provinces. The provinces do not have the capacity to deal with all issues nor the provincial leadership has the ability or will to handle this gigantic task of successful implementation of CEAA.

Provinces have raised many questions about the will of the federal government to implement the CEAA. The transfer of assets, records, human resources have been cumbersome and anything but transparent and systematic. Invention of new ministries and divisions with different names about subjects which have been transferred to provinces is very questionable and against the spirit of CEAA. Ministry of Disaster Management and Ministry of Human Rights are two issues in point. The Capital Affairs division and Ministry of Interprovincial Coordination are two other examples. The Ministry of Sports has been abolished but many functions have been transferred to the Sports Board rather than devolving them to provinces.

Same is the case with distribution of assets. Very senior and foreign qualified officers capturing prime location offices near Margalla hills are not

able to devise a system of distribution of assets and efficient ways to protect the rights of employees and pensioners. Nobody in the federal government had the clue that how new departments are developed and how transition takes place in modern countries. Many of them might have done Ph.D on these issues and will be ready to offer their services if offered good money. The point is not to criticize the bureaucracy or individuals. The issue is to highlight the negligence and lack of political will and bureaucratic non-cooperation in implementing a landmark legislation in such a poor manner that people stop believing in the constitutionalism and pray for some extra legal framework which delivers some direct results bypassing all norms and process which can pave the way for a bright future. May be there is deliberate effort to sabotage the passage of CEAA or may be there is no incentive for the bureaucrats to do this job well. In either case, the mistrust, among the provinces and center has increased instead of decreasing.

The essence of a democratic process, at least in the present times, is the way to elect representatives through the election process. The CEAA has opened the doors for improving this process and initiating electoral reforms. The government will have to legislate so that the legal framework conforms to CEAA. The electoral reforms were in the offing already after Pakistan's ratification of International Covenant of Civil and Political Rights (ICCPR) and extending the political parties act to FATA and enactment of new executive order in Gilgit Balitistan. However, it should not be considered a compulsion for the state, though it is, to make such changes due to CEAA or ICCPR. It is important to harmonize the election laws and processes for better legal framework and developing good understanding of the citizens about this election process and to improve it. The success of CEAA, as mentioned earlier, will depend upon the process of crafting these electoral reforms and making this exercise inclusive of all political entities and even public at large that can contribute in the process. Unless these changes are not made in the primary legislation, it will not be possible to fulfill the requirements of ICCPR or implement the CEAA.

The CEAA was much discussed because of the controversial procedure of selection of judges. Soon after that the 19th Amendment had to be passed to clarify the situation and appease the judiciary by appointing a Judicial Commission with representation of government and opposition members. The process has not been without hiccups but so far it is running well. The excessive domination of judicial discretion in the commission has created resentment even within the judiciary but without commotion. It seems that during the tenure of the present leadership of the Supreme Court there will not be any problem but ultimately this may cause issues about favoritism and discretion of the judges about internal issues of selection and promotion in higher judiciary.

The CEAA empowers the provinces to control, along with the centre important issues like regulation, ports, census and 18 other important subjects. Almost forty subjects have fully devolved to provinces after abolition of concurrent list and the whole social sector (e.g. labor, social welfare, Zakat, *Auqaf*, environment, education, health, population, tourism, print media and cinematograph films, culture and archeology) lies with the provinces. Where provinces should be euphoric on this gain, it also raises the issue of capacity of the provinces to deal with the situation and handle these additional responsibilities with grace and extra hard work. This shifting of balance of powers after CEAA is an announcement of development partners of the state to realign their policy framework on provincial lines and keep the balance between the provinces and the centre.

The CEAA has reinstituted the Council of Common Interests (CCI) to deal with the issues listed in Federal list-II which relate to all provinces and the centre. The composition of this constitutional body is chief ministers of all provinces and representatives of the federation providing a participatory framework for all. It will be meeting once in a quarter. The success of CEAA and federation is guaranteed if CCI can become a meaningful forum for dispute resolution, economic development and future planning by joint endeavors of the federal and provincial representatives. The provinces have also got a say in the enactment of emergency rule where the respective provincial assembly's approval is required before the center's action. This will not only lengthen the process of such imposition but also make it difficult to suspend the basic rights of the citizens in the name of emergency.

However, provinces have got a major role in National Finance Commission with addition of two new clauses in Article 160. These clauses state that "(3A) the share of provinces in each Award of National Finance Commission shall not be less than the share given to the provinces in the previous Award. (3B) The Federal Finance Minister and the Provincial Finance Ministers shall monitor the implementation of the Award biannually and lay their reports before both houses of Parliament and Provincial Assemblies." By passage of 7th NFC Award before CEAA, it has fixed the highest share of the provinces since inception of new Pakistan and these clauses make it irreversible. Another door has been opened for the provinces to issue guarantees and raise domestic and foreign loans. New clause "(4) A province may raise domestic or international loan, or give guarantees on the security of Provincial Consolidated Fund within such limits as may be specified by the National Economic Council" under article 167 which has resolved the problems which were faced by provincial banks in the past. There is potential that debt management and monetary policies will be disturbed but it has helped the provinces to act responsibly and play a constructive role in the economic issues of the federation. The economic homogeneity or coordination in the federation is maintained by reforming National Economic

Council (NEC). In its advisory capacity, it can review and advise federal and provincial governments on economic planning and implementation. The effective working of the NEC, NFC and the CCI will determine the relationship between the provinces and the federal government. If the experience of the federating units in the new social contract is pleasant then it is certain to expect that peace dividend will be shared among all. However, if the experience is not pleasant and any of the dual transition takes an ugly turn then this unstable federation may fall apart. There are many potential points to predict this unhappy ending.

After the CEAA, the people of the Federally Administered Tribal Area (FATA) have been given political rights by extending the Political Parties act to this border region. Similarly, through an executive order, reforms have been implemented in Gilgit Balitistan (GB). Azad Jammu and Kashmir (AJK) is already under a different administrative set up and so is the Capital city of Islamabad. All these regions, with the exception of Islamabad, are border regions and all of them are under federal government. Only in FATA, there is the claim of the Taliban to have territorial control and inability of the government to effectively enforce its writ. In GB and AJK there are no such issues. However, governance of these areas provides a chance of healthy competition of good democratic governance between provinces and the federal government. We are already aware of the centrifugal voices from a section of Balochistan due to poor governance by provincial and federal governments. If after giving provincial autonomy in the form of CEAA, people still did not believe that they have been empowered and fruit of devolution are reaching them, then it will be very difficult to console them with another constitutional arrangement limited to present boundaries of the state. Therefore, the only chance with the people at the helms of affairs remains the successful and effective implementation of CEAA in true spirit. There is no going back.■

IMPACT OF EIGHTEENTH AMENDMENT ON RESOLVING THE ISSUE OF BALOCHISTAN

Dr Naheed Anjum Chishti

Introduction

The Founder of Pakistan, Quaid-e-Azam Muhammad Ali Jinnah, envisaged Pakistan;

Wherein the principle of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed.

Adequate provision shall be made in the constitution of Pakistan to safeguard the legitimate interests of minorities and backward and depressed classes. The three constitutions of Pakistan with different political schemes were implemented but the targets have not been achieved as yet.

Balochistan geographically is the largest province of Pakistan. Political unrest in Balochistan demands constitutional and political solution. The Eighteenth Amendment shall have an impact on resolving the issue of Balochistan. The research article cites the provisions which will be helpful in resolving the problems of Balochistan. The researcher refers the original constitutional documents and articles written on the related topic. Conclusion, recommendations and bibliography is in the end.

Balochistan in its Perspectives

The landscape of Balochistan has absorbing peculiarities. It is spread over more than 45 per cent of Pakistan's total area, and is inhabited by less than 5 per cent of Pakistan's population. Roughly half of the population is ethnic Baloch; the remaining half comprises Pushtuns and settlers from other provinces. The means of travel are meager, the deficient infrastructure distorts the time and space conception.

Water is a scarce commodity. Media access is limited. The people of Balochistan are one of the poorest communities of Pakistan with the lowest human development indicators like literacy, employment rates, life expectancy etc.

Balochistan has a long history of political unrest. There has been armed resistance against government. The overwhelming majority of ethnic Baloch groups advocate greater autonomy and a handful of dissidents wish cession. A series of incidents and broken pledges have eroded Balochistan's trust in the federal government. In November 2009, the federal government attempted to address the grievances of Balochistan about economic and political deprivation by coming forth with a package of laws: *Aghaz-e-Haqooq-e-Balochistan*.

However, the implementation has been rather slow. Measures like 7th National Finance Commission Award and 18th constitutional Amendment are pertinent corrective steps, but lack the requisite speed for follow-up actions.

Eighteenth Amendment

The 18th Amendment to Pakistan's constitution became law after country's president signed it on April 19, 2010. This historic accomplishment was achieved after many rounds of discussions and compromises. The key achievement was the restoration of much of the original 1973 Constitution and to shift away the massive power that was given to the Presidency under generals Zia-ul-Haq and Pervez Musharraf.

The turbulent constitutional history of Pakistan shows the pitfalls and hurdles to provide social justice and provincial autonomy to the deprived province of Balochistan.

29. Principles of Policy

- (1) It is the responsibility of each organ and authority of the state, and of each person performing functions on behalf of an organ or authority of the state, to act in accordance with those principles in so far as they relate to the functions of the organ or authority.
- (2) In so far as the observance of any particular principle of policy may be dependent upon resources being available for the purpose, the principle shall be regarded as being subject to the availability of resources

8. Fundamental Rights

Laws inconsistent with or in derogation of Fundamental Rights to be void.

- a. The state shall, promote, with special care, the educational and economic interests of the backward classes or areas;
- b. remove illiteracy and provide free and compulsory secondary education within minimum possible period;
- c. enable the people of different areas, through education, training, agricultural and industrial development and other methods, to participate fully in all forms of national activities, including employment in the service of Pakistan.

25 a. Equality of Citizens

- (1) All citizens are equal before law and are entitled to equal protection of law.
- (2) There shall be no discrimination on the basis of sex.

- (3) Nothing in this Article shall prevent the state from making any special provision for the protection of women and children.
 [1. (25).A. The State shall provide free and compulsory education to all children of the age of five to sixteen years in such manner as may be determined by law.]

Provincial Consolidated Fund and Public Accounts

- 118. All revenues received by the provincial government, all loans rose (sic) by that government, and all moneys received by it in repayment of any loan, shall form part of a consolidated fund, to be known as the provincial fund.
- All other moneys, received by or on behalf [of] the provincial government; or received by or deposited with high court or any other court established under the authority of the province; shall be credited to the public account of the province.

National Finance Commission

160. (1) within six months of the commencing day and thereafter at intervals not exceeding five years, the President shall constitute a National Finance Commission consisting of the Minister of Finance of the federal government, the Ministers of the Finance of the provincial governments, and such other persons as may be appointed by the President after consultation with the Governors of the provinces.

160 (2) it will be the duty of the National Finance Commission to make recommendations to the President as to:-

- The distribution between the federation and the provinces of the net proceeds of the taxes mentioned in clause (3).
- The making of grants-in-aid by the federal government to the provincial governments.
- The exercise by the federal government and the provincial governments of the borrowing powers conferred by the constitution.
- Any other matter relating to finance referred to the Commission by the President.
- (3A) the share of the provinces, in each Award of National Finance Commission shall not be less than the share to the provinces in the previous Award.
- (3B) The federal Finance Minister and provincial Finance Minister shall monitor the implementation of the Award biannually and lay

their reports before both houses of Majlis-i-Shoora (parliament) and the provincial assemblies.

- As soon as may be after receiving the recommendations of the National Finance Commission, the President shall, by order, specify, in accordance with the recommendations of the Commission under paragraph (a) of clause (2), the share of the net proceeds of the taxes mentioned in clause (3) which is to be allocated to each province concerned, and, notwithstanding the provision of Article 78 shall not form part of the Federal Consolidated Fund.
- The recommendations of the National Finance Commission, together with an explanatory memorandum as to the action taken thereon, shall be laid before both houses and the provincial assemblies.
- At any time before an Order under clause (4) is made, the President may, by order, make such amendments or modifications in the law relating to the distribution of revenues between the federal government and the provincial governments as he may deem necessary or expedient.
- The President may, by order, make grants-in-aid of the revenues of the provinces in need of assistance and such grants shall be charged upon the Federal Consolidated Fund.

Borrowing by Provincial Governments

- 161.4. a province may raise domestic or international loans, or give guarantees on the security of the Provincial Consolidated Fund within such limits and subject to such conditions as may be specified by the National Economic Council.
- 167.1. Subject to the provision of this article, the executive authority of a province extends to borrowing upon the security of the Provincial Consolidated Fund within such limits, if any, as may from time to time be fixed by Act of the provincial assembly, and to the giving of guarantees within such limits, if any, as may be so fixed.
- (2) The federal government may, subject to such considerations, if any, as it may think fit to impose, make loans to, or, so long as any limits fixed under Article 166 are not exceeded give guarantees in respect of loans raised by, any province, and any sums required for the purpose of loans raised by, any province, and any sums required for the purpose of loans raised by, any province, and any sums required for the purpose of making loans

to a province shall be charged upon the Federal Consolidated fund.

Checks and Balances Regarding Financial Matters between Provinces and Federation

Auditor-General of Pakistan

- 168, (1) there shall be an Auditor-General of Pakistan, who shall be appointed by the President.
- 169. The Auditor-General shall, in relation to,
 - the account of the federation and of the provinces; and
 - the accounts of any authority or body established by the federation or a province.
- 170.4(1) the account of the federation and of the provinces shall be kept in such form and in accordance with such principles and methods as the Auditor-General may, with the approval of the President, prescribe.
- 4.(2) The audit of the accounts of the federal and of the provincial governments and the accounts of any authority or body established by, or under the control of, the federal or a provincial government shall be conducted by the Auditor-General, who shall determine the extent and nature of such audit.
- 171. The reports of the Auditor-General relating to the accounts of the federation shall be submitted to the President, who shall cause them to be laid before both the houses of the Parliament.
- In addition, the reports of the Auditor-General relating to the accounts of a province shall be submitted to the Governor of the province, who shall cause them to be laid before the provincial assembly.

Natural Gas and Hydro-electric Power

2(3) subject to the existing commitments and obligations, mineral oil and natural gas within the province or the territorial water adjacent thereto shall vest jointly and equally in that province and the federal government.

158. The province in which a well-head of natural gas is situated shall have precedence over other parts of Pakistan in meeting the requirements from that well-head, subject to the commitments and obligations as on the commencing day.

161.1(1). Notwithstanding the provision of Article 78

- (a) the net proceeds of the federal duty of excise on natural gas levied at well-head and collected by the federal government, and of the

royalty collected by the federal government, shall not form part of the Federal Consolidated Fund and shall be paid to the province in which the well-head of natural gas is situated.

- (b) the net proceeds of the federal duty of excise on oil levied at well-head and collected by the federal government, shall not form part of the Federal Consolidated Fund and shall be paid to the province in which the well-head of oil is situated.

(2) The net profits earned by the federal government, or any undertaking established or administered by the federal government from the bulk generation of power at a hydro-electric station shall be paid to the province in which the hydro- electric station is situated.

Explanation

For the purposes of this clause “net profits” shall be computed by deducting from the revenues accruing from the bulk supply of power from the bus-bars of a hydro-electric station at a rate to be determined by the Council of Common Interests, the operating expenses of the station, which shall include any sums payable as taxes, duties, interest or return on investment, and depreciations and element of obsolescence, and over-heads and provision for reserves.

164. Grants out of Consolidated Fund

The federation or a province may make grants for any purpose, notwithstanding that the purpose is not one with respect to which Parliament or, as the case may be, a provincial assembly may make laws.

National Economic Council

156. (1) The President shall constitute a National Economic Council, which shall consist of,

- A. the Prime Minister, who shall be the chairman of the Council;
- b. the Chief Minister and one member from each province to be nominated by the Chief Minister ;and
- c. Four other members as the Prime Minister may nominate from time to time.

(2). The National Economic Council shall review the overall economic condition of the country and shall, for advising the federal government and the provincial governments, formulate plans in respect of financial, commercial, social, and economic policies; and in formulating such plans, it shall, amongst other factors, ensure balanced development and shall also be guided by the Principles of Policy set-out in Chapter 2 of Part 11.

Conclusion

The Eighteenth Amendment shows the political will of the federal government to solve the problem of Balochistan. The NFC Award and special provisions regarding the distribution of the revenues of natural gas, and other resources between the provincial and federal government on equal ratio will eliminate the hard feelings of the neglected Baloch. The Constitution of Pakistan promotes the principle of social justice. Quaid-e-Azam Muhammad Ali Jinnah believed in the principles of equality, social justice, and toleration. The Eighteenth Amendment will be helpful in achieving positive results in the Balochistan situation.

Findings

- Balochistan is a deprived province,
- Fundamental rights should be given to Balochistan,
- The dispute should be managed through peaceful means.
- Where, there is conflict, there is resolution, where, there is resolution, there is peace. So, it is high time to solve the problems through dialogue between the Government and the angry Baloch.

References

1. Government of Pakistan. 2010. *The Constitution of the Islamic Republic of Pakistan 1973*. Islamabad. Government of Pakistan.
2. Full text of the 18th Amendment, Bill. www.inpopak.gov.pk/.../full%20text%20%2018th%20Amendment%20Bill.pdf.
3. Khalid, Hashwani. 2010. "18th Amendment and Provincial Autonomy: An unfinished Job." *Indus Asian Online Journal (iaoj)*, <http://iaoj.wordpress.com>.
4. Saleem, Muhammad. March 2, 2011. 18th Amendment makes difference. <http://www.Pkarticleshub.com/2011/03/02/18th-amendment-makes-a-difference>.
5. Najam, Adil. April 1, 2010. 18th Amendment: What Does It Say? [Pakistaniat.com](http://pakistaniat.com). <http://pakistaniat.com/2010/04/01/18th-amendment-text/>
6. Pakistan's New 18th Amendment: More Stable, Democratic Government. April 23, 2010. Sepia Mutiny. Com/ia/archieve/006142.html
7. Tribune, Express, The. <http://blogs.tribune.com.pk/story/379/the-problem-with-balochistan/>

CHAPTER V

CONSTITUTIONAL PROVISIONS ON CREATION OF PROVINCES
AND SUGGESTED MODEL

Prof. Dr Razia Musarrat

The Government of India Act 1935, after proper amendments through section 8 of 1947 Independence Act, was introduced as the Interim Constitution. The Interim Constitution established the federation of Pakistan which consisted of four provinces of (1) East Bengal, West Punjab, Sindh and North West Frontier, (2) Balochistan (3) any other areas that might with the consent of federation be included therein (4) the capital of the federation, Karachi (5) such Indian states as might accede to the federation.¹

Federalism in Pakistan was a product of conflict of nationalism, in which a large and a stronger nation, was trying to impose its hegemony on a weaker and smaller nation. The region's multicultural character and Muslim's experience with the working of limited provincial autonomy under the Government of India Act of 1935 motivated the struggling leaders to opt the system in 1940 for their homeland. Therefore, the Lahore Resolution became the basis of federalism in Pakistan. The federal system in Pakistan could be considered an outcome of conscious realization by the national and provincial leaders of the conflicting pressures of diversity and unity emanating from a common religion, fear of common enemy and ethnic and cultural variations. It could easily be assumed that they agreed to live as equal partners.²

Pakistan could be considered a state having a plural society. It is multi-lingual and multi-ethnic, its components i.e. Punjabi, Baluchi, Sindhi, Pathan and Bengali (till 1971) can be easily identified and due to this reason the most immediate loyalties of the vast majority of the people go to the units other than the nation state. None of its provinces can claim to be an exclusive domain of one ethnic group (East Bengal was the only homogenous province in Pakistan till 1971). The Federation of Pakistan consisted of two territorial units separated from each other by nearly 1000 miles of the territory of India.³ For a country like Pakistan, geographically divided into two widely separated

¹ Mehrunnisa Ali, *Politics of Federalism in Pakistan* (Karachi: Royal Book Company, 1996), 40.

² Razia Musarrat, "Pakistan: Federalism and National Integration" (Ph.D diss., Department of Political Science, The Islamia University of Bahawalpur 1995), 129-30.

³ Pervez Iqbal Cheema, and Rashid Ahmad Khan, ed., *Problems and Politics of Federalism in Pakistan*, (Islamabad: Islamabad Policy Research Institute, 2006), 1.

regions, the federal system was inevitable. In 1940, for their future homeland, Muhammad Ali Jinnah in his address mentioned the possibility of territorial readjustment, foreshadowing the partition of Punjab and Bengal either within united India or through partition. According to Syed Jaffar Ahmed, Pakistan with this background of cultural pluralism falls in the category of what Clifford Geertz describes as “old societies and new states”⁴

The two distinct wings of the country were different from each other in geography, population, culture, source of income and capability of administration. Geographical separation between the two wings of the country made inter wing communication and travel difficult and expensive. This had led to divergent economic problems and lack of mobility of population and resources between them. The factor of distance became a major obstacle to the attainment of effective unity of Pakistan. The geographical separation produced administrative, social, economic and political problems. Moreover the capital was in West Pakistan, East Pakistan felt neglected.

The East Pakistanis were more conscious that they made up more than half of the population of Pakistan. They complained that their area has been backward and neglected. The subordination of Hindu community was changed into domination of West Pakistan. This was the colonial style exploitation of East Pakistan by West Pakistan. The equality of conflicting communities could be achieved, through mutual interdependence of the national and regional subsystems. Structural integration of the two wings of Pakistan could be obtained by giving the East Bengalis numerical representation and functional integration and a united identity through political participation.⁵

Dissatisfied with the one economy policy of the government, the Bengalis put forward the two economy theory because they realized that investment in one wing of the country had been their disadvantage and had not had a spread effect on their province.⁶

The federal government structure was an integrative institution and considered an effective device for maintaining diversity within a common political structure. But the Government of India Act 1935 provided for a controlled parliamentary federalism as the means for organizing public power. There were vast differences between East and West Pakistan in comprehension of the federal structure. If one man one vote system were applied there would be more Bengalis in parliament than West Pakistanis. Bengalis demanded political representation in the National Assembly based on

⁴ Syed Jaffar Ahmad, *Federalism in Pakistan A Constitutional Study* (Karachi: Pakistan Study Center, University of Karachi, 1990), 40.

⁵ Razia Musarrat, “*Pakistan: Federalism and National Integration*” 147.

⁶ Raunaq Jahan, *Pakistan Failure in National Integration* (New York: Columbia University Press 1972), 7.

population. The politicians in West Pakistan refused to accept proportional representation and the inherited viceregal system continued. The attempts were made to infuse confines of imperial order in the parliamentary system and this structural tension became the main cause of the failure of the parliamentary democracy resulting in the civil and military bureaucracy's dominance in the body politics of Pakistan.

Coming back to the constitution making we see that Prime Minister Liaquat Ali Khan on August 11, 1947 said that the future constitution of Pakistan be on federal principle.⁷

The Objective Resolution for the future constitution of Pakistan which was passed in March 1949, laid down those territories now included in Pakistan and such other territories as may have after be included or acceded to Pakistan shall form a federation.⁸

The next step was appointment of Basic Principles Committee. The first report of Basic Principles Committee was presented in 1950 that declared Pakistan to be a federation of provinces.⁹ The interim report made no attempt to take the problem of providing an equitable representation to the provinces in the future federal set up. The draft constitution suggested principle of equal representation in the upper house and left composition of lower house unclear.⁹ This situation was unacceptable to Bengalis being the majority unit of Pakistan. Bengalis demanded that they should have majority in both the houses of the parliament, which was unacceptable to the provinces of West Pakistan. In united or separated Pakistan, we have always faced the problem of the majority confronted by regional minorities, militating against the emergence of a national leadership. The result is compromise which actually weakens the fabric of the state.

The second constitutional draft was presented by Khawaja Nazimuddin in 1952, which suggested a federal structure with bicameral legislature. The principle of parity was incorporated to resolve the complicated problem of representation and it claimed to bring about a constitutional balance of power between the two wings of Pakistan.¹⁰

Serious disliking and disagreement was aroused in Punjab. The parity-cum-weightage formula was described as an attempt based on parochial, racial

⁷ M.Rafiq Afzal, *Selected Speeches and Statements of Quaid-e-Millat Liaquat Ali Khan (1941-1951)* (Lahore: Research Society of Pakistan, 1987) 139.

⁸ Hamid Khan, *Constitutional and Political History of Pakistan* (Karachi: Oxford University Press 2005), 51-52.

⁹ Riaz Ahmad, *Constitutional and Political Development in Pakistan 1951-1954* (Rawalpindi: Pak-America Commercial Ltd, 1981), 7.

¹⁰ Ahmad Shuja Pasha, *Pakistan: A Political History* (Lahore: Sang-e-Meel Publications (1989)) 170.

and sectional considerations and aimed at fostering the worst type of provincialism. It was a violation of the universal principle of democracy and negation of all conceptions of federalism.¹¹ The second report also failed to solve the differences between the leaders of East and West Pakistan on the issue of representation.

Muhammad Ali Bogra presented a constitutional formula in 1953. According to the formula bicameral legislature was proposed and it was suggested that equal seats and powers should be given to every federating unit and house respectively. In the Bogra Formula the celebrated principle of federation was kept in view which provides representation on the basis of population in the lower house. East Pakistan having the majority of the country's population got a clear majority of seats. In accordance with the federal principle, 50 seats were proposed for the upper house and according to the formula 10 seats were given to East Pakistan while 40 seats were given to the Western wing (Punjab 10, Sindh 10, Baluchistan 10 and North West Frontier provinces 10)¹²

It is imperative to note that the distribution of seats in the two houses was made in such a way that when the house meets jointly to settle dispute on legislation between them, there would be parity between the wings.¹³ This scheme was also rejected. The Chief Minister of Punjab, Feroz Khan Noon, presented a parallel proposal for a zonal sub-federation for West Pakistan which was soon shelved.¹⁴ Pakistan pursued a policy that merged the provinces of West Pakistan into One Unit, under the Province of West Pakistan Act in 1955 which declared West Pakistan as One Unit and Baluchistan, NWFP, Punjab and Sindh were merged into a single province of Pakistan. In this way smaller provinces were forced to accept the supremacy of the Punjab in 1955.¹⁵ Most federations have special amending procedures for creating new constituent units, often requiring some measure of consent from the existing constituent units. The issue of the number of units and their boundaries can be challenging in a federation but in Pakistan the consent of the provinces was not sought.

The purpose of unification of the provinces of West Pakistan into One Unit was to achieve parity between East and West Pakistan. Prime Minister Muhammad Ali Bogra said, "One Unit will create national unity and curb the

¹¹ *Pakistan Times*, December 24, 1952.

¹² Ahmad Shuja Pasha, *Pakistan: A Political History* 170.

¹³ Inam ur Rahman, *Public Opinion and Political Development in Pakistan 1947-1958* (Karachi: Oxford University Press, 1982) 55.

¹⁴ Dr Mohammad Wasim, *Federalism in Pakistan*, (2010), 6.

¹⁵ Craig Baxter, *Government and Politics in South Asia* (Lahore: Vanguard Books, 1988), 224.

evils of provincialism”.¹⁶ To solve the language issue, Muhammad Ali Bogra moved a motion in the Constituent Assembly under which both Urdu and Bengali were declared to be the national languages. One Unit served as the basis of the federation under the constitution of 1956 and 1962. The capital of West Pakistan was Lahore in Punjab. Khawaja Nazimuddin and Bengali politicians were opposing the unification scheme. Non Punjabi provinces also strongly resisted One Unit.

The adoption of One Unit scheme was considered to be the controversial mechanism upon which the leaders of smaller units such as Pirzada Abdul Sattar from Sindh, Khan Abdul Ghaffar Khan and Quyyum Khan from NWFP, all were disappointed by the decisions.¹⁷ Later in 1960, the federal capital of Pakistan was shifted from Karachi to Islamabad, which is situated in Punjab. These arrangements were seen as a sign of Punjabization of Pakistan.

Unlike India, provinces in Pakistan were not re-organized on the language basis. India has the constitutional power to redraw state boundaries without state consent and Pakistan also redrew boundaries of provinces without the consent of the provinces. We see that the demographic majority of Bengalis was a cause of tension within the federation of Pakistan. It was also the main reason of the delay in constitution making. However the attempt to address the imbalance, the One Unit Plan, created more problems than it solved because it reduced, rather than enlarged, the small number of provinces. Within West Pakistan, Punjab comprised 58 per cent of the population.

Mehrunnisa Ali wrote at the adoption of One Unit Act “with two far-reaching contiguous units, divided on geographical and cultural differences, when implemented in 1955, the centre provincial tussle perceived into East-West rivalry, that created the ruling elite only for the centralization of governance and administration rather than sharing and parity of powers¹⁸ and Katharine Adeney remarks “One Unit created a dangerous bipolar federalism”.¹⁹ The federation having small number of federating units are more likely to fail in establishing the principles of federalism. To promote good federal relations, the number of units is important. The alternative identities within a unit become important when the identity around which the

¹⁶ Ennolian Zalkots Magelalena Kavalski, *Federalism Failure*, (London: Asghate and Gawan Publishers, 2008), 30.

¹⁷ Yar Muhammad Badini,, Provincial Autonomy: Another View from Balochistan in *Problems and Politics of Federalism in Pakistan*, ed. Pervez Iqbal Cheema, & Rashid Ahmad Khan, 62.

¹⁸ Mehrunnisa Ali, *Politics of Federalism in Pakistan*, 81.

¹⁹ Katharine Adeney, *Federalism and Ethnic Conflict Resolution in India and Pakistan*, (New York: Palgrave MacMilan, 2007) 142.

unit has been created, has been given security. Here it may be asked that is it necessary in Pakistan to subdivide all the units to discourage secession or just that of the dominant group. It may be argued that only homogeneity of units in Pakistan is not required for stability rather participation and equality in economic development are essential conditions of stability. It was the denial of the Awami League's demands for appropriate federal relationship that promoted the demand for confederation. The adoption of One Unit was to obtain national integration but it caused the ethno-nationalist movements in Baluchistan, NWFP and Sindh.

In these controversial circumstances the first constitution was passed by the Constituent Assembly in 1956. The constitution was heralded as federal in form and parliamentary in composition. Turning to the distribution of powers between the centre and provinces it retained the same situation as provided in the act of 1935. Apparently the provincial powers were increased but in reality the central government maintained its hold in the executive, legislative and federal spheres with the help of which it interfered in the affairs of the provinces. Article 191(6) seems to have granted the federal executive undefined powers to suspend the democratic process for an indefinite period or as long as the President wishes.²⁰

Introduction of the unicameral legislature was the main feature of the constitution which was against the celebrated principles of federalism. The federal structure has a bicameral legislature as in the United States of America. According to the provisions of the constitution, both wings of Pakistan were granted equal representation on parity basis in the unicameral legislature. The federal system under the constitution of 1956 showed a tendency towards unified control and authority of the federal government. It may be argued that in Pakistan (1947-58) federalism was never tried, or was tried in a very unique way. Therefore, East Pakistan's leaders turned increasingly in the direction of autonomy as the goal.

Katharine Adency analyzed that "the constitution of 1956 was not based on federal principles" She considered it a "quasi-federal", wherein minority group formed a local majority and therefore exercised the illegitimate self-governance based on a strong central government.²¹

Herbert Feldman indicated that "unworkable conditions, ethnic and political unrest in East and West Pakistan, failure of stable democratic political culture, non-existence of general elections, uncertainty in political hierarchy and civil-military relations" imbalanced the federal system in Pakistan.

²⁰ G.W Chaudhary, *Constitutional Development in Pakistan* (London: Longman Group Limited, 1969), 113.-114.

²¹ Katharine Adency, "Democracy and Federalism in Pakistan," in *Federation in Asia*, ed. Boagang He, Barian Galligan, Takashi (Inoguchi Massachusetts: Edward Elger Publishers 2007), 105.

On 7 October, 1958 a group of generals led by General Ayub Khan seized power and a proclamation was issued by President Iskandar Mirza which abrogated the constitution, dissolved the National and Provincial legislatures, dismissed the central and provincial cabinets, abolished all political parties and appointed General Ayub Khan as the Chief Martial Law Administrator who dislodged Mirza and became the sole authority in Pakistan. Commenting on the situation, Dr Khawaja Alqama said, “thus, bringing to an end the first phase of the “Drama of Politics” in Pakistan.”²²

Another constitution was promulgated in 1962 which described the country as a form of federation with the provinces enjoying such autonomy as was consistent with the unity and interests of Pakistan as a whole. It is worth noting that Ayub Khan introduced a controlled federal system in the state. In the constitution of 1962, the word “federal” was replaced by the word “central” and, the state was designated as the Republic of Pakistan. As for the structural distribution of power between the centre and provinces, the constitution favoured the centre.

According to articles 135 and 136 of the Constitution of 1962 there was a unicameral legislature contrary to other federal states. The National Assembly had power to make laws for the federation of Pakistan and also for the provinces in case of emergency in the country or in any of its federating units. Moreover Ayub Khan had the support of the civil bureaucracy, army, the feudal elite and a disorganized political opposition which provided him the opportunity to rule like a constitutional autocrat.²³

The Constitution of 1962 lasted till 1969 when as the result of agitation against him, Ayub Khan stepped down as President and handed over the reign of power to another General, Yahya Khan who again imposed Martial Law, abrogated the Constitution and dissolved the national and provincial legislatures. President Yahya Khan promulgated the Legal Framework Order on March 28, 1970.

He dissolved the One Unit and restored the previous status of the provinces of West Pakistan. Baluchistan emerged as an independent province including the Baloch states with the promulgation of the West Pakistan Dissolution Order of 1970.

The general elections were held in 1970 in which all political parties of East Pakistan contested. The Awami League contested the elections on Six Points.²⁴ The result showed the majority of Awami League in the parliament but it failed to win a single seat in West Pakistan. Zulfikar Ali Bhutto’s Pakistan Peoples Party emerged as the second largest party but failed to obtain

²² Razia Musarrat, “*Pakistan: Federalism and National Integration*,” 210.

²³ G.W Chaudhary, *Constitutional Development in Pakistan*, 221.

²⁴ For detail Hamid Khan, *Constitutional and Political History of Pakistan*, 188-189.

a single seat in East Pakistan. After the elections of 1970, differences remained alive between the two wings of Pakistan on the transfer of power on the basis of Six Points, resulting in political dead lock. An intense dilemma occurred between the two parties at the question of drafting of the constitution which resulted in the change of geographical boundaries and disintegration of Pakistan, into two separate states in December 1971. As Katharine Adeney analyzed that the federations with small number of federating units are more likely to fail in establishing the principles of federalism.²⁵

After the dismemberment of Pakistan, Zulfikar Ali Bhutto became civil Martial Law Administrator and state of Martial Law continued till April 21, 1971 when the National Assembly adopted an Interim constitution which remained in practice until the promulgation of the Constitution of 1973.

The Constitution of 1973

Unlike the Constitution of 1956 and 1962, the important feature of the constitution of 1973 was introduction of bicameral legislature in the federation of Pakistan. The position of Prime Minister was strong. The parliamentary form of government was defined. There were two legislative lists, federal and concurrent list.²⁶

Provincial languages were recognized but only Sindh adopted a provincial language as official language. According to Dr Muhammad Waseem the federal structure of the Constitution of 1973 exacerbated ethnic conflict by creating de jure recognition of core linguistic communities identified with their respective federating units. Thus Sindhis, Pushtuns, Punjabis and Baloch got their respective provincial governments. However such “legal elevations” of ethnic groups which represented majority communities in these provinces, disfranchised minority groups like Mohajirs in Sindh. This policy of the government consolidated the Sindhi identity and created a Mohajir ethnic identity.²⁷ The Constitution of 1973, by vesting residuary powers in the province and by establishing machinery for equal sharing of resources provided adequate provincial autonomy. However, Mehrunnisa says, this as usual lacked not only the guarantees against the federal government’s violation but again affirmed the central trend by strengthening the executive vis-à-vis other institutions of the state.²⁸

²⁵ Boagang He, Barian Galligan, Takashi, ed., *Federation in Asia*, 105.

²⁶ Since 2010 the concurrent list has been erased. Arrangements have been made to transfer the power to the provinces According to federal government process is completed in June 2010.

²⁷ Dr Mohammad Wasim, *Federalism in Pakistan*, 10.

²⁸ Mehrunnisa Ali, *Politics of Federalism in Pakistan*, 36.

The 8th and 17th Amendments

The introduction of 8th and 17th Amendment changed the balance of power in favour of the President by giving increased discretionary powers. Saeed Shafqat describing the disparity between the president and the Prime Minister said, “it gave imbalanced federalism in the state because the Prime Minister was considered to be the representative of the people under the parliamentary democracy in the federal legislature and the former enjoyed only ceremonial status.”²⁹ It is evident that the “8th Amendment enabled the successors of General Zia-ul-Haq to dismiss the elected Prime Ministers with impunity.³⁰ The 17th Amendment was restoration of 8th Amendment which created powerful presidency and imbalance of power between the president and the Prime Minister.

Gilgit-Baltistan Empowerment and Self Governance Order 2009

Gilgit Baltistan is situated in the north of Pakistan. In 1970 it became an administrative unit. It consists of Gilgit Agency, the Baltistan District of Ladakh, Wazarat and the states of Hunza and Nagar and administered by the federal government. The process of giving independent identity without having a provincial status started in 1975. The main purpose of the policy was to increase federal government’s administrative powers. In 2009 the government decided to give it full internal autonomy without the status of province and changed its name to Gilgit-Baltistan. After informal consultation with local leaders, the President signed the Order and stated that “Gilgit-Baltistan Assembly will formulate its own rules of procedures. The legislation upon internal matters will be done by a council and assembly in their respective jurisdiction.”³¹ A governor was appointed by the federal government. The Pakistani government is empowered to amend the Gilgit-Baltistan Empowerment and Self-governance Order. India protested saying Gilgit-Baltistan had become the fifth province of Pakistan. It may be said that Pakistan is attempting to integrate the region in the administrative system of Pakistan.

²⁹ Saeed Shafqat, “Is Consolidation of Democracy Possible in Pakistan” in *Contemporary Issues in Pakistan*, Shafqat, Saeed, (Lahore: Azad. Enterprises, 2000), 263-264.

³⁰ Benazir Bhutto, *Reconciliation: Islam, Democracy and the West*, (New York: Simon and Schuster Publishers, 2008) 192.

³¹ *Dawn* (Lahore), August 30, 2009.

The 18th Amendment

The 18th Amendment was passed in April 2010. It restored the parliamentary system prescribed by the Constitution of 1973. It restored almost 100 articles of the constitution including abolishing of the concurrent list.

Federalism in Pakistan after 18th Amendment

Article 1(2) of the amended constitution defines that the Federation of Pakistan consists of territories, the provinces of Baluchistan, Khyber Pakhtunkhawa, Punjab and Sindh, the federal capital Islamabad, the federally administered tribal areas and such other states and territories as are and may be included in Pakistan, whether by accession or otherwise.³²

Majlis-e-Shura (parliament) may by law admits into the federation new states or areas on such terms and conditions as it thinks fit³³.

It is imperative to note that the territories of Azad Kashmir are not mentioned in Article 1 of the constitution of Pakistan but they become part of Pakistan under article 1(2) clause (d) of the constitution.

The territories of Kashmir may be included in Pakistan according to Article 257 of the constitution of Pakistan, which describes that “when the people of the state of Jammu and Kashmir decide to accede to Pakistan, the relationship between Pakistan and the state shall be determined in accordance with the wishes of the people of that state”³⁴

Further, part XI article 239 clause 4 states that “A bill to amend the constitution which would have the effect of altering the limits of a province shall not be presented to the president for assent unless it has been passed by the provincial assembly of the province by the votes of not less than two-third of its total membership.”³⁵

Under the 18th Amendment there is no mergence of FATA in Khyber Pakhtunkhawa. But it is imperative to note that Article 247(1) of the constitution defines that “subject to the constitution, the executive authority of the Federally Administered Tribal Areas, and the executive authority of a province shall extend to the provincially administered areas therein.”³⁶ This article provides opportunity to constitute one or more provinces after obtaining the views of tribesmen through Jirga.

The creation of more provinces, it may be argued, will enhance the strength of federation of Pakistan, but division cannot be based on ethnicity or

³² *The Constitution of Islamic Republic of Pakistan 1973* as amended by the constitution (Eighteenth Amendment) Act, 2010 (Act No.X of 2010), 3.

³³ Ibid.

³⁴ Ibid., 150.

³⁵ Ibid., 140.

³⁶ Ibid., 144.

language diversity as is the case of India. In 1950s the Indian Parliament decided to redraw state boundaries and went from 14 to 28 states. Nigeria has gone from three states to thirty six when there was military regime rather than democratic government; Switzerland created a new Canton of Jura from the existing Canton of Bern through referendum. A federation should have a special procedure of amendment for the creation of new constituent units; the consent of existing units should also be acquired because it is essential that the constituent units must agree among themselves. If the units have a large enough population, either heterogeneous or homogeneous, and the people of far flung areas are deprived of their rights then a new province may be created.

In case of Pakistan, Pukhtoon leadership would not favour the reorganization of the province on linguistic basis because there is a Hindko speaking population. It is a fact that the British rulers drew boundaries of the provinces according to their administrative requirement. They did not consider linguistic differences. At the time of emergence of Pakistan, millions of people migrated and this situation changed the demographic structure of the provinces. When in 2010, the 18th Amendment was made to the constitution; the NWFP was renamed as Khyber Pakhtoonkhawa. The Hindko speaking people reacted against it. It is not the first time that Hindko speaking population is showing resistance against the renaming of the province. They had protested in the past also -- in 1997 when Provincial Assembly of NWFP passed a resolution, the protest was started by Hazara Qaumi Movement (HQM)³⁷

MQM was organized in late 1980. It claimed to be the champion of the rights of Hindko population.³⁸ They claimed that Hindko was a separate language; on the other hand, the Pushtuns claimed that Hindko was a dialect of Pushtuns. The Hindko speaking population is 40 percent of the province's population and they are demanding that Hindko should be recognized as a separator language in national census. It may be noted that Hindko speaking areas include Mansehra, Abbotabad, Peshawar city, Haripur, Kohat, Nowshera and D.G.Khan.

It is a fact that in case of creation of Hazara province, the area of Khyber Pushtuns will be reduced. This would not be acceptable to the leadership of the province. FATA and the Pushtuns belt of Balochistan are the areas outside the Khyber Pakhtoonkhawa. They are against the inclusion of their territory in Khyber Pakhtoonkhawa, particularly FATA is excluded from the province. It will also affect the strategic position of the province.

³⁷ Monthly Herald (Karachi), January 1998, 68.

³⁸ Yasmin Roofi, "Renaming of NWFP and Hazara Ethnicity, A New Course of Ethnic Conflict in Pakistan," *European Journal of Social Sciences*, vol. 19, no.4, 2011, 591.

Pushtuns are also settled in the northern part of Baluchistan. The Baloch leadership is also against the reorganization of their province on the basis of language because the result would be loss of northern area of the province. The Mengal tribesmen are Brahvi speaking. They can create a problem. The province is small in terms of population and the division will further decrease its population.

When we turn our attention towards Sindh, we find confusion regarding the creation of new provinces. Sindhis and Muhajirs are divided on linguistic basis. Demand for the creation of Karachi province has been heard off and on over the years. Recently the Chief Minister of Punjab, Shahbaz Sharif, was reported hinting at such a possibility. The MQM however denies any such plans.

Mohajirs are living in Karachi and in other urban areas of Sindh. Rural Sindh is Sindhi speaking. There is no need to create new province on linguistic basis. Thousands of Pushtuns are settled in Karachi. Moreover there is a large number of Baloch population in Sindh. According to Lawrence Ziring “the four major geographic divisions retained their specific character, harboured special interests and endeared diversities made essential the realization of a viable constitution which can satisfy aspirations of the people of Pakistan.”

As we know Sindh became a separate province in 1936, with Karachi as its capital. The Muslim League had no candidate to contest the election of 1937 in the Muslim majority province of Sindh. In 1938, G.M.Sayed and Sheikh Abdul Majeed who were members of Sindh Assembly joined the party and attempted to pass the resolution for the creation of separate homeland for Muslims. After the creation of Pakistan, the Quaid-i-Azam decided that Karachi will be the capital of Pakistan. This decision brought resentment among Sindhis because Karachi district was separated from Sindh on July 2, 1948. It was considered as a big loss to Sindh. The establishment of One Unit in 1955 was also resented by the people of Sindh. The representation of Sindhis in civil services and army was low. The political consequence of this, according to Dr Waseem, was the emergence of a new Punjab-urban Sindh axis of power which dominated the Muslim League, the bureaucracy and the army.³⁹ There was polarization between Sindhis and Mohajirs which resulted in riots of January 1971. Mohajirs and students of Karachi University demanded Urdu to be official language along with Sindhi. During the Ayub era, the study of Sindhi language was dropped from schools, colleges and universities. Sindhis perceived that if Urdu was accepted as a provincial language, Sindh would be considered as a multi-ethnic province. Actually both communities were of the view that one community's language was against the interests of the other community. The conflict between the Mohajirs and

³⁹ Dr Mohammad Wasim, “Creating New Provinces,” *Dawn*, May 31, 2011.

Sindhis came to an end when Zulfikar Ali Bhutto tried to solve the differences. But ultimately Mohajirs declared themselves a separate nationality which further strengthened the forces of communalism in Pakistan. The Sindhis feel that they have become a minority in Sindh. They are not in favour of acceptance of ethno-linguistic division of the province.

In Punjab, there are two political movements: One is for the Saraiki province and the other is the movement for the province of Bahawalpur. The demand for the Saraiki province reflects the feeling of deprivation among the people of that part of southern Punjab. There has been resentment against the settlement of people from other areas of Punjab in the canal colonies of the region. The other issue is related to income and expenditures. They argue that their area generates more income than their expenditures because this area produces wheat and cotton, which contributes 10 per cent and 23 per cent of the total production of Pakistan. Urdu and Punjabi speaking people are against the creation of the Saraiki province on linguistic basis. Prime Minister Syed Yousaf Raza Gillani has promised to put the question of Saraiki province on the agenda after the next elections. PMLQ is also agreed on this.⁴⁰

It is worth noting that the majority of the people residing in Bahawalpur region are in favour of Bahawalpur province rather than the Saraiki province. The Rulers of Bahawalpur signed an agreement with the government of Pakistan on April 30, 1951, according to which the state of Bahawalpur was to enjoy the same rights as provinces in the matter of legislation, administration and grants and loans. It is imperative to note that before One Unit (1955) Bahawalpur enjoyed provincial status. But on March 30, 1970 when One Unit was dissolved and provinces were restored, Bahawalpur was merged into Punjab though it had been assured at the time of merger that whenever One Unit was dissolved, Bahawalpur would be restored its pre-One Unit status.. Economically, Bahawalpur is a rich region. It is a major producer of cotton. People feel that the earning of the area is being spent on other regions -- the same grievance that East Pakistanis nurtured before the disintegration of Pakistan in 1971. The people of Bahawalpur are of the opinion that the problems of Bahawalpur region can be solved if it is made a separate province.

Suggested Model for Creation of New Provinces

It is suggested that new provinces should be created on administrative basis. Following is the suggested model:

1. **Bahawalpur Province** will consist of the area included in the former state of Bahawalpur. It is an agricultural area. Cotton and wheat are crops from which revenue can be generated.

⁴⁰ Ibid.

2. **Lahore Province** will consist of the districts of Lahore, Kasur, Okara, Nankana Sahib, Gujranwala, Sialkot, Narowal, Faisalabad, Jhelum, Gujrat, Sargodha, Khushab and Jhang.
3. **Multan Province** will consist of the districts of Multan, Lodhran, Khanewal, Sahiwal, Vehari, Pakpatan, Muzafargarh, D.G. Khan and Rajanpur.
4. **Balochistan Province** will consist of areas already included in the province because it is less populated area and there is no need to create a new province out of the existing province.
5. **Sindh** is a province where there is no need for the creation of a new province within the boundaries of existing Sindh because the division of Sindh can cause ethnic conflict in rural as well as urban areas of Sindh.
6. **Khyber Pukhoonkhawa Province** will include the area of existing Khyber Pukhoonkhawa. There is no need to create a new province of Hazara on language basis.
7. **Gilgit Baltistan** will consist of areas already included in the entity i.e., Gilgit Agency, the Baltistan, district of Ladakh, Wazarat and the states of Hunza and Nagar. The government has approved a self-governance reforms package for the region aimed at giving it full internal autonomy with the status of a province. It can be given the same status as was Baluchistan before 1970.
8. **FATA Province.** The way to create a new province of FATA is that they will be asked through Jirga whether they want a province or not.

The creation of new federating units should be brought about only through constitutional engineering and not through any other mechanism.■

ADVERSE IMPLICATIONS IN CREATION OF NEW PROVINCES IN PAKISTAN

Dr Syed Hussain Shaheed Soherwordi

The creation of new provinces has become a hotly debated issue. It has started with the KPK (Hazara) and Punjab (Saraiki and Bahawalpur) but may not end there. While supporting the creation of new provinces may appear an easy way out for the politicians, it is going to be a difficult task to actually carve them out. Once the genie is out it will not be possible to force it back into the bottle. Like creation of new districts, it would become a political appeasement tool in the run up to each election. At the end of the day, the country is likely to end up having a provincial map very close to an existing administrative entity called 'Division'.¹ In this paper, an effort has been made to discuss the issue of the creation of new provinces in Pakistan. From a discussion about the federation and its units, the paper moves on to discuss the negative implications on the future of the country, the creation of sub units on ethnic grounds and on administrative lines. A constitutional discussion follows to assess what the 1973 Constitution says about having more provinces.

A "federation also known as a federal state, is a type of sovereign state characterized by a union of partially self-governing states or regions united by a central (federal) government."² A federation is also defined as a group of states with a central government but independence in internal affairs. It means any kind of a general association between autonomous units of a state. In this process, the units are associated for common goals to have dividends of the federation. James Q Wilson defines federalism in terms of sharing of sovereignty. He says, "federation is created when communities, hitherto independent of each other, unite to form a single body politic, yet in such a way as to preserve for something of its independence".³

For a successful federation, there must be a co-existence of two sets of governments within their limits, territories, and powers and functions. Each of them enjoys its own powers and functions within its own spheres. To have such an autonomy and harmonious relations between the federation and the federating units, there are political institutions to keep a balance. The pre-requisites of federalism are:

¹ *Nation*, August 15, 2011.

² <http://www.merriam-webster.com/> (accessed on 20 July 2011).

³ James Q. Wilson, *American Government- Institutions and Politics*, (Washington DC: Heath and Company, 1986) 49.

- An Independent Judiciary
- A formal division of powers which are defined by a constitution
- And the supremacy of the constitution

Constituent units or partially self governing regions are an important part of a federal state system or form of government. The federation in fact owes its formation to its units- the states or provinces. This is so because the object of the federation is to ensure unity in diversity. The case of Pakistan, however, is unique in many respects. Barring the 1962 Constitution in all the other constitutions, the country has been declared a federal state comprising of the federating units of the areas which were separate identities even before Pakistan came into existence. But despite being a federal state, the country has always had a strong central government i.e. the center having sway in most of the affairs than the provinces, which is apparently a contradiction in a federal set up. The advocates of provincial autonomy exploited this visible weakness to grind their political axes.

But we need to assess the situation of Pakistan by going beyond the conventions of a typical federation. The reason is that Pakistan is a peculiar federal state. The country is the first in the world to be formed on ideological basis. Still, ideology, that bond of commonality failed within a short span of 25 years when the Eastern wing seceded. The fall of Dacca is yet to be forgotten⁴. Similarly the Pukhtoonistan issue, the Sindho-desh slogan⁵, and the greater Balochistan are few harsh realities of our history which could not be ignored. Keeping in view the chequered history of the country, thinking of creating new provinces thus seems playing with fire.

The feeling of deprivation among the poor and backward regions if rationally analyzed are not because of fewer provinces but due to lack of provision of the rights ensured in the constitution. We need to differentiate between provincial autonomy and creating more provinces.

The provinces were never allowed to enjoy their rightful freedom. Ethnic, religious, regional, and lingual divides are gaining strength. Pakistan is currently passing through the most volatile phase of her life. If the issue of creating newer provinces is given more air, it may blow out of proportion, and endanger the country's solidarity. Maturity and patriotism are needed on the part of both the rulers and the ruled to prevent non-issues from creating further dissension.

It is unfortunate that the provincial autonomy debate is drifting towards creation of new provinces, and that too more on ethnic rather than administrative lines. These divisive trends are game for our neighbours.

⁴ Christophe Jaffrelot, *Pakistan : nationalism without nation*, (London: The Middle Eastern Studies Association of North), 2004.

⁵ Ibid.

Afghanistan has not abandoned its Pakhtunistan stunt⁶. India's role in the East Pakistan crisis is an important chapter of Pakistan's history.⁷ Similarly the Balochi uprising in mid-1970s that was crushed with the help of the Iranian government⁸ is another example of how provincialism has allowed external mischief. Musharrafs handling of the Balochistan issue has further complicated its solution.

The 18th Amendment and the change in the name of NWFP to KPK created a sense of deprivation in the people of Hazara. More than a dozen people lost their lives in April 2010⁹ when the Hazara Province movement turned violent. The former Nawab of Bahawalpur is also demanding a separate Province¹⁰ and so are the people of Southern Punjab who want a Seraiki Province¹¹. Will the current party position in the Punjab assembly allow the division of the province?

The creation of new provinces will open a new area of concern for the federation when the new entities will demand their share in the financial resources¹²

Let us say that the government accedes to the demand for new provinces. What will be the result? More ethnic movements will arise and different ethnicities will ask for separate province on the bases of their ethnicity. Former rulers of the merged states might also follow in the footsteps of the Nawab of Bahawalpur.

If the creation of new provinces is not going to result in the improvement of provincial administration, if ethnic division is going to harm national cohesion, if the gulf between the ruler and the ruled is not going to be bridged, and if the multiplication of the federating units is anticipated to create more constitutional problems,, then why this sudden frenzy at a time when Pakistan is facing far more serious problems at the national level?

⁶ 'S.M. Burke, *Pakistan's Foreign Policy: An Historical Analysis*, (London: Oxford University Press, 1971), 32.

⁷ M. Ikram Rabbani. *Pakistan affairs*, (Lahore: Zahid Bashir Printers, 2009), 150-54,

⁸ Ayesha Jalal, *Democracy and Authoritarianism in South Asia a Comparative and Historical Perspective*, (Cambridge: Cambridge University press, 1995).

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² Constitution of Pakistan, Articles-118-119. The idea of provincial consolidated fund is derived from article 118 and 119 of the constitution of the Islamic republic of Pakistan 1973 last updated on 31st December 2004.

Why People Demand Provinces?

Five important factors;

- 1- People want geographical recognition of their ethnic identities and feel encouraged to make such demands by the example of countries with large number of provinces.
- 2- People feel they are a major minority like the Saraiki belt in Punjab and KPK.
- 3- The territories that demand provincial status are situated at the periphery of existing provinces far away from the the provincial capital which is the power center. By having a province of their own they will have the power center moved closer to where they live and thus be able to have better access to social and economic facilities.
- 4- The demand for creating more provinces also gets support from Punjab's large population size which is around 58 per cent of the total population of the country.
- 5- Creation of more provinces will improve governance and make administration and services provision more efficient.

Ethnicity and Administrative Divisions

A new province may justifiably be demanded on the basis of one or more of the above mentioned arguments. But the demands that are being made in the present case have an ethnic and regional logic. The renaming of the former NWFP as Khyber Pakhtunkhwa is a purely ethnic measure. It sparked the demand for a Hazara Province. This region has an ethnic diversity. Neighbouring Afghanistan where Pakhtoons, Hazaras, Tajiks and Uzbeks live has 32 provinces. Afghanistan's eastern part contiguous to Pakistan is purely Pakhtoon which comprises 42 per cent of the Afghan population. The demand for Hazara, Saraiki and FATA Provinces is similarly ethnic based though administrative aspects are also mentioned. If the ethnic principle is conceded to create new provinces the Hazara or Seraiki Province would not be the end of it. Similar demands will arise in Sindh and Baluchistan as well. In the words of an analyst, "The ongoing ping-pong in Sindh between 'commissionerate' and 'local government' systems has amply highlighted the de facto division of Sindh on the urban-rural lines; alongside equally strong sentiment to prevent it. FATA has also been voicing for provincial status. The Pashtun population of Balochistan, which is around 50 percent, has traditionally been uncomfortable with the current demarcation of the largest province, and there has been talk about a separate entity".¹³

¹³ "Quicksand of New Provinces," *Nation*, August 15, 2011.

Inter-Provincial Harmony

Pakistan has been faced with the problem of provincialism since its creation. It was one of the factors leading to the secession of the eastern wing of the country. Now Punjab is being accused of usurping the share of the smaller provinces. The question is: will the creation of new provinces lessen inter provincial (inter ethnic) prejudices? How will the Hazara and Seraiki Provinces treat their mother provinces of KPK and Punjab and vice versa?

Demand for creation of new provinces is not new but recently it was spurred by the renaming of NWFP which was resented by the non- Pushtuns community whose opinion in the matter was not sought. Other names like Khyber, Abasin, Gandhara would have been more acceptable compared to Pakhtunkhwa which is purely ethnic.

The names of other provinces have a geographical origin. Punjab means *Punj Aabs* (land of five rivers); Sindh is after the river of that name. The ethnicity of the people of these provinces as Punjabis or Sindhis is a derivation from that feature of the land. It is not linguistic.

I recently conducted a survey in which besides numerous other questions for my research I also asked ‘What is most important to you: “the new name KPK, law and order, abolition of corruption, low price of daily consumables, or eradication of terrorism”?’ The results of the survey were very shocking but interesting with respect to the name KPK.

- 35%: Low price of daily use products
- 23%: Eradication of Terrorism
- 15%: Renaming of NWFP as KPK
- 15%: Law and order
- 12%: Abolition of Corruption

(Population): 100 D.I.Khan; 100 Abbottabad; 200 Peshawar; 100 Swat; 100 Bannu; 100 Mardan; 150 Kohat and 150 Charsadda. This survey result shows people’s low priority attached to renaming of the province.

According to another survey, the creation of new provinces in Pakistan would result in further price hike and increased financial burden on the national kitty. A Non-governmental organization (NGO), MEMRB, conducted a survey in all the provinces of the country. It found that 20 percent people were of the view that the existing number of provinces was enough; while 17 percent thought that the existing provinces should be run properly. The percentage of people opposing creation of new provinces was 83.

It is argued that the creation of more provinces will not lead to welfare of the people. I have seen in different TV channel talk shows experts citing the example of Afghanistan which has 34 provinces. It is relevant example because

even during the jihad against the Soviet occupation the various ethnic warlords could not unite on one platform. The same division persists today as to the position of different ethnic groups on US presence. On the other hand in England the Irish, the Welsh and the Scots have a union of good governance. There's no demand for further sub-division. These two examples, of Afghanistan and the UK, show that we need to focus on the development of our institutions and civil services. The fundamental and core issues concern people's welfare which if neglected result in such divisive demands.

There is a dire and urgent need to reevaluate our current policy regarding civil institutions. We need more efficient, effective, scientific, humanistic and welfare oriented institutions that not only serve provincial capitals but the far-flung areas of the provinces as well. When such an administrative set up is put in place fissiparous tendencies will of themselves fizzle out.

Two very important factors which are needed are the strengthening of local government and good governance. This will be explained in the following lines:

(A) Strengthening of Local Government

Pakistan embarked on a devolution and governance reforms programme in 1999. The main achievement was the introduction of a new local government system that was introduced in August 2001 when all the four provincial governments promulgated their respective Local Government Ordinance, 2001.¹⁴

Since August 2001 it has been a period of transition as well as consolidation. In the past more than 80 percent of the friction between the provincial and local governments was due to administrative reasons like postings, transfers and recruitment. This matter has been resolved in the latest amendments in 2005 in the LGOs with the provinces agreeing to the creation of a District Service. Now Efficiency & Discipline have been devolved to the local level in the amendments. The relationship between the Members of National Assembly (MNAs) and Members of Provincial Assembly (MPAs) and the local governments, especially with the elected Nazims, was a very difficult one. The new political structure had created heartburns. However, the latest amendments have formalized the relationship through the Provincial Local Government Commission (PLGC) -- a neutral body. The PLGC now arranges meetings between the MNAs/MPAs etc., and the Nazims where policy issues can be discussed and necessary recommendations formulated. A strong and

¹⁴ Local government system in Pakistan and the Aberdeen agenda, 24-25 July, 2006 Islamabad, Pakistan, symposium report.

effective local democracy will diminish the demands for the creation of new provinces.¹⁵

(B) Good Governance

‘Governance’ is the exercise of power or authority – political, economic, administrative or otherwise –to manage a country’s resources and affairs. It comprises the mechanisms, processes and institutions through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and address their differences.

‘Good governance’ means competent management of a country’s resources and affairs in a manner that is open, transparent, accountable, equitable and responsive to people’s needs.¹⁶

Governance in Pakistan does not meet this criterion. Providing good governance to the masses means they are happy with the status quo and with the existing administrative division. A people satisfied with the governance will not seek new sub units to safeguard their socio economic interests.

Constitutional Debate on the Issue of New Provinces

It is very important to see what the constitution of Pakistan 1973 says regarding the creation of new provinces. The 1973 Constitution does not allow the formation of new provinces. There is no article available in the constitution for creation of new provinces in the country. In fact, new legislation is required to legitimize the demands.¹⁷

With general elections only one and a half year away, there would be more demands for new provinces as the political parties consider it a tool to gain popularity among the people. The weaker parties in each province are expected to play the ‘new province card’ to fascinate the voters among minority ethnic groups. However, there could be a blowback effect as well, because the opposition by majority communities may gravely hurt the electoral tally of such parties.¹⁸ This will further aggravate the situation.

The constitutional procedure for taking such mega steps can be circuitous and laborious because no political party or alliance is likely to muster a two-thirds majority simultaneously in the Parliament and the provincial Assemblies. Obviously, new provinces would entail an addition in non-developmental expenditure. The additional administrative expenditure could

¹⁵ Ibid.

¹⁶ Uzma Khan, “Good Governance in Pakistan,” December 2012, <http://www.oppapers.com/essays/Good-Governance-In-Pakistan/533961> (accessed 10 August, 2011)

¹⁷ *Express Tribune*, August 16, 2011

¹⁸ *Nation*, August 15, 2011

be minimised by restricting the size of the provincial government and the bureaucracy.¹⁹

Is It an Opportune Time to Demand New Provinces?

It is pertinent to see if it is an opportune time to demand new provinces:

Firstly, provinces just got their share in the NFC Award and there is a need to await its outcome.

Secondly, the 18th Amendment's stipulation with regard to the abolition of the Concurrent List has created a set of imperatives for transferring authority to provinces. This will have a trickling down effect on the regions that are demanding for separate provinces. The need of the time is to wait and check the effect of the 18th Amendment upon such areas.

Thirdly, we have to see the political, administrative and fiscal implications of provincial autonomy granted to provinces under the 18th Amendment. It will improve district administrations in existing provinces which may in turn neutralise the demand for a separate entity.

Fourthly, local government is yet pending and is not fully functional. The local government system is undergoing a transition. Once it is re-activated, people will have their problems solved at their doorstep. We need to see the outcome of devolution of powers and development of democracy at the grass root level.

Fifthly, judicial reform at magistracy level are still in the pipeline.

Sixthly, the country is in a state of war- the so called 'War on Terror'. It is grappling with numerous internal security threats. Our armed forces are at war in our own country. In such a crucial period, talking about mega changes like the creation of new provinces will be like threatening the integrity of the country as a whole.

Seventhly, different micro and macro economic models are in operation and we need to see their results.

And lastly, the Karachi situation is getting worse where every day people are dying in target killing. One province is experiencing a separatist movement while another is at the forefront of the 'war on terror'.

While conducting the survey mentioned above, when I asked about the creation of new provinces, one of the interview respondents said that, in the present circumstances, "your question about creating new provinces looks very odd. We are short of food and you are talking about new provinces. It's just like "why don't they eat cakes". He further said, "I don't need [new] provinces; I need cheap flour, sugar, pulses and edible oil." This statement of a common man underlines the fact that Pakistan is not in a position to engage in

¹⁹ Ibid.

sensitive issues like new provinces. It will definitely have adverse effects on national solidarity..

Conclusion

The need of the time is to understand that the Greeks did not “form” city states out of a united country. It was the other way around. The Greeks were not a single unified country. The modern Greek state was formed in the 18th century after the fall of the Ottoman Empire and the Greeks merged into a unified state. It was not like Greeks separated into city-states; they were like that from before and often fought against one another. In the 21st century, why are we moving the other way round. Instead of making a strong federation, why are we splitting our country further into sub state units? It's just like going against the spirit of evolution in which we move from city state system to federation. We must not go back.

At the time where we find our country at the crossroads of history, we need to think more objectively. We need to behave like a nation. Ethnic and territorial prejudice will lead us to nowhere. A united Pakistan is and will remain beneficial for all ethnic identities residing in Pakistan. ■

CHAPTER VI

SIGNIFICANCE AND REQUIRED STRUCTURE OF THE LOCAL GOVERNMENTS

Shahid Hamid

Of all the components of the governance paradigm that progressive states aspire to in the twenty first century, Local Government is most definitely the one that has the widest applicability and far reaching effect. It is on the basis of this wide range of applicability of Local Government, both in terms of the number of people that it has a direct and immediate effect upon and with regard to the various sectors that it cuts across, from development to service delivery, dispute resolution and taxation, to name just a few, that I will place before you my views on its significance. The subject of Local Government in Pakistan is made even more interesting by the fact that historically the Indo-Pak subcontinent has been invaded numerous times and although some of the conquerors were rapidly assimilated into the prevailing culture of this region, the majority established new ruling dynasties with their own individual system of local administration. As far back in history as we are able to go we find reasonably sophisticated forms of local self-government in keeping with a strong sense of municipal values typically identified with any system that recognises the needs of the populace. For example, well over four millennia ago we have the Indus Valley Civilisation exemplified by Harappa where the urban areas had warehouses, public baths, sewerage drains and protective walls, in fact a degree of advancement in municipal planning that is absent from some rural centres in the country today. To analyse current needs in a historical perspective is therefore far more complicated than it would be in a country like the USA, say, where historical evolution of local governance would make for a relatively linear and straightforward narrative.

There is no going forward without looking back when it comes to future planning. Therefore, I will in passing mention that there is evidence of some sort of a local government if not local self-government through nominated/appointed 'subedars' to manage several 'parganas' during the Mughal rule and, in slightly greater detail, examine the British Period given that post independence it is the western democratic concepts of governance that give rise to our modern day description of local government as being 'an administrative authority over a defined area smaller than the state and acting within the powers delegated to it by the higher government'. The British defined Local Governance for the subcontinent (or the part of it that

constitutes Pakistan) with a set of laws that originated with the Conservancy Act of 1846 which was in response to the outbreak of an epidemic of cholera in Karachi. This developed into the Punjab Municipal Act of 1867. Successive legislation and policy decisions, such as Lord Ripon's Resolution of 1882 and The Decentralisation Commission of 1907, led to an increase in the representative character of the local institutions which culminated in the Government of India Act, 1935 allowing provinces to frame their own Local Government laws. The point worth noting about this era in the evolution of local government is that although steps were taken to make local self-government progressively more autonomous and efficient, the over-arching policy of the British stemmed from an imperialistic tendency to safeguard central control over the dominion while allowing limited freedom of self rule to preserve the public harmony. This tendency to have a strong controlling authority was, therefore, very much a part of the relevant legislation which was inherited by Pakistan at the time of Independence. Finally, I will focus on the last two local government systems because of their current relevance in the light of the constitutional provisions pre and post Eighteenth Constitutional Amendment.

What is the significance of local governments? Broadly speaking there is a political significance, an administrative significance, a legal significance and an electoral significance. From the political perspective no one can deny that local governments function as political 'nurseries' and help strengthen democratic institutions at the grass roots level. The ideal political construct would involve aspiring politicians stepping into the arena at a local level where in addition to the experience of an elected house they are responsible for the execution of a majority of all service delivery and development functions which are devolved upon them. If the local government positions are used as a spring board to gain an entry into higher level legislative assemblies then the prior experience will give rise to provincial and national legislatures with greater skills and experience with ability to enact laws which are more practical and need-oriented. This can happen only where local government politicians have autonomy to undertake such functions devolved to the local governments and also when they are associated with and linked to a political party. Party recruitment at the local level provides politicians with a career path within the party executive in addition to that in public office. This can in some measure strengthen democracy intra party as well as ensure loyalty to party principles not based on personal linkages or political patronage. It has been observed in countries where devolved governance systems have been in place for a considerable time that political career progression is not unidirectional from local to national. There are several instances where national level politicians aspire to hold local office to be able to tap the financial and logistical resources available locally, as well as to build up an electoral and good will safety net. In Pakistan the political picture is only partially what it

should ideally be and the reason for this is that local government elections so far have been on a non party basis and more pertinently mostly held under military rule.

In so far as administrative significance is concerned the present demographic position in Pakistan urgently requires an active participation of local government institutions to effectively deal with the challenges of governance and to improve service delivery. The population of Pakistan at this time is estimated to be more than 177 million as opposed to the figure reported at the time of Independence in 1947 which was 31 million. In 64 years where a nearly 600 per cent increase in population has taken place the requirement to have administrative structures taken down as close to the people as possible has become a necessity and attempting to maintain centralised control is impractical to say the least. To take a small example, an elected representative sitting in Lahore cannot successfully intervene in the management of a Boys Middle School in Pasrur. It makes eminently better sense that the school management committee be run by locally elected representatives who are answerable for the performance of the school at the next elections. As opposed to 350 – 400 provincially elected representatives, with local government you have an additional 3464 Union Nazims and 41, 568 Councilors for the population of Punjab alone. Of course, for maximum success it is necessary that local politicians should, independently of political biases, work to improve service delivery, enforce municipal laws and carry out revenue collection. This is certainly linked to the continuity of the system. Whenever local government is carried on in intermittent and brief spurts the system will fail, and whenever under military regimes the system is misused for preservation of the military rule the system will be perverted. The success of the system requires that democratic institutions be given a chance to develop beyond their initial teething stages. In Pakistan till now the opposite scenario has prevailed.

Most important is the legal significance, quite apart from the political and administrative necessities of having autonomous, effective and fully functional Local Government set ups. Article 32 of the Constitution of 1973 reads and I quote “Promotion of Local Government Institutions: The State shall encourage Local Government Institutions composed of elected representatives of the areas concerned and in such institutions special representation shall be given to peasants, workers and women.” In the light of the aforementioned legal provision, the federal government has to assist in the strengthening of Local Government Institutions. It is under this Article 32 that from 1973 onwards all laws relating to Local Government have been formulated: namely the People’s Local Government Ordinance, 1975 of the Bhutto regime under which it may be pointed out that no elections were held, replaced by Local Government Ordinance, 1979 of General Zia-Ul-Haq and finally Local Government Ordinance, 2001 of General Musharraf. Both the

military rulers ensured that all the provinces had a uniform law, with only very minor differences in certain areas. In enforcing this uniformity, consultation with the provinces remained minimal. The 18th Amendment, by implementation of which the Ministry of Local Government and Rural Development, Government of Pakistan, will be abolished, has removed altogether the protection that was given to the local government laws of the Musharraf era. Article 140 A of the constitution will, as a result, finally come into its own. This Article reads: “140-A. Local Government: Each province shall, by law, establish a Local Government system and devolve political, administrative and financial responsibility and authority to the elected representatives of the Local governments.” Article 140-A from its wording makes it mandatory upon the provinces to make their own laws. The implication is that each province will have its own system of local government peculiar to its own requirements. It is however, noteworthy that in the meetings held between the four provinces under the Ministry of LG&RD, Pakistan and the Inter-Provincial Coordination Committee on various dates in 2009 the provinces agreed to maintain as much uniformity between their laws as could be possible.

It also needs pertinent mention here that under the 18th Amendment it was also unanimously agreed, Article 219 (d) refers, that all Local Government elections are to be held by the Election Commission of Pakistan. But not necessarily all at the same time because of the presumably different laws that each province may now pass to suit its own needs.

Coming back to Article 140-A, three essential requirements that the law relating to Local Governments has to fulfill is the devolving of the responsibility and authority presently vested in the provincial government in the following areas 1) political 2) administrative and 3) financial. These are the three critical areas which form the basis of the submissions in the second part of this presentation viz., the structure of Local Government.

Before we begin on a discussion of structure which inter alia requires a comparative analysis of at least the two most recent laws, i.e. the Local Government Ordinances of 1979 and 2001 it would be pertinent to consider what is involved in devolving the political, administrative and financial authority of the provincial government. In this behalf it bears re-iteration that all parties and provinces have a constitutional commitment to the creation of autonomous local governments politically independent of the provincial government.

The devolution of financial authority to the Local Governments means three things: autonomy in utilisation of the allocated funds transferred through the provincial finance commission, regardless of the political affiliations that the concerned local government may have ; an equitable award mechanism for PFC in the same spirit as that under which the provinces receive their share from the NFC (a matter of ‘do unto others as you would

have done unto you’); and the gradual transfer of responsibility in the collection of taxes and generation of own source revenue in keeping with the parallel transfer taking place from the centre to the provinces.

In my view the parameters to keep in mind in devising the structure of Local Governments are as follows:

1. The definitive Article 140-A of the Constitution—this is imperative as it is the supreme law of the land.
2. The Commonwealth Principles as stated in the Aberdeen Report merit attention as these comprise shared values with the Commonwealth nations.
3. The successes and failures of the last two systems of Local Government viz. the 1979 and 2001 Local Government Ordinances.

Article 140-A I have already discussed. The Commonwealth Principles are a series of guidelines prepared by and issued to participating countries which set out the basic aims and intentions that the legislature should keep in mind in drafting the law for the establishment of Local Government systems. At this point I would add that in devising the new set up, the policy makers of today would be well advised to resist the temptation of doing away entirely with the past system and coming up with a new one diametrically opposed to it. The successes and failures of the past must be kept in mind in deciding the way forward. In discussing the past systems we may certainly do away with some provisions that have proved inadequate but should retain all those that have proved beneficial to the local populace.

A few words now on General Zia’s Local Government Ordinance of 1979:

- (1) Transfer of responsibility was confined to some areas of development and municipal service delivery alone.
- (2) There was recognition of the varying requirements of urban and rural areas and the different ways in which they needed to be addressed and, consequently, an urban – rural distinction was maintained in the structure of local government.
- (3) Public health and sanitation in the rural areas remained with the provincial government recognising that the *Zila* Council would lack the necessary fiscal and administrative resources to cater to far-flung areas.
- (4) Fiscal self generation capacity was devolved to the extent of allowing for the local collection of taxes such as the octroi tax and goods export tax and the receipts from cattle *Mandis* etc., all of which constituted a substantial source of income.
- (5) An especially strong point was the fact that the enforcement mechanism was linked to the executive magistracy which

exercised the requisite authority at the said time. This, of course, was much prior to separation of powers of the executive and judiciary.

- (6) Basic Health Units, Rural Health Centres; *Unani Dawa Khanas*, Primary and Middle Schools, including *Masjid-Maktabas*, were with Local Councils. A parallel system of the above listed entities was also at the same time with the provincial government. This duplication of responsibility at any other time would have been a policy flaw but at the time when the country was aiming to expand health delivery and literacy it was probably necessary to have a system of shared responsibilities.
- (7) Linkages were established between the local government set up at the union council level and the administrative departments, for example, the registration of birth and death certificates was the responsibility of the union council which was supplied with the necessary data by the village *Chowkidar*, himself an employee of the revenue department.
- (8) The overall aim of the military regime, however, was to strengthen the centre, and this was accomplished by provincially appointed administrative heads at the divisional and district level being made controlling authorities of the elected representatives thereby compromising the latter's political autonomy.
- (9) The selection of the Heads of the Local Governments was, in like manner, open to manipulation by the province. The electoral scheme as per the '79 law provided for direct election of members of the *Zila* Assembly from a constituency of a cluster of union councils. The elections were held under the auspices of the Provincial Election Authority. The members of the *Zila* Assembly then formed the electorate for the Chairman, *Zila* Council and were a small enough number for there to be legitimate apprehension that they could succumb to pressure from higher levels of government in their choice of candidate.
- (10) The list of functions assigned for each level of Local Government was exhaustive and outlined in great detail, yet by virtue of one proviso the entire discretion to hand out the responsibility to the respective local government was curtailed by the provincial government. The proviso stated that "the government may assign all or any of the functions" provided there under.

The LGO 1979 was replaced by 2001 law, 22 years after the ambitious road map announced by General Musharraf when he took over as Chief Executive of Pakistan. Devolution under the 2001 law was extensive. Not only was there transfer of responsibility in terms of development functions, there

was also a focus on transfer of functions relating to day-to-day governance. As a result about seventeen odd departments under the provincial government were devolved and placed under the District Government. However, the huge transfers in functions and responsibility undertaken without significantly enhancing the capacity of the local governments to deal with the same led to serious problems of implementation.

Some pertinent observations about this system need to be made here:

- a) Finances were distributed under the PFC and all the tehsil Municipal Administration (TMAs), District Governments and Union Administrations got their own independent funds. It is also pertinent that the TMAs in rural areas provided municipal services in the entire tehsil without differentiation of urban – rural.
- b) The only link between the three local areas in this set up was through the Nazims and Naib Nazims of the union councils who were members of the District and tehsil Assembly respectively. But the lack of institutional correlation between the three tiers translated into a lack of co-ordination in the work they carried out.
- c) The linkage with the provincial government was very limited. Provision was there for a provincial oversight mechanism in the form of PLGC but it was never put in place and never made effective perhaps in order not to alienate new found political loyalists. In eight years of local government not a single audit was held.
- d) Lack of Provincial oversight also meant that a lot of the policy decisions that by right the provincial government must make were not implemented at the local level and there was no way to monitor or ensure the same.
- e) There was also no capacity to perform some of the specialised assigned functions such as spatial planning and land use, for which it would have been beneficial to have involved the expertise of the provincial government.
- f) The most intensely debated reform of the 2001 law was the abolition of the office of the Commissioner and of the Deputy Commissioner. The vacuum was filled by distributing the authorities; a few to the police and the remaining chunk to the judiciary which significantly weakened the enforcement mechanism. Whether the decision was correct or not is up to the elected governments of the day and it remains to be seen whether they choose to amend or endorse the relevant law.

- g) The enforcement mechanism was weaker than in earlier systems as the special judicial magistrate was dealing with cases of a serious nature as well as with minor offences which were necessarily ignored. Most cases filed by local councils would remain pending unattended or drag on for far too long.

What have the four provinces done in the last 2 - 3 years?

Baluchistan has made amendments in the Cr. PC and enacted a law which is very similar to the 1979 Ordinance. It has also reintroduced the categorisation of A and B areas which had been done away with in the Musharraf period. Khyber Pakhtunkhwa and Sind are in the process of drafting the new law, as is Punjab.

Reportedly, Punjab has instituted a number of Committees to make recommendations for the new law. In the meantime it has already made some amendments to the LGO, 2001:

The Revenue Department has been handed back to the Provincial Government, which is indicative of the fact that Punjab is moving towards reintroducing the office of the Deputy Commissioner. It has already posted Commissioners to the Divisional Headquarters and Assistant Commissioners at the tehsil level (in place of DDORs under the LGO, 2001). The DCO has been given responsibility of the former DC in terms of revenue powers for which he is answerable to the Provincial Government, quite independently of his capacity under the LGO, 2001 in which he was subordinate to the District Government/Nazim.

Furthermore, all three Provincial Governments have requested the Government of Pakistan via the IPCC to finalise all pending references for amendment in the CrPC so that the executive magistracy can be reintroduced.

In October of this year the Provinces have to notify the ECP as to the date of holding Local Government elections.

A wise course for all the provinces would be to make amendments to the existing law based on previous experience while ensuring that they are not inconsistent with the constitutional requirements. Some suggestions that may be considered given the peculiar political and developmental challenges that Pakistan currently faces:

- (1) The enforcement mechanism should be linked to the executive magistracy (after the requisite approval by the GoP is obtained.)
- (2) An effective and functioning Provincial Oversight mechanism should be put in place provided of course that it should not be open to abuse in the form of curtailing the autonomy of the local governments.

- (3) Inter linkages between the local area Union Councils, tehsil Municipal Authorities and District Governments should be strengthened. For this purpose Coordination Committees as in the past could be set up, only this time they should be headed by elected representatives.
- (4) The representation rate of 33 per cent for females granted under the LGO, 2001 should be maintained.

An important question for the political and democratic evolution of the country is whether elections should be held on a party or non party basis. Non party based elections do lead to the phenomenon of 'elite capture' where success is often determined by the ability to spend on the campaign. This is not always the case with party based elections where more popular and worthy candidates with less financial capability can benefit from logistical and financial support from a party. Non party based elections also lead to polarisation of society at a local level, where votes are often divided along caste and *biradari* lines. To a great extent this practice is mitigated by party based campaigning.

Ladies and gentlemen, 64 years into Independence we have still not finally settled an agreed structure of Local Government. It is up to our respective provinces now to make mature, well thought out and practical laws. Let us hope and pray that they are able to do so. ■

DEVOLUTION OF FINANCIAL RESOURCES TO THE LOCAL GOVERNMENTS

Dr Zafar Mueen Nasir

Introduction

The centralized system of government has failed to address local needs in many countries. For this reason it became necessary to devolve power to the local level so that people at the grass root level could become part of the decision-making process. The decentralized structure ensures efficient, effective and sustainable local development, particularly in rural areas. The decentralized system helps in building capacity of the rural poor and of local institutions to plan, implement and monitor local development. This important aspect is accorded priority in many countries. Empowering the majority poor, especially in rural areas, is crucial to overcoming food and income insecurity. This is also an effective way to create awareness about the complexity of local issues.

It is pertinent to mention that the decentralization mechanism differs in structure, sharing of powers, resources and functions across countries. Administrative decentralization process ranges from transfer of national government functions to sub-national levels with central control over budgets and policy making. Fiscal decentralization involves transfer of partial control over budgets and financial decisions from higher to lower levels. Transfer of resources and authority to lower tiers of governance is also part of devolution. Due to this diversity in decentralization approach, it becomes difficult to compare the trends across countries.

The main objective of different decentralization measures is to make development programmes and projects more effective by increasing people's participation in policy planning and implementation and ensuring the efficient delivery of services. This is an efficient way to engender lower-level democracy, enhance coordination, mobilize local resources, promote equity, facilitate flow of information, enhance responsiveness of the central government to citizens' demands and interests, maintain political stability and provide education and training in political leadership. The success of decentralization process can be measured in terms of expenditure of local government, investment in rural infrastructure development and representation of weaker sections of society -- women, minorities and other socially neglected groups -- in local government. It can also be gauged from direct elections to different layers of local administration.

In Pakistan, the process of decentralization was introduced mainly on account of the failure of the centralized approach to development needs. Devolution of powers was initiated to achieve rapid growth for effective and sustainable development. The other objective was to increase the understanding of complex local issues and to address issues which the central government structure had failed to deal with. The decentralized system was important for Pakistan due to the dominance of rural share in the population as well as in the economy. The agriculture sector has an almost one-fourth share in the economy and employs more than 40 percent of the labour force. On top of that more than 60 percent population of Pakistan lives in rural areas where incidence of poverty is high and the fruits of development have yet to reach there in a substantial way. In 64 years of its history, long experimentation with different types of systems could not bring any visible change in the life of the people. The frequent takeovers of government by military rule did not allow any one system to produce results. All successive governments adopted systems that best suited their interests. The principle of service to the people and the betterment of their life failed to figure in their scheme of things. The devolution of resources to the lowest tier of government was not made leaving only administrative areas for devolution.

This paper is an attempt to look at the prospects of devolution of financial resources at the local level and the problems that are likely to be encountered in the process. It also takes into account important developments such as the new National Finance Commission which may change the course of history in this process. The first and the foremost is the charter of democracy which is the cornerstone of the devolution process. The paper provides a brief account of COD and developments related to it. The devolution of financial resources is discussed in the next section followed by the concluding section.

The Structure of the Federal Government

Pakistan inherited a system of governance which was designed mainly to collect land revenue and maintain law and order. Provinces were divided into administrative districts and Tehsils. There was hardly any opportunity for public participation in governance. The federal structure of Pakistan consists of four provinces, seven tribal agencies, six frontier regions, Gilgit-Baltistan and the Capital Territory of Islamabad. This constitutional structure was made in 1956 which provides a significant fiscal responsibility to the federating entities at sub-national level along with rights at the Centre. The third tier of the government was introduced under the devolution plan in 2001 consisting of districts, Tehsils and Union Councils.

The Local Government Ordinance 2001 was an important milestone that provides for devolution and institutional restructuring along with the

distribution of resources at district level and strengthening of grassroots organizations. The local government ordinance was successfully implemented in the country during Pervaiz Musharraf's regime and was established in all four provinces of the country, comprising 96 District Councils, 342 Tehsil/Town Councils and 6,022 Union Councils. Direct elections were held to fill 126, 462 Union Council seats across the country. The strategy for devolution under the Local Government Plan was based on three basic principles i.e. people-centered development, rights and responsibility and service-oriented government. Power was devolved to locally elected representatives to decentralize administrative and financial authority. A three-tier federated local government system at District, tehsil, and Union levels was set up in every district on 14 August, 2001 and was made an integral part of the provincial governments. The system integrated rural and urban local governments into one coherent structure in which district administration and police were made answerable to the elected district government. In the system, marginalized social sections were given adequate representation at each level of local government (i.e. 33 percent for women, 5 percent for peasants, workers and minorities each). A system of checks and balances was introduced with inbuilt mechanism for monitoring service delivery. Fiscal decentralization was the main pillar of this system which was necessary for localization of development.

The Ordinance also introduced far reaching changes in many areas: the voter's age was lowered to 18 years to empower young people; the representation for women was enhanced to 33 percent at all levels and the representation for peasants, workers and minorities was ensured at all three levels. The Zila (district) Council was the top tier of the local government system. It consisted of a *Zila Nazim*, *Naib Zila Nazims* and indirectly elected councilors with reserved seats for women, peasants/workers and minorities. The district administration had offices for agriculture, community development, education, finance and planning, health, information technology, law, literacy, revenue and works and services, each headed by an Executive District Officer (EDO). The entire district administration was to function under the control of the elected *Zila Nazim*. The overall structure of the local government was as under;

- District government, Tehsil and Union Municipal administrations were set up with vast powers. It was an important step to ensure strong links between Union, Tehsil and District Councils for effective coordination of the development process.
- *Zila Nazim* was the head of the district assisted by the *Naib Nazims*. District bureaucracy was placed under the District Coordination Officer who was accountable to the *Zila Nazim*. Police was also accountable to the *Zila Nazim*.

All Nazims and *Naib* Nazims were required to have minimum academic qualification of secondary school certificate or equivalent.

- Councilors were the main pillars in these administrations because they were vested with the powers to levy tax, plan, manage and monitor the development activities. For this purpose, local development training programmes were initiated for them. They were also provided with opportunities to participate in legislative activities. This was the way through which urban-rural division for development was removed.
- People's participation was ensured through Citizen Community Boards (CCBs) and Village Councils. Public display of information on various development activities was made obligatory and this information on real service delivery provided monitoring opportunity to the citizens of development projects. They were also provided direct role in monitoring the performance of district administration and line departments through the Citizen Community Boards.

To support the local government structures, a number of new institutions were being created. These included the Provincial Local Government Commission which was an impartial arbiter between local governments and the provincial government. It was an institutional mechanism for revenue sharing between provincial governments and districts. The *Zila* Mohtasib (District Ombudsman) was an important position but could not be established. Monitoring Committees, which included Ethics Committees, Accounts Committees, Insaf Committees, Musalihat Anjumans (Conciliation Bodies), *Zila* Mushavirat (District Consultation) Committees, Union Public Safety Committees, Citizen Community Boards, Village and Neighborhood Councils and Provincial Councils.

Devolution of Financial Resources

Each level of local government had its own local fund which included money transferred by another local government, grants/money received by local government from the provincial government or other sources, proceeds of taxes/charges levied by local government, rents and profits payable to local government from immovable property vested in or controlled/managed by it, proceeds/profits from bank accounts, investments or commercial enterprises of a local government, gifts, grants or contributions to local government by individuals or institutions, income from markets or fairs regulated by local government, fines for offences under local government laws/rules and proceeds from other sources of income. All other financial receipts such as

receipts from trusts administered or managed by local government, refundable deposits received by local government and deferred liabilities were credited to the Public Account of the local government. Although local governments were able to raise funds from taxation, they primarily depended on fiscal transfers from the provincial government.

Local governments were empowered to impose tax on transfer of immovable property, education and health, fees on cinemas, licenses, animal sales, tolls and rent on different facilities, land, buildings, equipment, machinery and vehicles with the approval of the local council and after vetting by the provincial government. Similarly Union Councils were empowered to collect fee for licensing of professions/vocations, registration/certification of birth/marriage/death, specific services rendered by Union Council, execution/maintenance of public utility work, rent for land, buildings, equipment, machinery and vehicles. They were also empowered to collect charges for tax recovery on behalf of government at all levels.

The NFC Award

The distribution of resources among the centre and provinces was adjudicated by the National Finance Commission (NFC) under the prescribed formula. Different tiers of government used to get funds to carry out their responsibilities as per the federal and concurrent lists assigned to them. Provinces were getting funds from NFC Award and transfers from the central government along with the tax revenue collected by them. The fiscal design at the federal level was full of complexities, both of taxation and expenditures. The multiple level of authority on taxation provided incentives to levy tax. The sub-national entities were faced with insufficient resources as most of the revenue was collected by the federal government. This created imbalance in the power of revenue collection and expenditure. This can be seen from the fact that four provinces used to collect 8 percent of total tax but their expenditures accounted for 28 percent of the total expenditure. This created excessive dependence of the provincial governments and local governments on federal transfers. These transfers include revenue shares, grants, straight transfer of provincial revenue collected by federal government and transferred to provinces after deducting collection charges (e.g. royalties on gas and crude oil) and loans. This created a vertical imbalance across governments and needed reforms in the distribution of the revenue.

The NFC Award determines the fiscal relationship between the federal government and the provinces for financing operating expenditures. There has to be fresh award every five years. The federal divisible pool consists of all revenue received by the federal government, all loans raised by the federal government and all monies received as repayment of loans. The main charter of the NFC is to recommend on the following:

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- a) The distribution of specific taxes and duties between federation and provinces
 - b) The disbursement of grants to provincial governments
 - c) The borrowing powers exercised by federal and provincial governments and
 - d) Any other financial matter referred to the Commission.

In total, nine awards have been issued till today. These include the Riesman Award of 1951, and the NFC awards of 1961-62, 1964, 1970, 1974, 1990, and 1996, the Presidential Order of 2006 and the 7th NFC award.

There have been marked improvements in the distribution through the NFC Award and larger share of the revenue is going to provinces but the overall performance of the NFC Award is not satisfactory. The recent award announced by the president was ad-hoc because of the failure of two previous awards of 2000 and 2005. The consensus agreement on the award could not be reached due to a number of contentious issues. These included

- a) Which taxes to include in the divisible pool;
- b) Magnitude of the respective share of federal and combined provincial governments in the pool;
- c) Distribution among the provinces; and
- d) Criterion for distribution.

The NFC formula is based on multiple indicators that include population, poverty/backward index, inverse population density (IPD) and tax effort/revenue generation. Yet it historically failed to address the socio-economic disparities across provinces. Horizontal distribution is based primarily on population, limiting the financial capacity of the provincial governments to meet their assigned roles and responsibilities. In practice, disparities measured by IPD, backwardness or fiscal effort have been ignored. On the basis of population, Punjab can claim a larger share whereas on poverty and backwardness index, NWFP was on the top. On IDP and poverty, Baluchistan was standing on the top while the revenue generation indicator was favoring Sind. Because population was the main player, Punjab benefited the most while Baluchistan suffered the most. In case of Baluchistan, the low population density and vast area required large per capita development funds to provide public services but it could not attract large sums due to NFC formula.

The other weakness of the NFC Award was its inability to incorporate any mechanism to motivate resource mobilization in the provinces so that the financial dependence of the provinces on fiscal transfers could be reduced. There is no inbuilt incentive mechanism in the formula to increase their tax efforts or punish them on failure. In a nutshell, it can safely be said that the

system of sharing development responsibilities and fiscal resources could not properly achieve the development goals in terms of reducing regional disparities in income generation, social conditions, and own revenue generation.

What was Needed for Effective Devolution

As stated earlier, there are a number of measures for decentralization. These include the expenditure of the local government, representation of women and other weaker sections in local government, investment in rural infrastructure development and direct elections to different layers of local administration. Although a number of steps were taken under the Local Government Ordinance 2001 but the real change in the devolution process could not be achieved due to explainable reasons. Still a number of measures can make the devolution more effective. The first and the foremost is the strategic plan for decentralization with strong commitment of the government, political parties and donor communities. Then an effective mechanism is needed to make local-level institutions participatory so that people can integrate their needs in development programmes. This needs bottom-up planning with its integration in development efforts at upper levels. Institutions can only be effective if they possess proper human and financial resources so that they ensure proper implementation of development programmes. Besides, an appropriate method of monitoring and evaluation needs to be developed and applied to ensure flexibility in strategic planning.

Institutional innovation is an integral part of the process since the creation and restructuring of local level institutions are necessary pre-requisites for success and sustainability of local development efforts. Despite the existence of various mechanisms, inadequate coordination of activities among the various agencies seems to persist and emerge as a critical bottleneck in the country. Innovative efforts are required to overcome such deficiencies. The effectiveness of local government from the district to the village level is again compromised by its dependence on the state and even the centre for resources. The influence of the law ministries extends to the local level where officials retain dual loyalties to the parent ministry and local elective institutions. The services of employees should be fully delegated to the local bodies in order to make the devolution of power effective. Decentralization of governance is crucial for empowering the majority poor to overcome food and income insecurity.

Capacity building of the poor and of local institutions to plan, implement and monitor local development is a priority for the success of decentralization. Pakistan inherited a tradition of strong centralized administration and an efficient framework of civil services, but local government institutions have not yet developed fully.

Charter of Democracy (CoD)

Realizing the need for real devolution, a consensus was reached among the two main political parties of the country with the historic signing of the Charter of Democracy (CoD) on May 14, 2006. The CoD paved the way for power sharing among the people of Pakistan. This event is regarded as the third most consensus document of the country.³⁴¹

The CoD brought two major political parties of the country at a common platform. This was the beginning of a new era of political reconciliation and cooperation after the smooth transition from military led government to democracy. The scope of the CoD was extended with the formulation of Parliamentary Committee on Constitutional Reforms after the restoration of democracy on the proposal of President Asif Ali Zardari. The committee included representatives of all political parties and independent members with the purpose of broad-based ownership of the Charter. The Committee was given the task to propose amendments in the Constitution in the light of CoD. The President also advised the Government to take appropriate steps in this regard.

Subsequently a Parliamentary Committee on Constitutional Reforms (PCCR) was formed representing 15 political parties of the country. The Committee has six members from each province, two from the Federal Capital, and one from FATA with Senator Mian Raza Rabbani who was elected as its first elected Chairman on June 25, 2009. The PCCR solicited opinion and proposals of all stake holders including general public, civil society, Bar Councils regarding CoD, 17th Amendment and provincial regimes in the reference of the Charter. The 18th Amendment was introduced in the Constitution of Pakistan and that set the tone for devolution of financial resources at the local level.

The 18th Amendment

In March 2010, the parliament passed the 18th Amendment to the 1973 Constitution repealing the 17th Amendment that had empowered the President as the Chief executive of the Country at the expense of the Prime Minister who was the chosen leader of the parliament. The 18th Amendment gives powerful new tools to the federating entities to manage their fiscal affairs as they pursue their development objectives. The financial problems faced by provinces have largely been addressed through the GST agreement, the seventh NFC award, and additional spending under the 18th Amendment. The

³⁴¹ The first was the Pakistan Resolution (1940) that expressed a consensus for the creation of Pakistan. The second was the 1973 constitutional consensus. Now we have the third national consensus in the form of CoD that is being regarded as the Magna Carta of Pakistan

provinces will have more resources to carry out additional activities devolved under the 18th Amendment.

The 7th NFC Award is a radical departure from the past practice. It requires a substantial makeover of the system of fiscal transfers between the Centre and the federating unit. This is not an easy task because the Centre is already facing resource crunch and allocating additional resources to the provinces need to raise revenues. In this regard, three important points have to be taken into account — the economic growth rate of the country, quality of physical and human infrastructure and social development. In case of Pakistan, all of these indicators are not at par with the other countries of the region. The capacity of the government to raise revenues from taxes is also limited. Therefore it is a dire need to reconsider the prevailing situation and make decisions accordingly. Currently the tax to GDP ratio is 8.9% which is very low by any standard. This ratio has to be high so that larger share of revenue can be generated. This requires larger revenue efficiency of GST. Currently Pakistan's efficiency of GST fell to .27 which is even lower than Philippines and Sri Lanka (their efficiency is around 0.45).

To raise the tax efficiency, center and provinces have to adopt an integrated approach to tax administration. The provinces can manage some sectors for tax administration but raising the tax base is difficult for them. The existing provincial assignments as per Government of India Act 1935 include provincial taxes, taxation of agricultural income, property and land taxes and sales tax. The 1973 Constitution assigned sales tax on services to provinces. At that time, this was largely a final point tax on tangible services. Much before the advent of the GST, spending was financed by the share of divisible pool. The 18th Amendment focused on unbundling of spending responsibilities but did not address the revenue assignments. This created a tussle between the center and provinces over the administration of the GST on services. Once this assignment will go to the provinces, they will adopt a serious approach toward raising the tax base. Accountability of provincial and local governments, i.e. clarity in spending responsibilities, addressed in the 18th Amendment, should be accompanied by access to broad-based own-source revenues.

The Goods and Services Tax (GST) on services is a good example of the own-source revenue base and it is difficult to implement with split administration. Moreover, variation in rates will make provincial administrations on services a very complex matter and will potentially lead to loss in overall revenue-productivity. As a result, it could lower overall tax revenues, without own-source benefits. The modern treatment to this problem could be to define accounts for tangible and intangible and joint supplies. This is an easy way to define goods. Services should be defined as all supplies other than goods. Provinces should be permitted to begin to administer the GST on services. The final point sales tax for "final" services should be peeled off from

GST on services. Items requiring input, crediting/refunds should come under federal administration. This will permit the application of modern approach to the definition of services under the reformed GST. Telecommunications which accounts for 80 percent of revenues on services should come under special treatment for involving effective federal administration. This way the tax base will be raised along with tax efficiency. In case of failure, the system will not run smoothly and a number of problems may prop up which would be difficult to handle.

Conclusion

The 18th Amendment has changed the financial landscape of the country by empowering provinces through larger share of resource allocation. This is an important move that has long term repercussions for the economy which is facing fiscal deficit every year beyond the agreeable limit. This is because of the low tax to GDP ratio and unwillingness of people to contribute their fair share in the national economy. The reformed GST was an attempt to bring more people in the tax net but due to inability of the government to develop consensus, it has not been possible to implement it so far. Government has to take steps for expanding the tax base and that needs to bring provinces on board for tax administration. The devolution of financial resources at local level can only be achieved through political will and consensus at all levels of the government. This is not an easy task because all tiers of the government have to compromise on some formula of resource distribution. The 18th Amendment is a good omen for the country and its implementation can bring the change at gross root level by devolving financial and political power. ■

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