

Federalism at Crossroads in Pakistan: Study of Structural Devolution
under the 18th Constitutional Amendment

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Abstract

The disintegration of Pakistan in 1971 suggested that federalism might not suit to the administrative requirements of the country owing to horizontal and vertical cleavages persistent in the length and breadth of the residual state. The musical chairs played by the succeeding democratic governments of 1980s and 1990s further strengthened this image hence the devolution of power envisaged by Pervaiz Musharraf and the later incorporation of 18th Amendment into the Constitution of Pakistan by the democratic government in an attempt to infuse the true spirit of a decentralized federation into a highly polarized polity of the country somewhat pacified the unrest and centrifugal tendencies and elements active in rather underdeveloped and marginalized regions felt accommodated albeit slightly. Accordingly, the instant study explores that how 18th amendment tried to mitigate the differences between the federation and the constituting units through abolishing the concurrent list and granting more financial autonomy to the provinces. It finds that although some meaningful and effective steps have been taken while empowering the bodies like National Finance Commission, National Economic Commission and the Council of Common Interests along with the Inter Provincial Coordination but still a long way ahead for the decision makers and ruling elite in Pakistan to truly achieve the much-aspired provincial autonomy and securing an independently functioning parliamentary democracy.

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Introduction

A federation is made up of a government that is shared with the territorial split between political and economic forces among constituent members known as provinces. The creation of a system to share power which can be accommodated, controlled and agreed upon is the real test of federalism that can give provinces independence. Across certain ways, federalism requires a well-structured transition of political and economic influence (Ariyo, 2003). It can be observed that the provincial representation and empowerment with respect to political and legislative institutions continues to be the spirit of federalism. While comparing the theory and practice of federalism within operating procedures, scholars find variations in various federal systems currently in vogue in various states. For example, Canada's units do not have the authority to veto federal government policies, but the provincial or federal governments have to comply with the agreed arrangements and federal scheme. The states and the federal government are also part of organized, policy-oriented multilateral negotiation bodies in Australia, Germany, Russia and Spain (Rodden, 2004). The case of Pakistan is also not unique in this sense where a new constitutional agreement on 14 August 1973, was established and implemented following the disintegration of the country in 1971, however, in the 1973 constitution, the federal provisions of the former constitutional agreements of 1956 and 1962 were largely preserved only ensuring the parliamentary form of government to be implemented in its true sense (Khan, 2010). Accordingly, the federal government in Pakistan has set up various bodies and consultative mechanism to ensure smooth functioning of the federation. In this perspective the current study revises the federal arrangements in the currently existing constitutional setup of Pakistan, particularly after the insertion of 18th Amendment into the 1973 Constitution of Pakistan, which the various governments claim to bring in the much-demanded provincial autonomy hence caused reduction/overcoming of frictional aspects between the federal government and provinces on the one side and between the provinces per se on the other side.

Literature Review

Adeney (2016) inter-connected the federalism with ethnic conflicts and elaborated that how ethnicity effects federalism. She believes that strategy of institution is the key variable for understanding the various forces and types of conflicts in both India and Pakistan.

Mushtaq (2016) holds that the relation between the center and provinces in Pakistan fluctuated in the past, nevertheless, after 18th amendment smaller regions were provided with sufficient autonomy. He recommends that the demands for new provinces should be fulfilled with significant popular support. He suggests that dialog and consensus are needed to be applied to resolve the problem rationally.

Rizwan (2014) accesses the nature of numerous military takeovers in Pakistan and their impact on the federal structure. In his opinion, the constitutional manipulations by the military regimes had influenced parliamentary democracy, diluted parliamentary sovereignty and rejected the public's privileges. The 18th Amendment pursued for the restoration of parliamentary democracy, maintaining the province's autonomy, judicial independence and the Election Commission, and tried to ensure the implementation of Charter for Democracy while suggesting concrete steps for socio-economic and political growth of the country.

Center-Province Relations in Pakistan after the 18th Amendment to the Constitution of 1973

On 8 April, 2010, the 18th Amendment into the Constitution of Pakistan was reified by the National Assembly, and on 15 April by the Senate of Pakistan. Finally, on 19 April 2010, the President signed the modified draft. This was a positive and optimistic move, because the 1973 Constitution was restored in many respects in the original position moving from semi-presidential to parliamentary form of government. Scholars and researchers working in the constitutional domain recognized this change as positive development. For the first time in the history of Pakistani, the President voluntarily signed a document in which he surrendered his powers. Furthermore, judicial independence was ensured and increased considerably through the 18th Amendment. It made the appointment of judges of the Supreme Court obligatory through a judicial commission. It further prohibited the President from enforcing an emergency unilaterally in the provinces, and the appointment procedure of the Chief Election Commissioner was also modified which not only strengthened the trust of the provinces towards the center and federal form of government but also empowered the provinces to make certain alterations in their economic and political realms.

The 18th Amendment seemed to reinvigorate the following philosophies of the original Constitution of 1973:

- i) Government system to be run through federal parliament.
- ii) Prime Minister as principal administrator and executive head of the government.
- iii) President as ceremonial Head of Government who had to function as per recommendations of the Prime Minister.

Apart from lifting ban on being elected as Prime Minister for the third term, the name of North-West Frontier Province (NWFP) was also changed to Khyber Pakhtunkhwa (KP) through this particular amendment nevertheless the textual dimension of changing the name of unit generated feelings of discontent and privation in Hindko speaking population of the province who agitated and protested against the said renaming on grounds of their distinct culture and identity. Besides, the provincial status was conferred upon the Gilgit-Baltistan region through the said Amendment. It is worth-noting here that the Parliamentary Committee on Constitutional Reforms (PCCR) spent approximately 385 hours in deliberations while drafting the Eighteenth Amendment. In sum, the Committee entertained 982 proposals and worked continuously for a period of nine months to finalize the Amendment. To make it a comprehensive document, the committee expanded its field of work and dealt with many different controversial issues while stepping outside the Charter of Democracy (COD). Out of the total 280 articles/provisions of the constitution of 1973, the 18th Amendment modified or altered 102 articles (Waseem, 2011).

Some important features of the Amendment included:

- i) Dismantling the list of conflicting issues and powers and passing them to the governments of provinces;
- ii) The functional establishment of the Council of Common Interests (CCI);
- iii) Enforcement of restrictions on the issuance of regular and excessive executive order;
- iv) Stressing upon the importance of the role of Chief Electoral Commissioner and ensuring the political consensus between government and the opposition;
- v) Constituting the Judicial Commission for appointment of Judges;
- vi) Renaming of NWFP as Khyber Pakhtunkhwa.

Institutional and Functional Reforms in Administrative Framework

Some of the important features which had been incorporated into the Constitution of Pakistan through the 18th Amendment for improving the institutional framework;

Council of Common Interests (CCI)

The reforms in CCI was a move in the direction of more regional self-sufficiency and increased regional portion in the allocation of resources in compliance with the 18th amendment. This adjustment led to the settlement of financial conflicts and disputes between federation and provinces on the one side and among the provinces on the other side. It was explicitly mentioned in paragraph 21 of the 18th amendment that the institution of CCI will provide joint management to further strengthen the central government by increasing regional economic and political independence. The CCI was made bound to present its report annually to the Parliament in the light of Article 153(4). Furthermore, it was allowed to formulate and govern policies in compliance with Article 154(1) to deal with provincial problems and in this relation, it could also regulate and control institutions. Rendering to article 154 (2), the CCI had to be constituted within one month after the oath of the Prime Minister. Under Article 154(3), that CCI shall have permanent secretariat. In ninety days, the CCI meeting must be held once. The CCI would have to supervise the latest Federal Legislative List-II (FLL-II) entries following the 18th amendment.

National Economic Council (NEC)

In terms of scale, process and roles provided under Article 156, the National Economic Commission (NEC) was also restructured. This body was made up and confined to the chief ministers of the provinces. Thus, the provinces were assigned the primary responsibility and stake for NEC's national management and designing. Furthermore, the chief ministers of the provinces were granted with the power for the nomination of one or more members for NEC. Importantly, the NEC had provided greater provincial autonomy, as the federal participation, including the Prime Minister, was limited to five members where eight members were there with each province. At the end, it made the provinces more established and independent. The NEC functions were also changed so that the provinces would be able to achieve and enjoy more autonomy. After the 18th amendment, it had become responsible for reviewing the federation's entire economy and the provinces to give advice to the members of parliament and governments.

The NEC was specifically designed to achieve better results in the development and financial independence of the provinces in terms of taking economic and social policy initiatives. Because, under Article 156 (2), the NEC had been granted with the mandate, the provinces became more independent, to take care of matters of developments of their regions on equal grounds. NEC was governed by the constitution under Chapter 2, Part II. Article 156(4) provided for a minimum of two meetings of NEC in one year. It provided to the provinces the opportunity to raise their voices twice a year under the forum of NEC however, reports had to be submitted by the NEC to the parliament on annual basis.

National Finance Commission (NFC)

Principally, the NFC award has been a federal legislative obligation. Article 160 of the 1973 Constitution explicitly stated that an NFC award was compulsory for the federal government reviewed after five years between provinces and federation for the distribution of resources and rights. Under the 18th amendment, even the national finance commission was revitalized. Article 160(3) indicated that the NFC award for provinces would not amount to less than the previous share in the capital of the divisible pool. That provided

provinces with economic autonomy. Article 170(3) established moral obligation for supervision of the implementation of NFC award by the Finance Ministers of federal and provincial governments and submission of reports to their respective parliamentary assembly. A significant improvement following the 18th amendment involved levying taxes from federal excise duties on gas and petroleum wellheads. The Federal Government was directed by Article 162(a) for gas and 161(b) for oil to pass the collected duty in respect of the wellheads to the relevant provinces accordingly.

The demands raised for the province of Sindh had been addressed throughout. The Federal Consolidated Fund now did not include a further federal excise duty. The major reform under the 18th amendment concerned the provincial government's ability to collect foreign loans and investment. The provinces were expected to undertake more construction and development projects through foreign loans and investments. The provinces could also receive internal and domestic loans against a guarantee from the provincial consolidated fund in compliance with Article 167(4) of the Constitution. In Article 172, another structural reform was inserted that carried matter of additional assets for the provinces. Article 172(2) allowed the Pakistan's ocean waters to be controlled and owned not by the federal Government but by the respective provinces. In addition, Article 172 (3) granted more autonomy to the joint ownership of resources with the federal government.

After extensive conversations and deliberations upon 18th Amendment, the consensus on the 7th NFC Award had been reached. Under the said Award, the key component of growth and development was economic capital. Furthermore, a fair distribution of economic capital was the federal government's primary responsibility and obligation and a provincial right. The 7th NFC award also addressed this dimension and appropriate arrangements for allocation of resources were made in conjunction with the said award, taking account and considering the growth factor of the country. From the perspective of federal government, this was the expression of confidence of units over federation.

Office of the Auditor General of Pakistan

In order to provide public accountability, fiscal transparency, watch over activities of the government and control of public operations, the office of the Auditor General of Pakistan had been formed under Article 168 of the Constitution. The duties of this office were watched and protected by Article 169. After the 18th amendment to the Constitution of 1973, some new clauses were added in the relevant articles of the constitution to further strengthen the said office. The agency not only regulated provincial and federal government's accounts but retained the power to lift provincial governments' international and domestic financial loan capability. This impacted positively the autonomy of the provinces.

Ministry for Inter Provincial Coordination (IPC)

The Prime Minister of Pakistan decided to establish the Inter-Provincial Coordination Division (IPCD) on the 19th of March, 2007, under Rule 3(2) of the Rules of Procedure. Afterwards, it was granted full ministerial status with effect from 3 November 2008. The duties of the IPC Ministry were expanded as a result of the 18th amendment. In the Rules of Business of 1973, required changes were made accordingly. In order to establish good ties between federations and provinces, the detail of some important tasks which were assigned to the IPC Ministry under the 18th amendment is as under:

Devolution of Ministries

Under the reforms program as envisaged by eighteenth constitutional amendment, the state planned to surrender seventeen of federal ministries in favor of provinces. It decided to abolish/delegate ten ministries under the first phase of devolution. Social security, education, tourism, special education, population development, special initiatives, rural development, local authorities, Usher and Zakat, youth, livestock, dairy production and culture were included in those ten ministries to be abolished between December of 2010 and April of 2011. The plan was to devolve seven other ministries in June 2011 to the provinces in the second phase of the process. With the transfer to the provinces of 17 federal ministries, provincial autonomy was ensured.

Instrumental Reforms: Reforms for Equalization and Transfers

The eighteenth amendment to Pakistan's 1973 constitution also brought in some important changes in the patterns for:

- 1) Sharing of incomes on duties and taxes e.g. levy, fee or surcharges
- 2) Transfers among provincial governments
- 3) Transmission of resources and assets
- 4) Sharing and transferring of responsibilities
- 5) Services and their transmission
- 6) Province to province borrowing

Timeline for Devolution

The timeframe for the planned transition would have to be determined under Article 270AA inserted through the 18th amendment which under section (8) provided that the decentralization procedure would be finished until the 13th of June, 2011 and it was also mentioned in the same article under Clause (9) that for the purpose of process of devolution as mentioned in clause (8) the Federal government shall create an Implementation Committee within 15 days after the start of the implementation of Constitution (18th Amendment) Act, 2010.

Policy Reforms

The eighteenth amendment revived the position of provinces in formulating policies significantly. Provinces were not just remained a mechanism for execution of centrally formulated policies but now they could develop their own policies to meet the political, economic and social requirements of their people. Provinces had now more scope to play an important role in the policy formulation following the implementation of the transition program envisaged by the said amendment. In order to obtain and enjoy full regional sovereignty, respective provinces had to innovate improvised policy structures and concentrate on neglected areas. For this purpose, the capacity of each province for planning and implementation of the necessary policies must be strengthened.

Under such a shift in legislation, the provinces now had the right under Article 25- A to implement education policy. The right to free mandatory education had been provided through the said article. The provinces appreciated this inclusivity but lamented the lack of sufficient resources to turn this idea into reality. Nonetheless, under Article 25A Punjab had taken a number of positive steps towards policy formulation and execution. The provinces were further entitled to develop their own curricula, in line with their cultural values, under the 18th amendment.

Economic Dimensions Prior to 18th Amendment

The economic aspects of the provincial autonomy dealt with the collection and utilization of taxes, the leveraging of domestic or foreign capital and control in the embedded

production and provision of products and services. To this end, the CCI and NEC, and the NFC Awards had a significant role in providing appropriate political and financial services related to the specific requirements of the federal units.

Prior to the 18th amendment, with actual expenditures of approximately 72% the federal government generated revenues of approximately 93%. Persistent tensions between provincial governments and federal government prevailed due to the ineffective method of transformation of resource from federation to the provinces. Nevertheless, under Article 160(1) of the Constitution, an orderly transition mechanism had been established under the NFC. The charter of NFC comprised dispensing the tax receipt; arbitrary transmissions like grant funding and furnishing recommendations. In order to rationalize the proportion of divisible pools of tax receipts based on the actual population, the NFC awards were given and dispensed to the provinces.

Although the military regimes had issued several financial awards, Ayub Khan, for example, awarded these awards in 1961 and 1964, Zia, in 1979 and 1985 and later Musharraf in 2000 and 2006 yet there was no consensus among the federal and provincial governments on these awards (Ahmed, Mustafa & Khalid, 2007). Nevertheless, the Z. A. Bhutto's award was somehow consensus-based in 1974 and 1991 award of Prime Minister Nawaz Sharif also enjoyed the confidence of units. The 5th NFC award of 1996 raised the percentage of provinces on federal tax revenues by 28% taking them to 45% subsequently. The N.W.F.P (now Khyber Pakhtunkhwa) got 13.54%, Balochistan acquired 5.30%, Sindh obtained 23.28% while Punjab received 57.88% of the total provincial shares. In 2006, Musharraf announced the provincial contribution and allotment to remain 45% which would have to be extended with a rate of 1% annually in the upcoming five years taking that to a maximum of 50%.

Interprovincial Matters and Coordination before 18th Amendment

The journey of Interprovincial Council/Conference/Coordination (IPC) is long, complicated and elusive, although it is now added as a subject under the Federal Legislative List, Part-II. The origins of Interprovincial Matters and Coordination could be traced back to Section 135 of the Government of India Act, 1935. The functions of the IPC, established under the said Act were as followed:

- (a) Seeking information and counseling on conflicts amongst provinces;
- (b) Locating issues of popular interest to some or all of the Provinces, or to the Federation and one or more Provinces; or,
- (c) Offer suggestions on any other issue and in general make suggestions for improvement of coordination policy and action.

The rationale provided by the British Parliamentary Joint Committee on Social Reforms for the IPC clearly indicated that the framers of the 1935 Act had an inter-governmental platform in mind while framing the IPC (Noorani, 2011).

In Pakistan, the Inter-Provincial Council was made part of the Constitution of 1956 under Article 130 with the same name but with two significant changes as compared to the provisions of 1935 Act. The approval of provincial governors was provided as a compulsory requirement in the Constitution of 1956 for the establishment of the IPC and the drafting of its rules and procedures. The other amendment was the elimination of subsection (a) from the original Section 135 of the Act of 1935. Moving further, in the Constitution of 1962, the IPC was entirely omitted and no new article was added to establish an inter-governmental forum to deal with political issues nevertheless the provisions relating to the NFC and the NEC were kept intact to cover the fiscal side of intergovernmental relations.

Likewise, in the original 1973 Constitution, there was no mention of inter-provincial council/conference/coordination. The original 1973 Constitution, however, provided for the CCI as a new intergovernmental platform which would have to take up the eight subjects listed in the Federal List Part-II.

The history of Inter-Provincial Collaboration/Coordination revealed that the concept of IPC was materialized because of the particular interest of Mr. Zulfikar Ali Bhutto, the former Prime Minister of Pakistan, who also was the first chairman of the Inter Provincial Coordination Committee (IPCC) (IPC Year Book, 2008-09). In fact, Bhutto wanted to have some kind of intergovernmental mechanism for conflict resolution to keep all the remaining federating units on board which was necessary in the backdrop of Dhaka debacle of 1971. Nonetheless, on the face of it, the continuation of the same IPCC process after integrating the CCI into the 1973 Constitution seemed to be a futile exercise but it was kept intact since Mr. Bhutto preferred to keep all the power with himself through virtually substituting the CCI's constitutional mechanism, which mandated provincial chief ministers to be important stakeholders in the organization. It would also be important to recall here that the CCI was made part of the 1973 Constitution in response to the insistence of the opposition parties, especially the National Awami Party (NAP), which then formed governments in NWFP and Balochistan (Khan, 2001). The CCI was therefore not Bhutto's brainchild, but he had formulated it in order to secure the constitutional spirit.

The Secretariat of the IPCC was initially established by Z. A. Bhutto in 1972. After Zia regime, the IPCC was reconstituted in 1989 in the Cabinet Division by the then Prime Minister of Pakistan Mrs. Benazir Bhutto. It was, however, the Prime Minister, Nawaz Sharif, who reconstituted it as a separate inter-provincial coordination division under the Cabinet Secretariat in 1992 for the first time during his first term (IPC Year Book, 2011-2012). With the frequent changing of successor governments, this status continued until March 19, 2007, when the new Inter Provincial Coordination Division was set up in the Secretariat of the Cabinet and on November 3, 2008, Prime Minister Yousaf Raza Gilani granted it the status of Ministry.

Before the incorporation of 18th amendment, the IPCC remained more active as compared to the CCI in terms of the number of sessions. Between 1973- 2010, more than thirty IPCC meetings were held, while only eleven CCI meetings were held during the same time. The available record of these meetings indicated that the IPCC was mainly used by the federal government to obtain support for the implementation of its policies from the provincial governments. As in the IPCC meeting of September 2006, the share of Balochistan in federal employment increased from 3.5 percent to 6 percent on the basis of the 1998 census. In the same meeting, a conflict between Sindh and Balochistan over fishing rights was also resolved. Similarly, fishing rights were transferred from the Federal Government to the KP Government over the Tarbela and Khanpur dams. In the February 2009 meeting, the government of Balochistan was granted fishing rights over the Mirani and Subukzai dams.

In a nutshell, the IPC ministry was the smallest ministry in size and budget before the 18th amendment. For the year 2008-09, the overall expenditure of the IPC Division was only Rs. 18,719 million, with a total authorized strength of only forty-two workers (Year Book, 2008-09). Other than that, no attached department / organization / autonomous / semi-autonomous entity was then under the jurisdiction of the IPC Division.

Interprovincial Matters and Coordination after 18th Amendment

A new subject with the name 'inter-provincial matters and coordination' was introduced in

the 18th Amendment as Section 13 of Part II of the Federal Legislative List and the powers to supervise the matters referred to in Part II of the Federal Legislative List were given to a modified and more empowered CCI. Too much changes had been incorporated by the 18th amendment for the working of Inter Provincial Coordination (IPC) Division. The regulations for the Inter-Provincial Cooperation Division were adopted on 2 April 2010. Since the wings of the Inter Provincial Conference and the CCI were transferred from the Division of the Cabinet to the Division of the IPC, the workload and value of the IPC multiplied. In another significant development of 4 May 2010, the IPC was appointed as the Secretariat for the seven-member high-powered Implementation Commission headed by Senator Mian Raza Rabbani to enact the 18th Constitutional Amendment in its true spirit and letter.

Since the 18th Amendment, the Inter Provincial Coordination (IPC), which was regarded as a very small wing of the Cabinet Division and later as a minuscule separate division, had mushroomed into a much larger division with much larger personnel working at its disposal. The empowerment of IPC becomes clearer when one looks at the IPC Division's organizational charts prior to the 18th Amendment and compares it with its current form.

Analysis

This study is a comprehensive attempt to examine the viewpoints and problems emerging from of the enforcement mechanism in Pakistan underneath the 18th constitutional amendment. This work strengthens the comprehension of the process of regional independence and a less-centralized control before and after the 18th constitutional amendment. Therefore, under an adequate conceptual perspective and study design, this research systematically examined federalism and provincial independence from the perspective of the federation of Pakistan to explore and understand effects of the 18th amendment on the economic and political relationship between federations and provinces. The findings of the study entail that the federalism as a political structure seems to have been insufficient to overcome the power inequalities in the political system of Pakistan hence the framers of the Constitution i.e. the parliamentarians had to go and opt for the 18th constitutional amendment. It asserts that these are only the provincial and federal institutions that can assist the system to operate in an effective manner in order to resolve political and economic disputes.

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