

# **Bicameralism in a Federation: An Historical Analysis of Role of Senate in Promoting Federalism in Pakistan**

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## **Abstract**

Bicameralism is an essential feature of federalism. It is indispensable for a federation to safeguard the rights of smaller units and to accommodate the diversity in the legislature. For this purpose, the upper house of the bicameral legislature, known variously including the Senate, provides a feasible platform to the units for representation on the principle of equality. Therefore, it is almost evitable for all federations, to have the upper house. Pakistan adopted bicameralism in 1973, though it became a federation in 1947 but remained under a unicameral legislature according to early two constitutions (of 1956 and 1962) which severely compromised the basic essentials of federalism. However, the Constitution of 1973 finally provided a bicameral legislature for the development of federalism. Even then the country could not flourish as a true federation and the Senate could not perform its basic functions well. What actually have been the lacunas in the working of the Senate and what can be the possible remedies for them, this study aims to investigate the answers to such questions.

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## **Introduction**

Bicameralism is considered to be an important feature of federalism. It is commonly found especially in those federations which predominantly have a diversity of population and the units. In such federations, the demand of self-rule and shared rule goes hand in hand in lieu of diversity. Because every group or community, no matter in majority or minority, wants to be a part of the main stream politics and intends to be represented well, specially in the central government. Bicameralism offers feasible strategies to not only accommodate these demands but also diversity in an appropriate way in the legislature. A bicameral legislature means a legislature or the parliament having two houses, i.e.

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the lower house, and the upper house. Lower house is supposed to be the popular house based on the people's representation. While the upper house is called the territorial chamber or house of federation, based on the representation of units. For such federations where the demand of shared rule is very strong and the diversity of the size of land and the population of the provinces is quite significant, bicameral legislature provides the institution of upper house, which is composed of equal numbers of elected members from all the units. Hence, in the lower house the seats are distributed on the basis of the population and eventually a province who has the larger number of population gets majority of the seats in the parliament. This may cause an imbalance and the smaller provinces may be at the disadvantage in terms of making legislation and serving their due interests.

Territorial representation on the national level creates a sense of belonging, a feeling that territorial units, even if they are fairly small, find respect. If regions keep their distance to the state they belong to, it is certainly easier for secessionists, for example The Scottish nationalists, to argue that the only relevant territory that counts is their own region. The same effect can be created by another extreme, i.e. the exclusion of a territory from national politics, especially if this means discrimination by the centre.<sup>1</sup>

Most of the federations of the world provide for a bicameral legislature having an upper house usually called the Senate, but some other names are also used like, the Bundesrat (Germany), Council of States (Switzerland) or House of Chiefs (Botswana) etc. In all the bicameral legislatures, the upper house is comparatively a smaller body with permanent or the longer time membership. Some federations have an upper house which has limited powers against the lower house in terms of legislation and in some federations, it has equal powers to the lower house, e.g. the US Senate. But in all the bicameral legislatures the main functions of the upper house are a bit same. i.e., equal representation of territorial units and to safeguard the interests of the units against the possible tyranny of the majority in the legislation process. Therefore, the rules, decisions and the actions of the upper house play a significant role in the development of federalism in a

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<sup>1</sup> Roland Sturm, 'Democracy and Federalism as Principles of State Organization', in Susanne Luther/ Hanns Buhler (eds.), *Federalism in Asia and Europe: The Wildbad Kreuth Federalism Days 2013* (Islamabad: Hanns Seidel Foundation, 2015), p.31.

country. So, all the countries of the world who are federations or want to be a federation, they must establish a bicameral legislature. Especially the countries like Pakistan, who came into being and became a federation in lieu of the political merger of its constituting units, require to have a system and a legislature having the proper representation of both its people and the constituting units. That requirement can be served best by bicameralism which plays a very crucial role in the development of federalism by managing the issues of diversity and inequality of various types.

Federal states in Asia and elsewhere in the world all have bicameral systems. Bicameralism is closely bound up with federalism, of which it is one of the key features. The same applies to countries that are highly decentralized or constitutionally regionalized, where, as in the case of federalism, the Senate plays an essential balancing role between the centre and the state's geographical components. However, bicameralism is not limited to federal countries, about one third of unitary states too have bicameral legislatures.<sup>2</sup>

Pakistan is a country which emerged on the map of the world as a federation in 1947. To make federation for the Muslims of India was a dream of the founders of the country and this dream came true in 1947 with the name of Pakistan. But this federation could not be a viable federation mainly because of the compromise of the subsequent governments over the basic essentials of federalism including bicameralism. In Pakistan, the history of bicameralism and upper house is, comparatively, a recent phenomenon. The country was created in 1947 but bicameral legislature was established in 1973 with the third permanent constitution of the land. Though as a federation, having an enormous diversity of population and size, Pakistan required to have a bicameral legislature representing the federating units in its upper house, but it remained a federation of unicameral legislature since its beginning till 1973. All the drafts prepared for making the permanent constitutions in Pakistan suggested a bicameral legislature, but the constitutions which were finally implemented in 1956 and then in 1962 provided a unicameral legislature which eventually compromised over the basic essence of federalism. However, the Constitution of 1973 provided a

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<sup>2</sup> Sanaullah Baloch, *Senate Reforms in Pakistan*, at [www.civiceducation.org/.../Senate-Reforms-in-Pakistan-Senator-Sanaullah-Baloch.pdf](http://www.civiceducation.org/.../Senate-Reforms-in-Pakistan-Senator-Sanaullah-Baloch.pdf), downloaded, 17/02/16, 3:37pm.

bicameral legislature having an upper house with the name of the Senate. The composition of Senate in Pakistan was sought to fulfil the basic objective of an upper house, that is, to accommodate the territorial diversity of the units in order to establish and promote federalism in the country. However, ironically, it has not been very successful in achieving this very objective. There have been many hurdles in the way of Senate to perform its desired role in Pakistan including the compromise over its integrity and composition. The framers of the Constitutions of 1973 though realized the importance of bicameralism in federation and established this upper house, they did not signify its role in the very process of legislation. The main purpose of having an upper house is to safeguard the interests of the units which cannot be done unless the units are given equal representation and due share of powers in law making. In the Constitution of 1973 neither the composition of Senate can be attributed just and rational, nor are the powers given to it according to the very notion of bicameralism. Moreover, the intermittent martial laws and various ordinances issued by the central governments from time to time further hindered the proper functioning of the Senate. However, in 2010, Eighteenth Amendment was passed which established the parliamentary supremacy in the country and fulfilled the long awaited demand of provincial autonomy to the units of Pakistan. Since the Eighteenth Amendment, as stated by its current chairman, 'the Senate has assumed a new role and Pakistan was now functioning as a true Federation'.<sup>3</sup> But inspite of this new role and enhanced working of the Senate, there is a long way to go to make it a true representative of the units so that it could work as the true bastion of democracy and federalism in Pakistan.

### **Theory of bicameralism**

All the countries of the world debate the issue of establishing their political system and government institutions on the basis of rule of law. The outcome of this debate is usually depicted in a constitution which formally establishes the system and the institutions of the government. Among all those institutions, the parliament is that institution which actually creates the constitution and ensures its supremacy within the state. Therefore, the questions of the composition, working and powers of the parliament or the legislature matters a lot in the process of state

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<sup>3</sup> <http://dailymessenger.com.pk/2015/06/10/%EF%BB%BFpakistan-now-a-true-federation-after-18th-amendment-raza-rabbani/> accessed: 20/05/16. 12:45 p.m.

building. Among all the questions related to the legislature the most debated one is the question of the structure of the parliament that whether the parliament should be unicameral or bicameral. The answer of this very question is largely based on the history, culture, social and political structure of the society of the country. Though there is no debate over the efficiency of the unicameral or bicameral parliament, most of the countries, no matter unitary system or federations, have adopted bicameralism in their legislature, because comparatively it serves the basic essentials of law making and development of democracy better.

Many states are now embarking upon a process of democratisation or of consolidation of the rule of law which requires the involvement of all components of the nation, sometimes in situations where these constituents are not inclined to participate; the bicameral model assumes this cohesive role and acts as a guarantor of stability in the transition to democracy.<sup>4</sup>

Bicameralism is a system in which a legislature or the parliament has two houses, each sit separately and performs exclusive functions within their jurisdiction prescribed by the constitution. All the countries that have bicameral legislature, have various names for lower house for example, the House of Commons (UK), House of Representatives (USA), National Assembly (Pakistan), Lok Sabha (India) etc; and for the Upper House too, e.g. the House of Lords (UK), Rajya Sabha (India), and the Senate in many countries, like USA, Canada, Australia, Pakistan etc. No matter whatever the nomenclature the main objectives of the upper house are more or less the same, that is to create national harmony through equal representation of the constituting units in the central legislature and to promote feelings of shared rule, unity and the responsibility among all the regions and the communities of the country. That is the reason, bicameralism and the institution of the upper house is considered to be the basic essential of a federation.

Federal systems almost always have bicameral legislatures...

Diverse elements in countries often compete for limited government resources and for representation in the political process. A second chamber facilitates more balanced representation among competing groups by providing a

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<sup>4</sup> Bicameralism Around the World, at [http://www.senat.fr/senats\\_dumonde/introenglish.html](http://www.senat.fr/senats_dumonde/introenglish.html) accessed. 16/05/16. 5:15 p.m.

political outlet to those outnumbered or underrepresented in the lower chamber.<sup>5</sup>

### **Rationale and working of bicameralism**

Bicameralism is an essential feature of federalism, but it is also adopted in those countries as well which are not federation or which did not remain federation. Bicameralism is actually adopted to manage the regional diversity and to promote democracy among all the constituting units of a country. It also plays a crucial role in countering the possible tyranny of the majority in legislation and to make a thorough legislation by holding the interests of all the regions irrespective of their size and number of population.

Federalism and bicameralism go hand in hand... the concentration of the legislative authority in one chamber may lead to the constitutional autocracy. Therefore, to avoid hasty legislation and in order to have multiple checks on government the need of second chamber is increasingly recognized. It is imperative for all federal states that their parliaments should provide an adequate representation to the whole nation. That is why the federal states opt for two chambers, one providing for proportional representation and the other providing equal representation to all federating units.<sup>6</sup>

Legislation is a very sensitive and indispensable business. It requires a thorough process of thinking, reviewing and analysis. It is done, inter alia, for smooth functioning of the government and the development of democracy in the society. Therefore, it is required that all the stakeholders should be the part of this business. Democracy is about the rule of the common people which are directly represented in the lower house of the parliament, but because of their proportional representation in the chamber, it is very much likely that there can be an autocracy of the majority in the legislation which should be countered

<sup>5</sup> *One Chamber or Two? Deciding Between a Unicameral and Bicameral Legislature*, Legislative Research Series, Paper # 3, National Democratic Institute for International Affairs, [https://www.ndi.org/files/029\\_ww\\_onechamber\\_0.pdf](https://www.ndi.org/files/029_ww_onechamber_0.pdf), downloaded: 15/03/16, 2:52 p.m.

<sup>6</sup> Tahir Mehmood, 'A Comparative Analysis of the Functioning of the Senate in USA and Pakistan', *South Asian Studies A Research Journal of South Asian Studies*, 30:2 (July-December 2015), pp.265-280, at [http://pu.edu.pk/images/journal/csas/PDF/17%20Tahir%20Mahmood\\_30\\_2.pdf](http://pu.edu.pk/images/journal/csas/PDF/17%20Tahir%20Mahmood_30_2.pdf), Downloaded, 13/02/16. 3:09 p.m.

through constitutional means. Thus, bicameralism or having an upper house in the parliament provides a feasible check on this tyranny and it balances the power of legislation among the people and the provinces in intra-federal relations.

In a well-framed constitution, the best check on the power of the popular assembly is usually found in the creation of a second chamber capable of criticizing, amending and, if need be, rejecting measures passed by the other chamber. Without a second Chamber, any political party, with a simple majority in the assembly, may upset the democratic structure of the governmental machinery. Thus, the second chamber might act as bulwark against the dangers of the tyranny of majority. One great advantage of the existence of a second chamber is that it might be helpful in attracting technocrats or persons of eminence and ability who may be unwilling to take part in the electoral battle. The presence of such persons is necessary because the ever-increasing complexity of the governmental functions requires so much technical skill that parliament cannot do without the professional or other special knowledge possessed by some of its members.<sup>7</sup>

It is an established fact that bicameralism is essential not only for the federations but also for those states and governments who believe in decentralization and notion of shared rule. However, it is pre-requisite of a federation because federalism is meant for the geographical representation and the division of powers especially in the legislature.

....it is accepted as a fundamental rule of the Federation that the law shall not be altered without the consent of the majority of the people, and also of a majority of the States, both speaking by their representatives.<sup>8</sup>

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<sup>7</sup> Syed Azhar Ali, 'Unicameralism in United Pakistan: Why and How?' *Pakistan Horizon*, 48:3 (July 1995), pp.69-80, Pakistan Institute of International Affairs, at <http://www.jstor.org/stable/41393529>, downloaded: 16-05-2016. 12:06 p.m.

<sup>8</sup> Sir Samuel Griffith, quoted by Sir Richard Baker, Australasian Federal Convention, 23 March 1897, p.28, quoted in Harry Evans, *Federalism and The Role of The Senate*, at [http://www.aph.gov.au/About\\_Parliament/Senate/Powers\\_practice\\_n\\_procedures/The\\_Biographical\\_Dictionary\\_of\\_the\\_Australian\\_Senate/Papers\\_by\\_former\\_Clerk\\_of\\_the\\_Senate\\_Harry\\_Evans/Federalism](http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/The_Biographical_Dictionary_of_the_Australian_Senate/Papers_by_former_Clerk_of_the_Senate_Harry_Evans/Federalism), downloaded, 14/02/16. 2:18 a.m.

An Upper House in a bicameral legislature performs very crucial tasks which are quite essential for proper legislation in order to establish rule of law and democracy in the society. It has limited powers as compared to the lower chamber, but the powers given to it by the constitution are very important and complex in nature. The powers and the functions of the upper house or Senate vary from country to country. Some countries, though not federation, have an upper house. But their upper houses are not enough powerful. They just have customary powers or have some share in executive powers or legislative powers of the lower house, e.g. House of Lords in UK. However, upper houses in the federations usually have very wide range of powers and sometimes equal to the lower house, e.g. the Senate of USA. So irrespective of all the variations of powers and jurisdiction some of the main functions of the Senate are:

- i) *To represent the constituting units*: One of the major functions of an Upper House is to represent all the constituting units in the central legislature at the principle of parity. And it also works as the main locomotive of the intra federal relations. Therefore, Senate is usually called the 'Territorial Chamber' or 'The House of Federation'.
- ii) *To give a 'sober second thought'*:<sup>9</sup> As part of the legislature the main function of Senate is to make a due contribution in the legislation process within the jurisdiction prescribed by the constitution. It is not necessary that all the bills are initiated in the upper house, but it has a crucial power to give a second thought over the legislation initiated in the lower chamber.

Second chambers perform one core function in all bicameral states; they offer a second opinion. Whether elected or appointed, federal or unitary, invested with additional functions or not, the second chamber is meant to be a cautionary check in the legislative process to guard against bad-broadly-interpreted decision -making.<sup>10</sup>

- iii) *To review and revise the bills of lower house*: Senate has the power to review and revise the legislation of the Lower House for any flaw, confusion, error etc. which may affect the implementation or the working of a particular law. In a way it keeps an eye to 'check and balance' the powers of Lower House.

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<sup>9</sup> <http://mapleleafweb.com/features/canadian-senate-role-powers-operation> , 21/05/16. 9:27 p.m.

<sup>10</sup> Leader of the House of Commons and Lord Privy Seal, *The House of Lords: Reform* (London: Parliament of the United Kingdom of Great Britain and Northern Ireland, 2007), 22. Quoted in Shamus Reid, *Comprehensive Senate Reforms: Why We Shouldn't Give Up?* at [http://web.uvic.ca/~onpol/5\\_Shamus.pdf](http://web.uvic.ca/~onpol/5_Shamus.pdf) downloaded. 17/5/16. 2:29 p.m.



Since the concentration of the legislative authority in one chamber may lead to constitutional autocracy, therefore, the presence of the second chamber enables both to act as a check on one another. It also makes possible that a bill is thoroughly examined and more effective deliberation is made during the legislative process.<sup>11</sup>

- iv) *Scrutiny and criticism of federal government policies*: Not all but most of the upper houses have the power to review and criticize the government or executive policies after making a thorough scrutiny. This function is performed through the standing committees which are created for special purposes to scrutinize specially those policies which are directly related to the social, political or economic etc., affairs of the country. In some federations Senate has the powers to scrutinize other departments and the institutions of the federation. It makes thorough scrutiny of those legislative policies of the federation which directly affect public life. And after this scrutiny those matters or policies which affect the society, at large, can be rejected or sent back to the initiators.

Apart from all these there is another main function of the upper house. It provides and retains the sovereignty of the constituting units. In a federation, all the constituting units want to retain their sovereignty or atleast they intend to have a considerable share of sovereignty in many matters of the government. And this only can be done through an upper house which is supposed to be a house of units. It is this attribute of the federalism which compelled the 13 states of American confederation to form a federation. Initially, these states of America formed a confederation where they had absolute autonomy and, in many matters, they were supreme to the central government. With time they realized that some of their interests, like defence or monetary affairs, are not well served in a confederation. So, in 1776, they decided to form a federation with a bicameral legislature in which the upper house retained the 'sovereignty of states' with the representation of all constituting on the principle of parity. So the most significant matter is the issue of having or sharing the sovereignty in various matters while having a vibrant central government. Hence, the upper house of a federation performs this crucial task.

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<sup>11</sup> Tahir Mehmood, *op.cit.*

### History of bicameralism

Having a bicameral legislature is not a new phenomenon in the history of the world. It is as old as the idea or the system of the government and legislation. It was first started in Greek and Roman legislature not with the idea to have proportional or equal representation of various components of the society, rather to have consultation with the sages or the elders of the society for exclusive purpose of the legislation. Initially the purpose of the upper house was to have the recommendations or the advice of the learned men of the society, specially from the elite class or from a particular community like ecclesiastical society. This feature of the Senate is still present in many federations. The members of the Senate were not supposed to be elected directly. Rather there has been practice of appointments or the nominations of the Senators. Later on, as the democracy flourished and federalism spread in the world, there came many changes in the criteria of the membership of the upper house and so in its powers and jurisdiction.

Bicameralism first emerged in Europe during the medieval ages when, with the collapse of feudalism, Europe reached the stage of entering democracy and constitutionalism. Though monarchies remained there, there came a big change in the system and monarchies turned into ‘constitutional monarchies’. For that purpose, monarchs used to run the system and the government according to the laws made by them in consultation with the high profile personnel, technocrats, philosophers or other experienced persons from the elites or the aristocracy. That was the primitive structure of the bicameral legislature, which was not an elected chamber nor had a limited term of the service.

The ideas that underlie the concept of bicameralism, or which have been used to provide justifications for second chambers, are much older than the institutions that may be classified as bicameral. The latter, the institutional arrangements, first arose in the medieval period in various European countries. They arose out of a particular conception of society and out of a need for kings to consult with the ‘great and the good’ of their day. Parliaments came into existence to serve this practical purpose, and they took a bicameral structure because different forms of consultation were deemed appropriate with different sections or orders of society.<sup>12</sup>

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<sup>12</sup> Donald Shell ‘The History of Bicameralism’, *The Journal of Legislative Studies*, 7:1 (2001), pp.5-18, DOI: 10.1080/714003862, at

The history of bicameral legislature in its formal structure starts from England. Initially it was a unicameral legislature but later on it adopted bicameralism in the fourteenth century. The creation of the second chamber in English parliament was not to accommodate the diverse communities or the demand of shared rule, rather it was the sheer need of the time to include the experienced and distinguished elders of various classes of the society in order to counter multiple challenges with exclusive expertise and skills and to avoid the centralization of legislative power in a single house.

Thus, the intellectual roots of bicameralism do not lie simply in the need for the different classes of society, or different estates of the realm, to be separately represented in different parliamentary chambers. Instead they lie in much more ancient notions going back to the dawn of government as a rational endeavor of the human mind and spirit... First that the power of government should not be concentrated in a single individual or a single institution, or even a single class of people. Rather there should be a blend or a mixture of sources which contribute to the authority exercised by government... The second powerful idea concerns the need for wisdom in government, and hence the desirability of hearing counsel from various sources, but with special attention being given to the wise, the experienced, the distinguished, the elderly and the meretricious. Government is not simply about the exercise of power; it is also about sound judgment and persuasion based on reasoned argument.<sup>13</sup>

The English parliament provides the first formal bicameral structure with an upper house viz., House of Lords, and the lower house viz, House of Commons. Though variant in criteria of membership and legislation, the House of Lords set the precedent of bicameralism in a unitary system. However, the American Congress presents the first model of modern upper house with the name of the Senate, with a very different mode of membership and legislative powers in a federation. It signified the inevitability of bicameralism in a federation. American Senate deviating from the English tradition, replaced the wisdom and experience by property and wealth ('wisdom and integrity were difficult

to measure, property was not')<sup>14</sup> and from hereditary to elected, to be the criteria of the membership of the Senate. From here the notion of bicameralism evolved to the modern day structure of upper house with various criteria of membership including the nominations and direct or indirect elections, extended or limited but crucial powers of legislation, additional functions of regulations, appointments and checks and balance, equal representation of constituting units and development of democracy.<sup>15</sup>

For centuries the task of representing aristocracy was deemed sufficient justification for second chambers...However, a wholly new justification for second chambers as institutions intrinsic to the success of federal states emerged from the American revolution. Today the most powerful second chambers are found in federal states.<sup>16</sup>

With the flourishing of democracy and federalism in the world, many countries specially the federations adopted bicameralism in their legislature with various practices and norms. Today, majority of the world countries have the bicameral legislature, which highlights the significance of this system.

### **History of bicameralism and Senate in Pakistan**

Bicameralism and the institution of the upper house, i.e. the Senate is a recent development in the history of Pakistan. It was created in 1973 by the third permanent constitution of Pakistan, though the country was created long ago in 1947. Since the beginning, Pakistan remained a country of unicameral legislature though all the initial documents and drafts, in the name of constitution, provided for a bicameral legislature because the country was sought to be a federation and bicameralism was thought to be indispensable for it by the founders of the country.

The first document which was adopted in Pakistan, in the name of interim constitution, was the Government of India Act 1935. This act actually was given by the British colonial government in united India. It was an act given in the name of decentralization of power, self-rule and federalism by a unitary government. Though very centralized in nature this act provided a bicameral legislature in federation of India.

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<sup>14</sup> *Ibid.*

<sup>15</sup> See *The Federalist Papers* 51, 62, 63, for more details. (American Bicameralism).

<sup>16</sup> Donald Shell, *op.cit.*

The Act of 1935 had contemplated a specular bicameralism. Generally, equality of representation is accorded to the units in the Upper House of the federal legislature, but the units of the proposed Indian federation were to be unequally represented in the Council of States – the Upper Chamber.<sup>17</sup>

Pakistan was created through Indian Independence Act of 1947 and it adopted the Government of India Act 1935 as the interim constitution of Pakistan with certain modifications. According to this act Pakistan became a federation but its clause of bicameral legislature could not be implemented because of many initial problems that the country faced at that time. In March 1949, the Objectives Resolution also upheld the principle of federation in Pakistan. In 1950 the first Report of Basic Principles' Committee (BPC)<sup>18</sup> was presented which also reiterated the importance of federalism in Pakistan but recommended a bicameral legislature with two houses viz., House of the People (lower house) and the House of the Units (upper house). This report of BPC was supposed to be the first draft of the constitution of Pakistan but it was rejected by East Pakistan over the issues of composition and powers of the bicameral parliament. This report did not provide the exact number of seats or the size of the House of People but clearly defined that all the units would have equal representation in the upper house. However, both the houses were given equal powers.

Though the provision of a bicameral legislature fulfilled an important condition of a federal constitution, the envisaged equality of powers of the two Houses was not in consonance with federal traditions. According to the federal norms, the Upper House, being more federal in character, plays a more important role than the Lower House which represents the popular will and not the interests of the constitutional units. This inconsistency of the interim report was severely criticized.<sup>19</sup>

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<sup>17</sup> Syed Jaffar Ahmed, *Federalism in Pakistan* (Karachi: Pakistan Study Centre, University of Karachi, 1990), p.117.

<sup>18</sup> The Constituent Assembly of Pakistan established multiple committees and sub-committees to perform the different tasks of constitution making. Among all of them the most important one was BPC which was created on 12 March 1949 with the Objectives Resolution. Its main task was to frame the broader or basic principles of the future constitution of Pakistan in accordance with the Objectives Resolution.

<sup>19</sup> Syed Jaffar Ahmed, *op.cit.*, p.118.

After the rejection of this interim report of BPC, Liaquat Ali Khan, the then Prime Minister of Pakistan, sent it back to the BPC to resolve the apprehensions of East Pakistan. BPC worked on it and presented its second report in 1952. This time the West Pakistan had serious reservations over the report and rejected it for the same issues of quantum of representation and powers of the two houses of the parliament. This time the draft recommended equal number of seats for both the wings in both the houses of the parliament but more powers were vested in the House of People, which was given the real authority of the legislation. This report of the BPC claimed 'to bring about a constitutional balance of power as well as of responsibilities, between the two wings of Pakistan'.<sup>20</sup> However, the response from the West Pakistan specially from Punjab was quite negative. The main criticism was over undue favor given to a single province i.e. Bengal, over all the other provinces of Pakistan, by giving equal importance to the other units in the lower house and equal representation in the upper house. Thus, the second draft critically compromised the basic essentials of federalism and bicameralism by denying the large population of East Pakistan and diversity of the units in West Pakistan. Hence, the rejection of the second draft created a constitutional deadlock in the country which was finally resolved in 1953 with the passage of 'Muhammad Ali Formula', the third draft of the constitution. This draft also provided a bicameral legislature with proportional representation in the lower house and equal representation of all the units in the upper house. Balance of powers between both the houses and ultimately between both the wings was also settled. The deadlock was overcome and finally the first permanent constitution of Pakistan was implemented in the country on 23 March 1956. This constitution provided for a federation of Pakistan but denied all the essential norms of federalism by establishing a unicameral legislature having the National Assembly only. Being a federation and having a colossal diversity of size and the population of the provinces, the country should have adopted a bicameral legislature but this essential feature of federalism was compromised over in a very ill-mannered way. There was mistrust and apprehensions between the two wings of Pakistan over many issues including quantum of representation and powers of the legislature. Because of that two early drafts of the constitution were rejected. This problem was settled by the formation of 'One Unit' in 1955 when all the provinces of the West Pakistan were

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<sup>20</sup> Hamid Khan, *Constitutional and Political History of Pakistan* (Karachi: Oxford University Press, 2005), p.72.

merged into a single province called One Unit. The formation of One Unit apparently resolved the issue of representation in the legislature and, consequently, the rationale of having a bicameral legislature lost its importance. Therefore, the Constitution of 1956 provided a unicameral legislature having representation on the principle of parity between the two provinces.

Being a federation, Pakistan should have obviously adopted a bicameral legislature, but it did not do that, and finally unicameral system of legislature came to be adopted in this country through the first Constitution (1956). For any federation the existence of a second chamber is almost *sine qua non* because it represents the component units of that federation. Pakistan managed to escape this essential requirement.<sup>21</sup>

After the Constitution of 1956, the country continued as a federation but without bicameralism. In 1962 the second permanent constitution was adopted after the abrogation of the first constitution in 1958 through the martial law of Ayub Khan. In spite of the recommendation of a bicameral legislature, given by the constitution commission of Justice Shahabuddin, this second constitution also continued the unicameral legislature but having the heavy centralization of power in the office of the president.

Finally, the federation of Pakistan adopted the bicameral legislature in 1973 by the third permanent constitution of Pakistan. It was adopted after the second martial law in 1969, dissolution of One Unit in 1970 and separation of East Pakistan in 1971. After all these three significant developments, the framers of the next constitution did not face any deadlock over the issues of quantum of representation and powers of the legislature.

The Constitution of 1973 provided for a federation of Pakistan with a bicameral legislature having a lower house viz, The National Assembly and the upper house i.e. the Senate. For the first time in the history of Pakistan, the upper house was created by acknowledging all its merits of rational representation of all the constituting units, checks and balances over the possible tyranny of the majority in the lower chamber and having a sober thought over the legislation process. Though the intentions of the framers of the constitution were not the part of the debate, the composition and the powers of the Senate given in the

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<sup>21</sup> Syed Azhar Ali, *op.cit.*, p.71.

Constitution of 1973 initially, had severe flaws and compromised over the essential norms of bicameralism.

The Senate of Pakistan was created to harmonize the relations among all the federating units of Pakistan, by allocating the equal number of seats among all the provinces. Initially, the Senate has total 45 seats provided by the Constitution of 1973. In 1977, during the martial law regime of General Zia ul Haq, this number of membership was raised to 63 and then to 87 in 1985 by the same regime. It was further increased from 87 to 100 in 2002, by the Legal Framework Order (LFO), during the military regime of General Pervez Musharraf. Finally, after the passage of Eighteenth Constitutional amendment to the Constitution of 1973 in 2010, 04 seats were also included to the Senate, reserved for the minorities, on the basis of one member from each province. Thus, now the Senate has total 104 seats, including the equal number of general seats for all the four provinces with some reserved seats for women, technocrats, *ulema* and minorities.<sup>22</sup> The current composition of the Senate of Pakistan is shown here through the following table:

**Table 1: Senate of Pakistan: Current Composition**

<b>Federating Units</b>	<b>General Seats</b>	<b>Technocrats/ <i>Ulema</i></b>	<b>Women</b>	<b>Minorities</b>	<b>Total</b>
Sindh	14	4	4	1	23
KPK	14	4	4	1	23
Balochistan	14	4	4	1	23
Punjab	14	4	4	1	23
Federal Capital	2	1	1	-	4
FATA	8	-	-	-	8
<b>Total</b>	<b>66</b>	<b>17</b>	<b>17</b>	<b>4</b>	<b>104</b>

*Source:* This table is drawn by the author based on the information given in the Article 59, Constitution of Pakistan 1973, amended by the Eighteenth Constitutional Amendment.

### **Role of Senate in promoting federalism in Pakistan**

The Senate plays a crucial role in promoting federalism in a country by providing equal representation to all the constituting units with substantial power of legislation. It provides a sense of shared rule and

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<sup>22</sup> For further details, see the Article 59, Constitution of Pakistan 1973, and more details can be taken from the official website of the Senate of Pakistan, i.e., [www.senate.gov.pk](http://www.senate.gov.pk)



responsibility to all the regions and the communities which is essential in strengthening and promoting federalism. That is the reason why the Senate or the upper house is usually known as the ‘House of Federation’ or ‘Territorial Chamber’ in a federal state. Moreover, it upholds the exclusive regional identity of a unit in a chamber of the parliament. That is vital especially in such country like Pakistan which was created by the political merger of the constituting units, who, while joining the federation were conscious of their separate regional identity. In addition to that, Senate also provides a platform specially to the smaller units, who have a meager number of representatives in the lower house, to have their say in the central legislation in order to serve and safeguard their regional interests and to protect their rights from the possible tyranny of the larger group in the lower house.

The architects of the Constitution of 1973 wanted to make Pakistan a federal polity with a bicameral legislature in order to keep the house intact and to avoid the further episodes of secessions, the country had suffered recently. The constitution was prepared with much rigor and a thorough process of diplomacy by taking all the stakeholders on board. After a due effort and consideration, the constitution was prepared and was promulgated in the country on 14<sup>th</sup> August 1973. This constitution was claimed to have all the essentials of federalism and bicameralism. It provided parliamentary system and a two house parliament comprising the National Assembly with proportional representation and the Senate with equal representation of all the units. Thus, though federalism and bicameralism were both adopted in the country, Pakistan could neither become a true federal state, nor was the Senate able to perform its desired role of promoting federalism. What were the hurdles or flaws that remained? By focusing on the theoretical role and the actual performance of the Senate of Pakistan since 1973, this analysis provides a brief answer to this question.

*(i) Criteria of the membership and election of the Senate — representation of constituting units:* Initially, according to the Article 59 of the Constitution of 1973, the Senate comprised 63 members, among whom 14 were to be elected from each province by its provincial assembly. Five members were to be elected from FATA members of the National Assembly by the National Assembly. Moreover, two members were to be from the Federal Capital, in a manner prescribed by the president.<sup>23</sup> The membership of the Senate was increased from 63 to 87

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<sup>23</sup> The Constitution of The Islamic Republic of Pakistan, Article 59.

by a Presidential Order in 1985 during Zia-ul-Haq's regime<sup>24</sup> and then further increased to 100 during Pervez Musharraf's regime in 2002 through LFO, 2002.<sup>25</sup> With the increase in the total number of Senate seats, the number of representatives from FATA and the Federal Capital were also increased but even then with the increased number of seats FATA remained out of the jurisdiction of the constitution, supreme and the high courts of Pakistan<sup>26</sup> and its representatives were not given the right to legislate on the behalf of their own region. As they were not elected by their provincial assembly, rather they were elected by the members of the National Assembly, according to the constitution. The election of the FATA members by the MNAs is really absurd and a big compromise over the spirit of federalism.

Similarly the total term of the Senators was increased from four to six years now. But half of the members would be elected after 3 years<sup>27</sup>. This clause of the constitution for the election of the Senators actually turned into the selection of the members of the political parties, who already would have taken majority in the lower house, as the elections of both the chambers are held in different times.

The election of the Senate for 6 years, with half of the house elected every 3 years, has become virtual selection by the political parties through nomination of their candidates... Since elections for the two houses were held at different times, it was not uncommon to see the majority party in the National Assembly to have a minority representation in the Senate. This frequently happened in the 1990s. After the 2008 elections, the PPP and its allies managed to get a bare majority in the Senate only after elections for half of the house in 2009. Sometimes, this situation blocked legislation from moving beyond one

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<sup>24</sup> Revival of the Constitution of 1973 Order, 1985. President's Order 14 of 1985.

<sup>25</sup> Legal Framework Order, 2002, Chief Executive's Order No. 24 of 2002. Article 5. 59. (1) For clause (1).

<sup>26</sup> The Constitution of the Islamic Republic of Pakistan, Article 247, Article 248.

<sup>27</sup> Constitution (Eighth Amendment) Act, 1985, Article 59, clause 3, (a,b,c,d) and The Constitution of the Islamic Republic of Pakistan, (as modified upto the 28<sup>th</sup> February, 2012), Article 59, clause 3 (a, b,c,d).

house. This happened in the case of the 1991 Shariat Bill (the aborted 15<sup>th</sup> Amendment).<sup>28</sup>

It can be argued here that no matter the intentions of the architects of the constitution and its amendments, the overall impact of the changes in the membership and election criteria did not improve the actual performance of Senate and essential elements of democracy and federalism remained under strain.

(ii) *Division of powers and system of check and balance through Senate in bicameralism:* By the theory of bicameralism, the upper house provides a system of checks and balance for legislation and possible autocracy of the majority in the lower house. It is a feasible system to have separation of powers in the government institutions. But in Pakistan it is also used to fulfil the vested interests of the individuals or other stakeholders.

During the period of diarchy (1985-1999), the 8th Amendment gave the President power to dissolve the National Assembly and thus dismiss the federal government. Successive presidents Zia-ul-Huq, Ghulam Ishaq Khan and Farooq Leghari exercised these powers in 1988, in 1990 and 1993, and in 1996 respectively. Both Ghulam Ishaq Khan and Farooq Leghari were able to mobilize the support of certain political parties from the smaller provinces represented on the floor of the Senate in order to counter the majority in the National Assembly led by either Benazir Bhutto's PPP or Nawaz Sharif's PML-N. While the Prime Minister drew on the critical support of Punjab in the lower house, the President relied on the tacit support of smaller provinces in the Senate. In this way, bicameralism became enmeshed with diarchy representing division of powers between the two houses of parliament and between the head of state and the chief executive respectively.<sup>29</sup>

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<sup>28</sup> Dr Mohammad Waseem, *Federalism in Pakistan* (August 2010) <http://www.forumfed.org/pubs/Waseem-Fed-Overview.pdf>, downloaded, 18/05/16, 11:52 p.m.

<sup>29</sup> Mohammad Waseem, *Constitutionalism in Pakistan: The Lingering Crisis of Dyarchy*, in Gilles Tarabout & Ranabir Samaddar eds, *Conflict, Power and the Landscape of Constitutionalism*, Routledge, 2008 (Waseem c). Quoted in Dr. Mohammad Waseem, *ibid*.

In addition, though the constitution provides that the Senate is a permanent body which cannot be dissolved,<sup>30</sup> during the intermittent military regimes since 1973, the Senate of Pakistan either remained suspended or was dissolved with the National Assembly by the civilian presidents.<sup>31</sup> This suspension or dissolution of the Senate denied the fundamental norms of democracy and federalism.

*(iii) Legislative powers of the Senate and the working of Federalism:*

The constitution of 1973 provides various powers of legislation to the senate, but these powers are not substantial in true sense. Initially, before the Eighteenth Amendment (2010), the constitution had the two legislative lists, viz., The Federal Legislative List (FLL) and The Concurrent List. The FLL was consisted of the two parts. Part I of the FLL was comprised of all those subjects which were purely the Federal subjects. However, in the Part II of the FLL, those subjects were enlisted which were more related to the provinces. E.g. Railways, energy, CCI, resources etc. Moreover, the concurrent list was consisted of the subjects which were common to the interest and importance of both the federation and the provinces. (However, the Eighteenth Amendment has abolished this concurrent list and the subjects enumerated in it and some of the subjects from the Part II of FLL, are transferred to the provinces in the name of provincial autonomy). Hence, by focusing on the pre Eighteenth Amendment scenario, it can be argued here that Senate, being the House of Units, should have been given the extended role in dealing atleast with those subjects of the FLL and concurrent list also, which were directly related or of the great importance to the provinces. From 1973 — 2010, Senate remained deprived of this fundamental right of it and federalism continued to suffer for a considerably period of history.

As discussed earlier the upper house has the power to review and scrutinize the legislation made by the lower house. However, the Senate of Pakistan, even after having this reviewing power, cannot reject any bill because it lacks the power of veto. It only can discuss, review or delay the legislation but cannot veto it, no matter how much that very

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<sup>30</sup> The Constitution of The Islamic Republic of Pakistan, Article 59. Clause 3.

<sup>31</sup> From 1988 till 1999, the National Assembly of Pakistan was dissolved four times by the presidents of the time. In 1999, Pervez Musharraf suspended the Senate and then dissolved it by creating the National Security Council as the supreme authority, and himself became the Chief Executive of Pakistan.

bill is against the consideration of the house or the senators have contradictory opinion for it. Thus, a Senate 'without teeth' is a serious blow over the basic notion of bicameralism and consequently compromise the working of federalism.

Furthermore, according to the constitution, the senate provides a number of seats to the technocrats of various discipline of the society. These people are supposed to be the qualified learned scholars, scientists, artists or other seasoned, professional or experienced men of the society. But the history of the senate in Pakistan shows that a number of comparatively inexperienced, non-qualified people were elected in those seats mainly because of their adherence to major political parties. The presence of such ill-qualified people in the Upper House severely destroyed the foundations of federalism in the country.

Theoretically, one of the most important legislative powers of the Senate is the power related to finance and money bills. It is the matter of fiscal federalism, which comes under the purview of the Upper House being the 'House of the Federation'. But ironically, the Senate of Pakistan is deprived of significant powers to legislate on matters related to fiscal federalism. According to the constitution, all money bills are originate in the National Assembly and it is the prerogative of the speaker of the National Assembly only to decide which bill lie under the category of a 'money bill'. So the denial of Senate's authority or atleast a considerable share of authority over the financial matters is a serious setback to the legitimacy of the bicameralism.

In terms of initiating legislation, the Senate of Pakistan do not have enough capacity. The sources of legislation in the Senate are very minimal. In the other federations of the world like USA, the Upper House has very diverse sources of legislation including the Executive communication through an order, advice or recommendation of the Supreme Court, over the request of the provincial or local government or on the requests of the members. But in Pakistan the sources of legislation are very meagre. Neither the executive orders nor the communication of the Supreme Court provides a sufficient source of legislation. Moreover, the provincial government hardly send or request an issue in the Senate. In addition to that, rarely do the politicians initiate any issue to legislate on, for the matters they had vowed over during their election campaign. One of the main reasons for this shortage of sources of legislation may be the limited jurisdiction and the authority of the Senate, prescribed in the constitution.

(iv) *Business in the Senate*: In the Senate of Pakistan, there are two types of business, i.e. Private and government.<sup>32</sup> If a bill is initiated by a minister in the Senate, it is called the government or official business. If a bill is initiated by a member of senate, then it is called the private bill. After the Eighteenth Amendment, another category of the business is also defined i.e. The Senate Business. 'The Senate business shall include business relating to Committees and such other business as the Chairman may designate as Senate Business'.<sup>33</sup> It means, it's not the nature of the bill which makes it significant, rather it's the status of its initiator, which signifies a bill. And consequently it affects the efficient working of the chamber for achieving its main objectives.

The committees in the Senate are an important part of its composition and functions. Senate perform many essential functions through its committees and these committees carry out their given task through a rigorous process of consideration and deliberations but their recommendations are not bound to be adopted as the legislation or the part of the legislation. There is a need to reform the working of this committee system by giving it a weightage in legislation process.

## Conclusion

Bicameralism is one of the basic elements of federalism. No federation can be a viable federation without adopting it in its legislature. It not only accommodates the diversity of the regions and desires shared rule in a society in a well-mannered way, rather it also provides a check and balance system against the autocracy of a dominant majority in the legislation process of the lower house. Usually a federation is formed to manage the diversity found in the society. And for this purpose, bicameralism provides the institution of the upper house in the legislature. The upper house, usually called, the Senate, is the territorial chamber where all the constituting units irrespective of their size and population, are given the equal representation. The Senate plays a significant role in promoting federalism in a country by this accommodation of the diversity and protecting the rights of smaller units from the encroachment of the larger groups.

Bicameralism is not new in world history rather it is as old as the idea or the notion of legislation and government. It first appeared in Europe, when Europe was entering the era of democracy from

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<sup>32</sup> Roles, Functions and Procedures, Senate of Pakistan, 2003.

<sup>33</sup> Rules of Procedure and Conduct of Business in the Senate 2012 (As Amended Up to 28<sup>th</sup> December, 2015).

feudalism. It had a primitive form of ‘Council of Elders’ or ‘Assembly of philosophes’, who used to advice the monarch on different matters of legislation. However, the modern concept of bicameralism evolved with the notion of federalism first in the United States. American Congress set a precedent of a viable bicameral legislature in a federation. After America, many countries, especially those who adopted federalism in their system followed this model in order to accommodate the diversity of their heterogeneous society and to strengthen federalism. Pakistan is among those countries who adopted federalism for the same purpose. But it took a long way to adopt bicameralism in its polity. From 1947 to 1973 the country remained under a unicameral legislature provided by early two constitutions, i.e. of 1956 and 1962. It was the third constitution of the land which adopted bicameralism and established the upper house viz., the Senate. Though, the authors of the constitution adopted bicameralism and created the Senate with the dream of promotion and strengthening of federalism in Pakistan, Senate could not play its desired role for achieving these objectives. Many hurdles and flaws remain there in the way of Senate to perform its very function. Moreover, most of the time in its history, the Senate of Pakistan either remained suspended or was out of the house mainly because of intermittent martial laws. However, after the passage of the historic Eighteenth Amendment in 2010, many changes occurred in the composition and the working of the Senate. Which ultimately made it and still making it an institution which is the true locomotive of federalism. Since 2012, when the current chairman of the upper house took the charge, Senate performance has improved comparatively, but still there is a long way to go to make the Senate a true representative and guardian of the rights of the constituting units, a very robust process of reforms is needed which would enable it to promote and strengthen federalism in the country. Among those required reforms, some of the recommendations are given here:

*Recommendations of Senate reforms:* Some of the reforms which are strongly needed in the Senate of Pakistan are as follows:

1. There should be direct elections for the Senate.
2. Senate should be given the power to legislate on the money bills and should be more empowered to deliberate and legislate on the federal budget.
3. Not only all the provinces, but the various regions found in the provinces should be given representation in the Senate.

4. It should be given the authority and powers at par with the National Assembly especially in the financial matters.
5. Sources of legislation in the Senate should be enhanced with its legislative powers.
6. The committees of the Senate should be provided with some authority to get the job done effectively for which they are created for.
7. The Senate should be given some 'teeth' to check and balance the legislation done by the lower house and the executives.
8. Communication and the coordination in terms of legislation, among the three pillars of the government, i.e. the executive, parliament and the judiciary, should be enhanced and made more effective.