

Historical Evolution of Federalism in Pakistan: From Bewilderment to Setting up of a Path

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Abstract

Pakistan's federalism has come a long way since independence. It has been a journey of trials and errors, and of crises of historical proportions. Created on the belief that the country would not have any difficulty in adopting a federal system on the pattern of Australia and Canada, it found itself bewildering for years for a viable federal contract. Pakistan's oscillating between military and civilian rule also made its search for a genuine federal system difficult. After having experienced different constitutional arrangements, four military rules and the separation of its biggest province in terms of population, Pakistan has finally found some light at the end of the long tunnel it has been passing through. Since 2008, it is witnessing the second civilian regime that has come into office after the completion of the full term of the previous regime. This has happened for the first time in the country where the tenure of all the civilian regimes was aborted due to one or the other reason. Similarly, the 18th Constitutional Amendment has raised hopes about provincial autonomy and a more democratically devolved political system in the country. To what extent these hopes are fulfilled, only time will tell. This article traces the difficult terrain that Pakistan has traversed in its search for a federal arrangement that would have suited its needs and satisfied its federating components. It also analyses changes made by the 18th Amendment in the Constitution to demonstrate that the amendment has in fact made the major departure from the past constitutional documents of Pakistan. But despite this, certain challenges are still there. The paper also looks into them to suggest that meeting them successfully is important for the smooth functioning of federalism in the country.

Pakistan is one of the 28 countries of the world who have adopted federalism as their form of government. Pakistan's federalism has evolved over a long period of more than six and a half decades. This long journey has had difficult phases and crises as well as successes. The tracking of this difficult terrain of the country's history can help

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understand the vicissitudes of Pakistan's political history. In this brief paper various phases of federalism in Pakistan seen through the prism of the constitutional devices will be looked into. Before this survey, however, a brief account of why at all Pakistan was compelled to adopt federalism as its system of polity and governance would be given.

The concept of federalism

Federalism has been adopted as their system, mostly, by the countries with large population and territory. If such countries are diverse in the composition of their population, their choice of federalism becomes all the more necessary and important. The countries with homogeneous population may not require the type of institutions which are needed by those with diverse populations. The diversity spread over a wide territory necessitates a political system that is responsive to the specific needs of each segment of the population. In case, these segments are spread over specific territories there emerge regional units which need to be harmonized with each other through legal and political arrangements. A federal system provides space for two levels of government, that is, the general government that operates over the whole country, and the regional governments which govern the respective regions. The inter-play between these governments through constitutionally created institutions and the political processes actually determines the nature of the federal system.

There exists a rich corpus of theoretical literature on the idea of federalism. Moreover, there is also no dearth of works on the practical and operational aspects of federalism. This whole corpus may facilitate the understanding of those specificities of federalism without which a country cannot make a claim of being one. Reference to it can also illustrate in a comparative setting where a particular federation is actually located. Here, without getting into the theoretical debates, it seems that a few references to conceptual works should not be out of order in getting a clear idea of how the two levels of governments in a federation should be seen if it is a genuine federation. For example, A.V. Dicey, a renowned constitutional writer, defined a federal state as 'a political contrivance intended to reconcile national unity and power with the maintenance of state rights'.¹ In his classical work on federalism, K.C. Wheare prefers to identify a principle operating behind the federal systems. It is designated as 'the federal principle' and described as: 'A method of dividing power so that the general and regional governments

¹ A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* (London: English Language Book Society & Macmillan, 1973), p. 143.

are each within a sphere, coordinate and independent'.² According to this principle, the people in a federation have to follow two sets of laws—the general laws of the central government, and those of the regional governments. Moreover, the respective areas of operation of the two sets of government should also be clearly enumerated or laid down so that none can interfere in, or encroach upon, the domain of the other. This demarcation of the spheres is important for the smooth functioning of the federal system. It is due to this reason that the constitution of a federation becomes all the more important since it represents the contract between the general and the regional governments. It is also for this reason that the principle of 'supremacy of constitution' is so closely attributed to the federal system. Moreover, the principle also, logically, lays it down that given its status as a contract between the central and the unit governments, the terms of the contract as carried in the federal constitution may not be altered unilaterally by one party of the contract. The amendment in federal constitution is, therefore, made difficult. In certain federations, units have direct role in the amending process; in others, though units are not given direct role, yet constitution is not left flexible and can be amended by the federal parliament through a relatively difficult process. Generally, a two-third majority is required for the amendment whereas everyday legislation is made through simple majority.

Today, while 28 countries with 40 percent of the total population of the world are operating as federations,³ their systems vary in terms of relative strength of the central or the regional governments. There exist highly centralized federations with most of the power vested in the central government; there also exist countries with significant decentralization giving more powers to the constituent units.⁴ The

² K.C. Wheare, *Federal Government* (London: Oxford University Press, 1963), p.10.

³ George Anderson, *Federalism: An Introduction* (Ontario: Oxford University Press, 2008), p.1.

⁴ G.F. Sawyer suggests a typology of federal systems, according to which a federal system may take one of the three forms — organic, co-ordinate and co-operative. In organic federalism, the centre is all powerful. Coordinate federalism indicates almost equality between the centre and the regional governments with an understanding among them for not interfering in each other's domain. Co-operative federalism means, on the one hand, constitutional demarcation of centre's and unit governments' respective areas of competence, and, on the other, availability of institutional and political avenues for cooperation with each other. See G.F. Sawyer, *Modern Federalism* (London: C.A. Watts & Co. Ltd., 1969), pp.117-25.

experience of advanced federations show that after long durations of federal experiment and with the establishment of trust between the central and regional governments, federations may become relatively more centralized as compared to what had been their earlier or original shape. Moreover, expansion of the modern communication system, the drive for more coordinated policies, and the pressures of globalization, have also facilitated the centralizing tendencies in certain federations. But this process goes unhindered only if the regional governments do not feel threatened by it. Experience has shown that federalism has served as an important means of democratic governance. In the cases, where the principle of democracy could result in the permanent domination of the region with numerical majority, federalism can serve as a counter-veiling force. It is due to these merits of federalism that with the passage of time it is gaining acceptance among the political societies with multiple centers of cultural, social and political interests.

The rationale of federalism in Pakistan

Pakistan's choice of federalism was made known by the founding father of the country Quaid-i-Azam Muhammad Ali Jinnah, and the All India Muslim League, that spearheaded the Pakistan movement. Even though on the creation of the country, and particularly after the death of Quaid-i-Azam, certain voices were raised against the federal form of government, suggesting that a unitary government would be better for the new country which, accordingly, needed a strong central government,⁵ the vast

⁵ In January 1951, thirty one Ulema belonging to the various sects presented their mutually agreed to 22 point demand for incorporation in the forthcoming constitution for which the Constituent Assembly was working. Of these, the point no. 21 suggested that all the realms and regions of the country should be the administrative units of a unitary state (*Mumlikat-e-Wahida*). Their status would not be that of an ethnic, linguistic or tribal unit but they would be mere administrative regions. Entrusting of the administrative powers to these regional units, under the sovereignty (or hegemony) of the centre would be justified for administrative reasons. The regional units would not have the right of opting out. This highly centralizing clause, read with point no. 15, allowing the head of the state to suspend, completely or partially, the constitution of the country and run the government without the *shura* (consultative assembly) gives the impression of a highly centralized and authoritarian state that the clergy and the politico-religious elite of the country was striving to ensure. See, for Ulema's 22 Points, Professor Mohammad Usman and Masud Ash'ar (eds.) *Pakistan ki Siyasee Jamatain* (Lahore: Sang-e-Meel Publications, 1988), pp.749-52.

majority of the political class believed that the integration of the country could only be ensured through federal form of government.

Historically, at least three factors determined why a federal arrangement was inevitable for the new country. First, the demand of provincial autonomy had been a persistent demand of the Muslim League led by Jinnah, during the days of undivided India. Throughout the three decades before independence in 1947, Jinnah had constantly argued for the increase in the number of Muslim majority provinces, more autonomy for the provinces, and equal quantum of autonomy for all provinces.

In the famous 1927 Delhi Muslim Proposals behind which the moving spirit was none else than Jinnah, demand for the creation of three new Muslim majority provinces, NWFP, Balochistan and Sindh, was articulated along with the demand for one-third representation for Muslims at the center. Jinnah was prepared to give up separate electorate in return for this. Separate electorate had so far been the major issue with the Muslim League which was established in 1906, in a way, for the realization of this very demand. It was accepted in 1909 when the Minto-Morley reforms accommodated it. This however, had been a bone of contention between the League and Indian National Congress. Thus, Jinnah's offer of 1927 suggested that to him the creation of new Muslim majority provinces with other devices of neutralizing the Hindu and the Muslim majorities in the respective provinces through affirmative action provided to the minorities could create communal balance and ensure sufficient safeguards for Muslims for which the League had raised the idea of separate electorate. After 1927 as well, Jinnah continued to carry forward this line of action. His 1929 Fourteen Points, his arguments in the Round Table Conference in London, etc., were steeped in this very thought.⁶ During this period, Jinnah never shied away from speaking against a powerful centre. His endeavor to realize more Muslim majority provinces was also aimed at influencing the overwhelmingly centralized centre of the colonial India. When all of his proposals to resolve the communal problem of India within a united Indian fold were frustrated, Jinnah had to ask for a separate federation of the Muslim majority provinces and the princely states falling in them.⁷

⁶ See David Page, *Prelude to Partition: The Indian Muslims and the Imperial System of Control 1920-1932* (Karachi: Oxford University Press, 1987) and Ayesha Jalal, *The Sole Spokesman: Jinnah the Muslim League & the Demand for Pakistan* (London: Cambridge University Press, 1985).

⁷ Deviating from her country's official historiography, Indian historian Ajeet Jawed presents Jinnah as a true secular and nationalist whose compromising

Second, the modalities which were employed to divide India and carve out a separate federation of Muslim majority provinces also laid down the federal path to be taken by the new country. In order to determine if the Muslim majority provinces of the undivided India wanted to remain with the Indian federation or would like to have a federation of their own, these provinces were given the right to decide. Thus either the Muslim members of the provincial legislatures were asked to decide their province's fate or direct recourse to the electorate in the form of referendum was taken. This can be taken to suggest that it was the federating units which decided to create the federation of Pakistan even though it was done within the framework of the partition plan.⁸

stances throughout the period from his joining the Muslim League to the eve of partition were always frustrated by the Congress leadership which was obsessed with the idea of a strong and centralized Indian union. See her *Secular and Nationalist Jinnah* (Karachi: Oxford University Press, 2009).

- ⁸ Reference to a debate on nationalities question in Pakistan could be useful in understanding this point. In 1978, after getting released following the wrapping up of the Hyderabad Tribunal, Mir Ghaus Bux Bizenjo, a Baloch nationalist leader and a former governor of Balochistan, spoke and wrote with renewed vigour about the rights of nationalities in the country. His views were criticized by the lawyer and jurist A.K. Brohi, a close associate of the then military ruler General Ziaul Haq. Brohi's contention was that Pakistan was a successor state to the British India which had a unitary, and not a federal, form of government. It was the centre which delegated powers to the provinces in the British India. Therefore, on its inception Pakistan inherited a unitary system, and the subsequent federalization was the result of the centre's decentralization and not something which was directly linked to the creation of the country (see: A.K. Brohi, 'Apropos of the wisdom of our Brother Bizenjo', *Dawn* (Karachi), 9 October 1978.) A.K. Brohi's interpretation of the creation of Pakistan was refuted by sociologist Feroz Ahmed who held that following the decision of Indian partition, Pakistan emerged not as a 'successor state' but as a 'seceding state' in whose realization the constituent units played the decisive role. He, therefore, wrote:

That [colonial] "state" died on August 14, 1947; and if at all there was a successor state it was India. Pakistan derived its legitimacy solely from the popular support the Muslim masses gave it.... What made it a federal "compact" was the consensus among the Muslim League leaders of the various provinces constituting Pakistan that their respective provinces would constitute the state of Pakistan with a federal system of Government. Given the peculiar circumstances obtaining at the time, this was the only way a "federal compact" could have been made....

Though the first two factors belonged to the past and the historical context in which the country came into being, the third factor related to the nature of the Pakistani society. Pakistan was inhabited by people who represented different cultures, spoke different languages, claimed different ethnic identities, and practiced different social norms. However, they also exhibited numerous common features evolved over centuries of mutual interaction. Such a diverse society could only be harmonized by a state built on the principle of federalism which ensures unity in diversity. In the diverse nature of the regions which came to constitute Pakistan, as also those which comprised India, was acknowledged by even the British colonial rulers who established their system of governance on the presumption that all regions could not be controlled without accommodating their respective specificities in the laws and rules.

Pakistan's early constitutional bewilderment

Contrary to the expectations of the people whose spirits had been galvanized during the Pakistan movement, the ideals for which the country had been demanded could not be realized after independence. Quaid-i-Azam Muhammad Ali Jinnah's death within thirteen months of independence removed the most effective figure from the scene. Since he was some one who had played the decisive role in the creation of the country, he could have led the country on the path of constitutionalism if

The Muslim League, in point of fact, proceeded more directly to obtain the consent of the people of Muslim provinces by first participating in the 1946 provincial elections and then agreeing to referenda in NWFP and Balochistan. When it became impossible to include the whole of Bengal and the Punjab in Pakistan, it was left to their respective provincial assemblies to decide on the partitioning of these provinces....

The approval of the partition plan meant, among other things, decision of West Punjab and East Bengal to join Pakistan. This act supports rather than contradicts the contention that the provinces are federating units. If the provinces had no right to self-determination and if the partition of the subcontinent could have been carried out by the fiat of the "Centre", there would have been no need of conducting referenda or submitting the partition proposal to the provincial assemblies.

(See: Feroz Ahmed, "Nationality: Refuting A.K. Brohi", *Dawn*, October 24 and 25, 1978. Reproduced in Feroz Ahmed, *Ethnicity and Politics in Pakistan* (Karachi: Oxford University Press, 1998), pp.1-11.

he had survived for some time.⁹ The death of the founder of the country created a vacuum which could not be filled by the rest of the leaders who were not even the pale shadow of what he was. Muslim League itself was a weak organization as it was assembled more as platform of Muslim separatism and lacked strong organizational structures. The vacuum was soon filled by the more powerful institution of the civil service which soon found a good ally in the form of the military establishment.¹⁰ This civil-military combine constituted the power-structure of the state and governed the country either from behind the civilian regimes¹¹ or directly through the military rules. In her history of six and a half decades, for almost half of the period the country has been governed by the military rulers.

In the first decade, Pakistan remained in search of a constitution which could have the support of its different regions. It took nine years to frame the first constitution. The constitution adopted in 1956, survived for only two and half years and was abrogated in October 1958 when

⁹ Mushtaq Ahmad Gurmani, who served as interior minister in the central government and as governor of the province of the Punjab and also, upon the establishment of West Pakistan province, its first governor, believed that had a constitutional draft been made in Jinnah's life with his backing, it would have been passed by the Constituent Assembly easily. See his interview with Mujibur Rahman Shami, weekly, *Zindagi*, Lahore, 29 June 1970.

¹⁰ Hamza Alavi has described the alliance of the bureaucracy and military as a military-bureaucracy oligarchy, and has discussed at length the causes behind its creation. He locates its origin in the nature of the Pakistani society at the time of independence. Accordingly, there existed three propertied classes in the country — the indigenous bourgeoisie, the metropolitan bourgeoisie and the land owning class, but none of them was so powerful to have established its control over the state power. This situation enabled the two relatively powerful institutions of military and bureaucracy, hither to the powerful pillars of the colonial state, to establish their control over the new state. See his "The State in Postcolonial Societies: Pakistan and Bangladesh", in Kathleen Gough and Hari P. Sharma (eds.), *Imperialism and Revolution in South Asia* (London: Monthly Review Press, 1973), pp.145-73.

¹¹ Thus, even during the first decade of the country's history, civil-military bureaucratic control of the state was a reality even though a pliable pseudo-parliamentary system was also in place. This theme has been discussed in detail in Syed Jaffar Ahmed, 'Defeating Independence: Genesis of Authoritarian State in Pakistan', *Pakistan Perspectives*, Vol.2, No.2, 1997, pp.92-107; and, 'Consolidation of Authoritarianism in Pakistan', *Ibid.*, Vol.3, No.2, 1998, pp.49-77.

martial law was imposed in the country. The military ruler General Ayub Khan gave his constitution in 1962 but after seven years he abrogated it while transferring power to another military ruler General Yahya Khan. Yahya's rule culminated on the break-up of the country and separation of East Pakistan. The third constitution was adopted in 1973. It was suspended in 1977 and was put in abeyance in 1999 by the successive military take-overs by General Zia-ul-Haq and General Pervez Musharraf respectively. In between the military rules, civilian regimes tried to restore the constitution and reassert themselves. At times their efforts were frustrated but on occasions they had been partially successful, too. It was only in 2010 that as a result of the 18th Constitutional Amendment, the original constitution of 1973 was, by and large, restored along with a new set of reforms pertaining to democratic devolution.

Throughout the constitutional journey of the country, the question of a viable federal system remained a living issue and a pivotal factor behind recurrent crises. In the first decade it was the issue of the dichotomy between eastern and western parts of the country that proved rather insurmountable for quite some time for the political class of the country. East Bengal being more populous than the western part of the country, demanded representation as well as share in financial resources on the basis of population, a principle that was unacceptable for the ruling elite of the country, and the civil-military bureaucratic oligarchy. Though, there had been other constitutional issues as well like the form of government, the relationship between religion and the state, etc., it was the disagreement on the relationship between the centre and the provinces, and the representation between the two wings of the country that proved most difficult to be sorted out. At the time of independence, Pakistan adopted the Government of India Act 1935 as its interim constitution. The said Act had to remain as the basic law of the country until the new constitution was made by the constituent assembly of Pakistan. The assembly that Pakistan inherited by virtue of the pre-Partition elections of 1946, thus, served both as the legislative as well as the constituent assembly. The low premium paid to the important task of constitution-making is evident from the fact that the constituent assembly had just one session in 1947, three sessions in 1948, one in 1949, and three in 1950. These eight sessions in the first three and a half years after independence amounted to only 36 days. From 1951 till 1954, eight more sessions were held which together made 80 days. It was only in the last

two sessions that the assembly met for altogether fifty-nine days.¹² Looking into the debates of the Constituent Assembly it appears that the members found it difficult to iron out their differences on regarding the centre-provinces relations and the divergent claims of the two wings of the country. On 12 March 1949, the Constituent Assembly passed the Objective Resolution, through which certain basic parameters of the future constitution were tried to be laid down. The Resolution has since then remained an object of severe controversy in Pakistan, as it tried to amalgamate abstract religious concepts with concrete and modern political ideas of statecraft. The Constituent Assembly also appointed Basic Principles Committee (BPC) to spell-out the basic principles for the future constitution. Three sub-committees were appointed by the BPC to make recommendations on three different subjects: 1) federal and provincial constitutions and distribution of powers; 2) franchise; and 3) judiciary. The first sub-committee proved more active as it prepared its report and submitted it to the BPC on 11 July 1950. In the absence of the reports of the other two committees, the BPC presented its interim report to the Constituent Assembly on 28 September 1950. The interim report's recommendations for the federal system were quite incompatible with the spirit of federalism. They were particularly objected to in East Bengal. As a result of this, Prime Minister Liaquat Ali Khan was compelled to ask for the postponement of discussion on the interim report.

A second draft of the BPC report was presented to the Constituent Assembly on 22 December 1952 by Liaquat Ali Khan's successor, Khawaja Nazimuddin. It also proved much short of the expectations of the provinces who wanted to ensure for them as much autonomy as possible. The constitutional deadlock was continuing when on the pretext of law and order situation and failure to handle the economic crisis of the country, Nazimuddin was dismissed by the Governor General Ghulam Mohammad. Nazimuddin was replaced by Mohammad Ali Bogra who presented to the Constituent Assembly, on 7 October 1953, a formula which came to be called Bogra Formula which remained under discussion for many weeks. The Bogra Formula brought the major segments of the political class belonging to the two wings of the country closer.¹³ It proved unacceptable for the civil-military

¹² Syed Sharifuddin Pirzada, *Dissolution of Constituent Assembly of Pakistan and the Legal Battles of Moulvi Tamizuddin Khan* (Karachi: Asia Law House, 1995), p.24.

¹³ The formula was so designed that it suggested a bicameral legislature for the country. In the upper house, the House of the Units, the five (would be)

combine that had established its firm position in the state apparatus. Consequently, the Constituent Assembly was dissolved and a pliable Federal Court gave assent to the Governor General's decision of dissolution.¹⁴

Subsequently, the second constituent assembly framed the constitution in 1956. It was based on an uneasy and by and large an artificial compromise for which three provinces and all the ten states in the western wing were merged together to create a single province of West Pakistan. This was done to suggest that with only two provinces in the country, that is, East Pakistan and West Pakistan, there was no need to have representation on the basis of population, and that parity could be enforced between them. Equal representation in the house which was meant to express the democratic principle, put to rest the idea of bicameralism, which in part has become an essential feature of a federal system, in which one house represents the democratic principle, while the other stands for the equality of the units. This scheme was imposed despite dissent and disapproval of vast majority of the political leaders belonging to the smaller provinces of the western wing. Even many of those political leaders of the two regions who had earlier accepted this scheme gradually joined the ranks of its opponents.¹⁵

provinces (four in western part and one in eastern part of the country), were given equal representation (i.e. 10 each). This meant that the provinces in the western wing had altogether 40 members in the upper house while eastern wing had only 10 members. But in the lower house, the House of the People, the provinces of the western wing had a total representation of 135 while eastern wing had 165 members. The allocation of seats in the lower house was done on the basis of respective population of the provinces, accepting the numerical majority of East Bengal. The allocation was done in a manner that in the joint session of the parliament both wings of the country had equal representation, that is, 175 members. See Syed Jaffar Ahmed, *Federalism in Pakistan: A Constitutional Study* (Karachi: Pakistan Study Centre, University of Karachi, 1990), pp.121-22.

¹⁴ The Constituent Assembly was dissolved on 24 October 1954; it is noteworthy that the Assembly has been convened on 27 October, and the draft constitution was to be put on the table of the house on that day. See Syed Sharifuddin Pirzada, *op.cit.*, p.47.

¹⁵ The formation of One Unit had a very curious background. Though, master-minded by the Commander-in-Chief of the Army, General. Mohammad Ayub Khan, the military-bureaucracy oligarchy did not have to wait for long to get support for its scheme from the crucial political figures belonging to the three provinces of the western wing. In fact these politicians proved more pliable than they would have been expected. Quite interestingly, all these politicians, prominent among them being, Hussain

One reason why military took over in 1958 was to ensure the continuation of the One Unit scheme.¹⁶ Ayub Khan's 1962 constitution also incorporated it. It was only during the military rule of General Yahya Khan, that in the face of severe public opposition, One Unit was repealed and the former provinces were restored.¹⁷ Moreover, through the Legal Framework Order, the principle of parity was replaced with the principle of one man one vote, on the basis of which the 1970 elections were held.¹⁸ However, the electoral verdict exposed the political divisions in Pakistani society. The more visible was the one between the eastern and the western parts of the country. Therefore, while the Awami League won 160 out of 162 general seats reserved for East Pakistan in the National Assembly it did not get a single seat in the four provinces of West Pakistan. Similarly, Pakistan Peoples Party which got 81 out of 138 seats reserved for the four provinces of the western part¹⁹ did not even

Shaheed Suhrawardy from East Bengal, Sardar Abdul Rasheed, Chief Minister of NWFP and Ayub Khuhro, Chief Minister of Sindh, had earlier agreed to the One Unit scheme. But as soon as they came to know that in the new setup they were not given the promised position of prime minister-ship to Suhrawardy, and the chief minister-ship of the newly-created province of West Pakistan to neither Khuhro nor Rasheed, all of them turned against the scheme. Suhrawardy took another u-turn and became a supporter of One Unit, once he was elevated to the office of prime minister after the removal of Chaudhri Mohammad Ali. See Hameeda Khuhro, *Mohammad Ayub Khuhro A Life of Courage in Politics* (Lahore: Ferozsons, Pvt., Ltd., 1998), pp.419-21; and Pir Ali Mohammad Rashdi, *One Unit ki Tarikh* (Lahore: Sang-e-Meel Publications, 1993), pp.89-120.

¹⁶ In his autobiography, Ayub Khan took pride in claiming himself to be the creator of the idea of One Unit. He held that in the beginning of October 1954, while he was staying in a hotel in London, he put down his ideas about the present and future of Pakistan, and it was there that he concluded that all the regions of West Pakistan should be merged to bring about a single province of West Pakistan. See *Friends not Masters; A Political Biography* (Lahore: Oxford University Press, 1967), pp. 187-8, and p.192.

¹⁷ The Province of West Pakistan (Dissolution) Order was promulgated on 30 March 1970, and it was implemented on 1 July 1970. See Herbert Feldman, *The End & the Beginning Pakistan 1969-1971* (London: Oxford University Press, 1975), p.58.

¹⁸ See for the text of Legal Framework Order, Safdar Mahmood (ed.), *The Constitutional Foundations of Pakistan* (Lahore: Publishers United Ltd. [1975]), pp.623-42.

¹⁹ *The Pakistan Election Compendium*, Vol. I (Karachi: Church World Service Pakistan/Afghanistan, 2012), p.51.

contest the elections in the eastern part.²⁰ The subsequent constitutional and political crisis was tried to be resolved through a military operation which further aggravated the situation and paved the way for the separation of East Pakistan. Pakistan's failure in evolving a workable and consensual framework for federal arrangement thus resulted in its disintegration only less than a quarter of a century after its creation.²¹

Apart from their artificial handling of the east-west disequilibrium and a farcical formula of parity, the 1956 and 1962 constitutions had other features also which had adverse consequences for national integration. The most harmful was the over-centralization which these constitutions imposed. Both the constitutions provided schemes of division of power which reserved all important subjects for the centre.²² Even for the subjects, who were given to the provinces, the policy-making was, by and large, kept in the centre's domain. Moreover, the fiscal federalism was especially overly centralized, making the provinces dependent on the central government.

The federalism of 1973 constitution

The constitution of 1973 was significant in many ways, as against the previous two constitutions, it enjoyed legitimacy for it was made by the

²⁰ In 1986, in an interview, the author asked late J.A. Rahim, the founding Secretary General and an ideologue of the PPP, as to why his party abstained from participating in the elections in the more populous province of East Pakistan in 1970. He responded by saying that since the Party had been established only three years prior to the holding of the elections, we did not want to scatter ourselves and concentrated where we could compete more successfully. Moreover, he said, we thought after the elections, we would find in East Pakistan, a good ally in the form of Maulana Abdul Hameed Khan Bhashani's National Awami Party, which was ideologically closer to us.

²¹ A lot has been written about the dismemberment of Pakistan in 1971, both within Pakistan and abroad. The scope and limitations of what has been written in Pakistan has been taken stock of in Syed Jaffar Ahmed, 'Pakistan's Intellectual Discourse on the Events of 1971: Apathy, Blames, and Remorse, but not much Objective and Critical Analysis', in his (ed.), *Challenges of History Writing in South Asia, Special Volume in Honour of Dr Mubarak Ali* (Karachi: Pakistan Study Centre, University of Karachi, 2013), pp.148-73.

²² For a comparative analysis of respective schemes of division of powers in Pakistan's various constitutions, see Syed Jaffar Ahmed, *Federalism in Pakistan...., op.cit.*

elected representatives of the people,²³ and it was approved by all the political parties who had representation in the constituent assembly. The constitution provided a set of institutions which are common in federal systems. For example, the constitution provided a bi-cameral legislature, with the lower house, National Assembly, elected directly by the people and the upper house, the Senate, established on the principle of the equality of the federating units. Similarly, the constitution provided mechanism for the division of resources. It created institutions for the harmonization of the interests of the provinces and the centre.²⁴ However, the constitution still had a clear tilt towards centralization. It was this fact which compelled the political leadership in the subsequent decades to demand constitutional reforms and enlargement of the space of provincial autonomy. The need for reform was felt right at the time of adoption of the constitution. Therefore, during the constitutional parlays, President Bhutto had agreed with the opposition leaders that the whole constitutional package would be revisited after ten years. On one point, he appeared to be convinced and tried to convince others that the Concurrent List of the constitution would be abolished after ten years leaving its subjects for the provinces.

The demand for further decentralization continued to occupy a prominent place in the political manifestoes, which were agreed to between the political leaders during the two military rules after the adoption of the 1973 constitution. Thus, whether it was the Movement for Restoration of Democracy (MRD) which was launched during General Zia's time, or the Charter of Democracy signed between

²³ The 1956 constitution was made by a constituent assembly that was elected by the members of the provincial assemblies while the 1962 constitution was made by a cabinet's committee which made use of the report of the constitution commission established by General Ayub Khan. The constitution was circulated and later when the National Assembly was elected through an electoral college of 80,000 members of the Basic Democracy System, which essentially was meant to serve as the local government system, the constitution was provided endorsement by it.

²⁴ Such institutions included National Finance Commission (NFC) which was supposed to announce, after every five years, an award laying down the formula for allocating resources to or distributing the revenues between the Centre and the provinces. Another important institution was Council of Common Interests (CCI) which resolved the issues regarding certain constitutionally identified subjects, between the centre and a province or between the provinces. Similarly, National Economic Council (NEC) provided a platform to all governments, central and provincial, to harmonize their respective policies and positions.

Pakistan People's Party and the Muslim League (Nawaz) on 14 May 2006,²⁵ or the subsequent All Parties Conference held in London, expansion of provincial autonomy remained a persistent demand apart from the restoration of democracy.²⁶ This outstanding demand came to be addressed once the civilian rule was restored and a democratic dispensation was established as the result of the 2008 elections. The manifestation of this change came in the form of Eighteenth Amendment in the constitution, which can be regarded as a paradigm shift in the constitutional federalism of Pakistan.

Pakistani federalism after 18th amendment

The 18th Constitutional Amendment has drastically changed the character of Pakistani's federal system, making it significantly decentralized. The changes made in the constitution through the said amendment can be analyzed along two themes: relations between the centre and the provinces, and inter-provincial relations.

a. Provinces' relations with the centre

As mentioned earlier the 18th Amendment has caused a paradigm shift in the relation between the centre and the provinces. It also represents a major shift from the centralized mindset to a decentralized one. At least eight areas can be identified affecting the centre-provinces relations.

First, the parliament after the 18th Amendment is more reflective of the federal nature of the Pakistani state. The Senate's membership has been raised thereby giving more voice to the provinces. Similarly, President's power to appoint the Governors has been altered; earlier he did so in consultation with the Prime Minister but now he does it on Prime Minister's advice. This is a step towards the strengthening of the parliamentary system on the one hand and the elected executive's closer association with provincial domain on the other.

Second, the administrative relations between the centre and the provinces have been readjusted. The original Article 144 of the constitution had empowered the Parliament to legislate for one or more

²⁵ Mian Raza Rabbani discloses some of the very important inside details of how the two parties, who had remained at loggerheads throughout the 1980s and 1990s, shed their differences and agreed on a roadmap for the restoration of democracy, and on how to make it sustainable. He also describes this important event in the history of Pakistan as 'Acrimony Buried' which is also the title of the chapter on the Charter of Democracy in his book. See his, *A Biography of Pakistani Federalism Unity in Diversity* (Islamabad: Leo Books [2012]), p.129.

²⁶ *Ibid.*, p.143.

provinces by consent, on a matter not mentioned in the Federal List. Now it is amended and the Provincial Assembly has been given the right to amend or repeal such legislation of the Parliament. Similarly Article 147 had given the power to the provinces to entrust functions to the federation on matters to which the executive authority of the provinces extended. Now it has been added, that the provincial government will have to get the functions so entrusted ratified by the provincial assembly within 60 days.

Third, a major shift in the federal character of the constitution has been caused through the changes in the distribution of the legislative powers. In this respect the most significant step has been the abolition of the Concurrent List, and the enhancement of the role of the Council of Common Interests (CCI). According to Article 154(1), the CCI shall formulate and regulate policies in relation to the subjects enumerated in Part II of the Federal Legislative List and shall exercise supervision and control over related institutions. Meetings of the CCI are chaired by the prime minister and the CCI must meet at least once in 90 days.

As a result of the abolition of the Concurrent List, certain subjects of the list have been transferred to Part II of the Federal List, which comes under the competence of the CCI. Similarly, a few subjects in Part I of the Federal List have now been shifted to the Part II of the same list. This means that these subjects will also be seen by the CCI now. These include: National Planning and Coordination of Scientific and Technological Research. Similarly, Major Ports, that is to say, the declaration and delimitation of such ports, and the constitution and powers of port authorities therein, has also moved from Part I to Part II of the Federal List. Another important subject in this category is Census. Moreover, certain subjects have been added to the Federal List. These are International Treaties, Conventions, and Agreements and International Arbitrations.

An important step towards provincial autonomy has been the addition of a new Clause (3) in Article 172 of the Constitution. The Clause says that the 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. This means that on the above mentioned resources provinces would now have 50 per cent of ownership rights while they had no such rights before.²⁷

²⁷ A few nationalists in smaller provinces have objected that 50% ownership of their resources is still unjustified as they should have full ownership on them. This point of view appears a bit difficult to accept seen in the context of the evolving federalism in Pakistan. The country has moved from a

Further, as the result of the abolition of the Concurrent List all the subjects which have not been shifted to the Federal List become part of the residuary subjects on which the provinces have exclusive competence. As a result of the major decision of abolition of the Concurrent List, 17 federal ministries were dissolved. This has also increased the responsibilities of the provinces, which now have at least 34 new responsibilities to fulfill.

Fourth, the CCI has become a much more important institution as a result of the 18th Amendment, which has increased its membership as well as functions. The Council is headed by the Prime Minister. All the four Chief Ministers and three members from the federal government constitute the Council. The CCI has its separate secretariat. The Council has to be constituted within 30 days of the Prime Minister's election and it is bound to hold its meetings at least once in 90 days. The functions of the CCI include the formulation, and regulation of policies pertaining to the subjects mentioned in Part II of the Federal List. It also performs the function of supervision of, and has its control over, the concerned institutions.

Fifth, with respect to the inter-governmental relations another institution of significance is the National Economic Council (NEC). This body has a membership of 13, with Prime Minister, four Chief Ministers, one member each from the four provinces to be nominated by the respective Chief Ministers and four members nominated by the Prime Minister. NEC is primarily an advisory body which takes care of the coordination and harmonization of the respective economic policies of the four provinces and the federal government.

Sixth, the 18th Amendment has enhanced the role of the National Finance Commission (NFC), and has made the provinces relatively stronger than before. It has laid it down that the share of a province determined in an NFC Award should not be less than that of what it had been in the previous Award. NFC would have to report to both houses of parliament and provincial assemblies about the status of the implementation of the Award.

highly centralized set-up to democratic decentralization whose worth should be weighed seriously. It should also be realized that the 18th Amendment has made Pakistan's federalism more decentralized than many of other federations like India and Malaysia. It may also not be forgotten that still in Pakistan there are powerful circles both in political and extra-political domains that are highly critical of the 18th Amendment and regard it as anathema of national interests.

Seventh, with respect to the implementation of emergency in a province it has now been laid down that such a proclamation should have the backing of the province itself through a resolution of the provincial assembly. Moreover, if the President proclaims emergency in a province on his own, it would have to be approved by both the houses of the Parliament within 10 days.

Eighth, an important clause enhancing the economic and financial position of the provinces deals with the joint ownership of property. Therefore, in Article 172, clause 2, it has been added that mineral and natural gas within a province or territorial waters adjacent to it, shall vest jointly and equally in that province and federal government.

The above changes effected by the 18th Amendment suggest that the character of federalism in Pakistan today is quite different from what it had been before the passing of the said Amendment. It can also be said that the CCI has emerged as the focal point of the federal system in Pakistan, and the fate of Pakistani federalism will depend on how the CCI works and succeeds in fulfilling the obligations rested in it by the 18th Amendment.

b. Inter-provinces relations

After having the central and provincial areas of competence clearly demarcated, it is hoped that the inter-provincial relations would also be handled according to the overall scheme and the spirit of the new federalism. However, human societies are not immune to problems and issues, so the issues may emerge in future within the working of the provinces, having bearing on their relations with each other. Constitutional clauses may be interpreted by different provinces differently according to their understanding of them. In the case of Pakistan such issues can be resolved at the level of different institutions like the Senate, the joint sessions of Parliament, and more directly by the CCI.

Challenges

Though the 18th Amendment has addressed numerous issues and has responded quite positively to the long-standing provincial demands, there are a number of challenges which the new federalism has posed and which need to be met by the political class of the country both at the centre and the provinces. Constitutional provisions at best provide a framework and lay down the principles for political conduct and the governance of the state. However, their being understood, implemented and translated into practice depends on the people who operate them. Though a lot rests on the political will of those who are, and will be, at

the helm of affairs, for a decentralized federal arrangement, succeeding a highly centralized one, what would be needed is a complete shift in the mindset of the people concerned. The authoritarian and centralized mindset of the past will be a mismatch with the new constitutional arrangement.

For the success of 18th Amendment and the new federalism that it encompasses, it is essential that the people for whom it has been designed accept its ownership. Without social ownership no constitutional project can take roots, and for creating such ownership the responsibility lies primarily on the shoulders of the politicians both in government and opposition.

Similarly, capacity building of the provinces in areas where it is not in conformity with the needs of the newly introduced provincial autonomy will be crucially important for the success of the new federalism. The detractors of the 18th Amendment have very strongly highlighted the real and the imaginary weaknesses of the provincial administrations. Their apprehensions can only be responded to by strong provincial administrative as well as political actions, which may put to rest all misgivings about the viability of the democratic devolution entailed by the 18th Amendment.

One area on which the political class of the country as well as other concerned sections will have to reflect sooner or later is the future of the Tribal Areas. This region of the country has since the time of colonialism, has been kept aloof from general constitutional and legal orbits. However, the colonial considerations should not have been adopted by the successive governments of Pakistan. Different constitutions of the country also did not consider them to be brought into the ambit of general administration. The negligence of the past should not continue now when a sea-change has taken place in the regional set-up. Since 9/11 and following the War on terror, to which Pakistan has also committed itself, the Tribal Areas have gained additional importance and have emerged prominently on the strategic map of the region. In future, the Tribal Areas may be merged in the province of Khyber Pakhtunkhwa or they should be made a separate province. Whatever status they are given in future, it must be decided by taking all the stakeholders, particularly the people of the Tribal Areas, on board.

Pakistan's federalism has evolved over a long period. It has passed through different phases and has moved ahead through a series of trials and errors. It has eventually come to a point where one can say with some confidence that if it is operated both in letter and spirit, it could result in a successful and viable federalism. But it all depends upon how it is made use of.