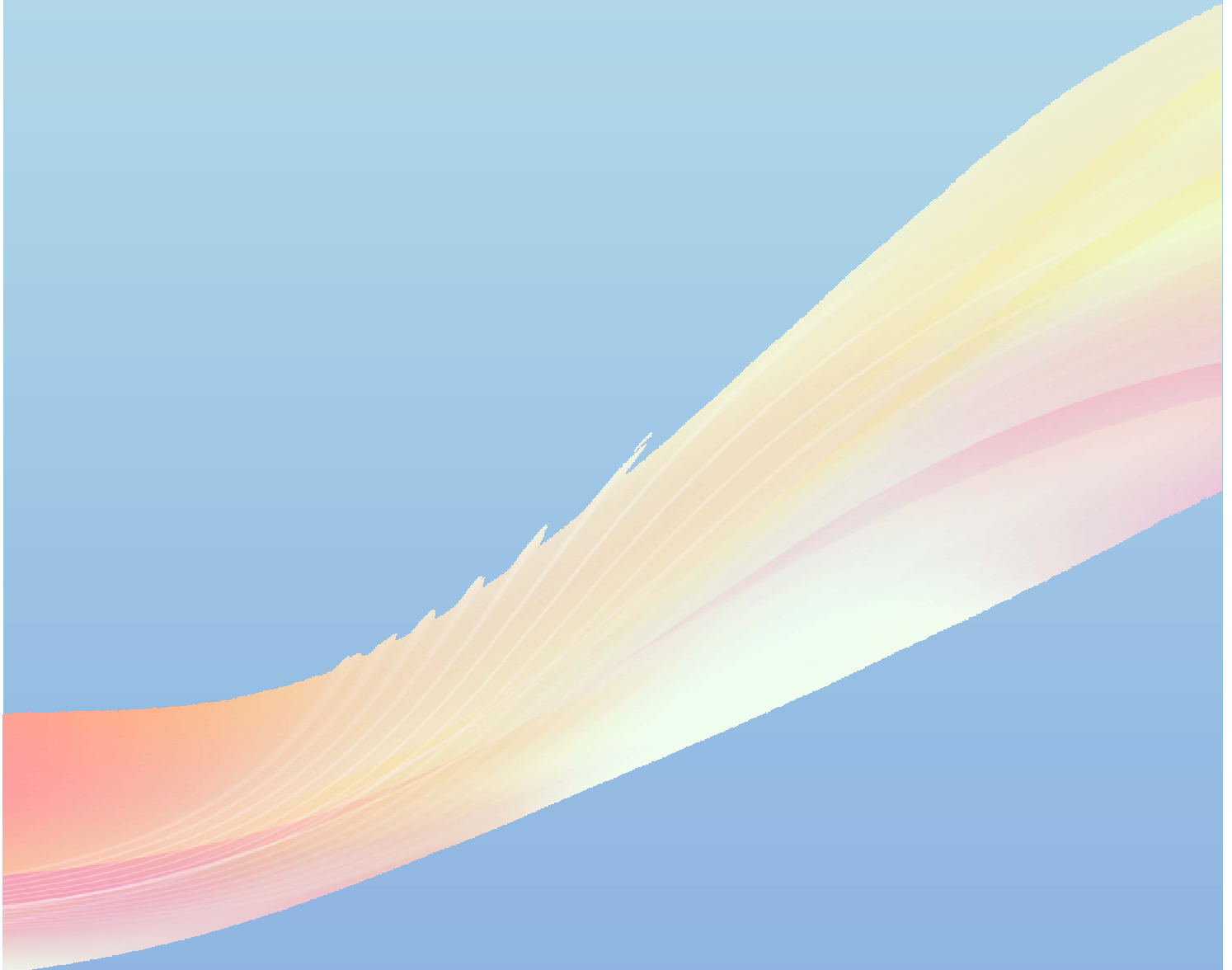


Federalism in Pakistan

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Contents

Introduction

Evolution of Federalism

The colonial legacy

In search of inter-wing parity: 1947-1971

Majority-constraining federalism: The 1973 Constitution

Centre-province relations

Division of powers

Fiscal federalism

Balochistan

The reform package

Gilgit-Baltistan: Informal federalism

The 2009 Order

The 2010 18th Constitutional Amendment

The Charter of Democracy

Salient features of the 18th Amendment

Political response

Administrative response

Legal and judicial response

Conclusion

ACRONYMS

ANP	Awami National Party
CCI	Council of Common Interest
FATA	Federally Administered Tribal Areas
ICCR	Implementation Commission for Constitutional Reforms
ISI	Inter-Services Intelligence
IPCC	Inter-Provincial Coordination Committee
Ji	Jamat Islami
JUI	Jamiat Ulema Islam
MI	Military Intelligence
MNA	Member of National Assembly
MPA	Member of Provincial Assembly
MQM	Muttahida Quami Movement
NAB	National Accountability Bureau
NEC	National Economic Council
NFC	National Finance Commission
NWFP	North West Frontier Province
PAC	Public Accounts Committee
PATA	Provincially Administered Tribal Areas
PCCR	Parliamentary Committee on Constitutional Reforms
PCO	Provisional Constitutional Order
PIDE	Pakistan Institute of Development Economics
PKMAP	Pakhtunkhwa Milli Awami Party
PML-N	Pakistan Muslim League-Nawaz
PML-Q	Pakistan Muslim League-Quaid-i-Azam
PPP	Pakistan Peoples Party
PR-STV	Proportional Representation-Single Transferable Vote

Introduction*

Pakistan has been a federation since independence, partly as the constitutional legacy of British India, partly as the result of necessity from 1947 to 1971 when it comprised two non-contiguous territorial units and partly because the provinces had developed distinct ethnic and linguistic identities of their own as sovereign states. British India brought them and various lesser states under the imperial control, mostly directly but also indirectly. The former emerged as provinces, in the case of Punjab in 1849, in the case of NWFP emerging out of Punjab in 1901, in the case of Sindh after separation from Bombay in 1937, and in the case of Balochistan in 1970 when it graduated from a Chief Commissioner's province before its merger in One Unit in 1955 to a fully-fledged Governor's province. Those ruled indirectly by the British can be divided into four categories: 1. Princely states of Bahawalpur in Punjab, Khairpur in Sindh and Kharan, Mekran, Lasbela and Kalat in Baluchistan, which were assimilated in their respective provinces soon after partition, and Swat, Dir and Chitral, which merged into NWFP in 1970. 2. Federally Administered Tribal Areas (FATA) and Provincially Administered Tribal Areas (PATA) alongside the frontier with Afghanistan. 3. Azad Jammu and Kashmir (AJK), which was put together as a legal-administrative entity, with its own constitution, legislature and Supreme Court, pending the resolution of the Kashmir dispute with India. 4. Gilgit-Baltistan, a breakaway region of Jammu and Kashmir from 1936 onwards, that remained unrepresented in the legislature of either AJK or Pakistan after independence.

The present study seeks to outline the dynamics of federalist politics in Pakistan, as successive constitutional arrangements were put in place to deal with ethnic pluralism. We shall trace the chequered history of centre-province relations in political, administrative and financial fields of public policy, and discuss recent initiatives in Balochistan and Gilgit-Baltistan. Also, we shall analyze the 2010 18th Constitutional Amendment as a landmark on the route to maturation of federalism in the country, as well as its political, economic and judicial fallout.

Evolution of Federalism

To analyze the development of federalism in Pakistan, we need to study the colonial heritage as well as the two phases of pre-federalization (1947-71) and federalization (1973---). The first phase was characterized by centralization of authority and elimination of the federal structure within West Pakistan. In the second phase, federalism bounced back and gradually moved forward in the face of formidable challenges from the centralist framework of state authority.

The colonial legacy

Development of federalism in British India took a quantum leap forward in the form of the 1935 India Act that sought to accommodate the diverse regional aspirations across the Indian sub-continent through provisions for provincial autonomy. The Muslim League high command shunned the territorial conception of federalism because it did not control the Muslim-majority provinces. Punjab never had a Muslim League government. NWFP was ruled by the Congress. Bengal and Sindh produced weak coalition governments, sometimes operating outside the command structure of the Muslim League. However, the party was eventually obliged to accommodate the demands of the Muslim majority provinces if it wanted to gain the support of the Muslims in these provinces. The 1940 Lahore Resolution passed by the Muslim League demanded ‘independent and autonomous states in Muslim majority areas’. This resolution was superseded by the resolution passed by the 1946 Muslim Legislators’ conference that sought to consolidate the areas covered by the former into one formidable entity. However, the Lahore Resolution has been celebrated because it publicly rationalized the separatist agenda of the Muslim League. It also underlined the (con-) federalist ambitions of Bengali, Sindhi, Baloch and Pakhtun nationalists who interpreted it as the foundation of a new social contract among provinces, to become part of the new state. (Waseem, 1990: 518-22) Elements from the ethno-nationalist leadership claim that: i) Jinnah envisioned confederation for Pakistan, ii) the 1935 India Act provided no role for the Centre, and iii) autonomous and independent provinces entered into a covenant to establish the new federation.

However, according to mainstream constitutional thinking, the supreme authority of the state after partition in 1947 devolved on two dominions in a top-down fashion rather than in a bottoms-up process. The perceived (con-) federal provisions of the Lahore Resolution remained inactive at the national level even as it continued to serve as a Magna Carta for ethno-nationalists of various categories. The fact that the two wings were considered vulnerable to the perceived hostile designs of India pushed the ruling elite towards the centralization of all meaningful power in the hands of Karachi and later Islamabad. The centre amassed enormous powers under Sections 9 (5), 8 (2), 102 and 92 (A) of the 1947 Independence of India Act. (Salamat, 1992: 66, 68) Thus, Pakistan was born into an anomalous political situation that led to two contradictory approaches: i) making federalism the only option for a viable form of government, and ii) making it as toothless as possible.

In search of inter-wing parity: 1947-1971

Pakistan faced the issue of an unbalanced federal structure from the beginning because of the demographic preponderance of the province of East Pakistan with 55% of the population. The ruling elite based in the West wing, which enjoyed economic, political and administrative power, shunned the grim prospects of rendering a permanent majority position to the East wing. It pushed the agenda for inter-wing parity in terms of equal representation in the parliament. The principle of parity underscored the 1952 Nazimuddin Report that provided for a bicameral parliament with 60 and 200 members in the upper and lower houses respectively for each wing. Later, the 1953 Mohammad Ali Bogra formula provided 10 and 165 seats for East Pakistan in the upper and lower houses respectively and 40 and 135 seats for West Pakistan. East Pakistan thus had a majority in the lower house, but not in the upper, although provision was made for a joint sitting of the houses in the case of disagreement (Adeney, 2007: 200). This scheme was not adopted. The Punjab chief minister Noon vehemently pursued a parallel proposal for a zonal sub-federation for the West wing, which was however soon shelved.

The merger of the provinces and territories of West Pakistan into One Unit in 1955 as a mega-province to achieve parity with East Pakistan served as the basis of the federation for both the 1956 and 1962 Constitutions. Punjab in general, and Commander-in-Chief General Ayub and President General Iskandar Mirza in particular, championed the cause of One Unit and steamrolled opposition from Sindh, NWFP and Balochistan. (Afzal, 1998: 227, 237-243) West Pakistan had its capital at Lahore in Punjab. In 1960, the capital of Pakistan moved from Karachi to Islamabad, also situated in Punjab. These federalist arrangements were widely perceived to be a sign of the Punjabization of Pakistan. National integration had ostensibly been the rationale behind the adoption of One Unit, but it led to fierce backlash in the form of ethno-nationalist movements in Sindh, Balochistan and NWFP. The erstwhile provinces of West Pakistan were restored in 1970, when Balochistan was created as a province for the first time.

Provinces in Pakistan, unlike in India, were not re-organized on the basis of language. Apart from their core communities, these provinces contained large ethnic minorities, which retained provincial aspirations of their own, e.g. Pakhtuns in Balochistan, *mohajirs* (Urdu speaking migrants from India) in Sindh, Siraiki-speakers in south Punjab and Hindko-speakers in the Hazara division of NWFP. The ruling elite in Pakistan found language unacceptable as a legitimate source of identity. In India, language was in and religion was out as a constitutional category (Adeney, 2007: Ch 5). In Pakistan, religion was in, but language was out because of its perceived potential for political destabilization (Rahman, 1996: 249). This discounted the agenda of creating language-based provinces. The requirement for a two-third majority in the two houses of parliament to create a new province, in addition to the consent in the assembly of the provinces concerned, as made the creation of a new province extremely difficult. In contrast in India, a simple majority of the Lok Sabha is required – although the opinion of the state legislature must be sought.

The 21-Point Program of the United Front in East Pakistan in 1954 demanded the establishment of the federation on the basis of the Lahore Resolution. In 1966, the

Awami League's Six Points Program again sought to radically redefine federalism by demanding: adult franchise in a parliamentary framework; two subjects for the Centre, i.e. defense and foreign policy, along with communications; two controvertible separate currencies or one currency to be handled by two separate reserve banks for the two wings; power of taxation for the provinces; right of provinces to handle foreign exchange and foreign trade; and paramilitary forces for East Pakistan. In the absence of an agreement on the quantum of provincial autonomy between the two wings and the refusal of Yahya Khan and Zulfikar Ali Bhutto to allow the Awami League to form a government after the elections of 1971, the federation violently collapsed in 1971.

Majority-constraining federalism: The 1973 Constitution

The separation of East Pakistan led to a new thinking about federalism as Punjab now represented the position of one-province-dominates-all at 58 per cent of the population. The smaller provinces were committed to constrain the majority of one province in the parliament. The specter of other ethnic communities seceding from what was left of Pakistan after Bangladesh loomed large on the horizon. The elites of Sindh, NWFP and Balochistan pushed for some kind of majority-constraining federalism. Prime Minister Z. A. Bhutto, himself from Sindh, was able to accommodate the demands of the provinces for a bicameral parliament comprising a population chamber (the lower house) and a territorial chamber (the upper house). Provincial languages were recognized. However, only Sindh adopted a provincial language – in 1972 when Sindhi was given the status of official language. Urdu was, by default, derecognized as a language of Sindh. Its negative fallout on mohajirs led to language riots, followed by decades of ethnic strife between the two communities. (Adeney, 2007: 141-143)

Just as the 1956 Constitution was preceded by the Murree Accord between the Bengali and Punjabi groups, the 1973 Constitution was preceded by the 1972 agreement between PPP and ANP-JUI combine. (Malik, 1974: 45-46) The 1973 Constitution provided for a National Assembly where majority belonged to Punjab and the Senate where all the four

provinces enjoyed equal representation at 19 members each, with 8 seats for FATA and 3 for Islamabad. This so-called *demos*-constraining role of the upper chamber has the potential of balancing the majority of the lower house. (Stepan, 1999: 22-23) However, the impact of the enhanced representation of smaller provinces in the Senate has been offset by the asymmetrical policy scope of the two houses. The Senate has no control over money bills. The national budget could be sent for assent of the President after passage through National Assembly, even bypassing the other house. The 2003 17th Amendment based on Musharraf's 2002 Legal Framework Order, increased the membership of the National Assembly to 342, including 272 directly elected members, 60 reserved seats for women and 10 minority seats, and expanded the size of the Senate to 100, with 22 seats for each province, 8 seats for FATA and 4 seats for Islamabad. It became mandatory to present the money bills to the Senate, if not to get it passed by that house.

The electorate for the Senate comprises MPAs, along with MNAs from Islamabad and FATA. Being indirectly elected under PR-STV system, Senators are twice removed from the public and thus have a low representative character. Over time, 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. The provision of election for the 8 Senators of FATA by 12 MNAs is considered farcical. 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 house. This happened in the case of the 1991 Shariat Bill (the aborted 15th Amendment). 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. (Waseem, 2008: 215-217)

The federal structure of the 1973 Constitution exacerbated ethnic conflict by creating *de jure* recognition of core linguistic communities identified with their respective federating units. Thus, Sindhis, Punjabis, Pathans and the Baluch got their 'homelands' legally acknowledged as federating units of Pakistan under their respective provincial governments. However, such 'legal' elevation of ethnic groups representing majority communities in these provinces, such as Sindhis in Sindh, in turn disenfranchised minority groups, such as mohajirs in that province. In other words, the federal project consolidated the Sindhi identity and within a decade and half created a mohajir ethnic identity (Khan, 2010: 5-7, 14-15) With the introduction of a quota system along ethno-regional lines, extended to rural and urban sectors in Sindh corresponding to Sindhi and mohajir communities, federalization discriminated against merit and further exacerbated ethnic consciousness among mohajirs. (Waseem, 1999: 459)

Juridical equality of the federating units in the Senate substantially enhanced the visibility and authenticity of ethnic majorities in provinces. Bicameralism itself is no guarantee of equitable distribution of resources, nor is the equality of the federative representation. (Linz, 1997: 5-6) Indeed, the likelihood of federalism to increase secession elsewhere has been noted. (Adeney, 2007: 2) Nor does federalism provide the route to democratization. Pakistan remained a federation under military rulers. It was General Yahya who dissolved One Unit and restored the four provinces of West Pakistan that laid the foundation for the 1973 Constitution. Federalization is not democratization. (Linz, 1997: 3-4) The argument of 'prefectorial federation' in India is based on the Centre's power to stultify provincial autonomy, intrude into the legislative domain of provinces sometimes through pre-emptive action, and put provincial legislation on hold in certain cases.

(Rajashekara, 1997: 245-48) In Pakistan, the Centre operated in an even more penetrative and commanding way. However, the weakness of the mainstream federal parties PPP and PML vis-à-vis the army has opened up space for their coalitional partnerships with ethno-regional parties that made it possible to slacken the hold of the federation over provinces in recent years. India's move to coalition governments including regional parties has resulted in a similar trend.

Centre-province relations

The federal issue in Pakistan is rooted in the persistent crisis of Centre-province relations. A profile of Punjabization of the state underscores the demand for provincial autonomy in the three smaller provinces. (Khan, 2001: 884-89)

Division of powers

From the 1935 India Act onwards, the heavy pro-federation bias in the division of subjects has characterized all constitutional arrangements. The list of subjects has shifted from three (federal, provincial and concurrent) in 1935 and 1956, to one (federal) in 1962 to two (federal and concurrent) in 1973, with residual powers lying with the provinces (1962, 1973). The federation penetrated deep into the domain of the concurrent list. Provinces sought to remove this list because the federation would always prevail over them in a case of conflict. The federal bias comprehensively defined the taxation structure. However, a long-term trend in favor of provincial subjects has been visible. (Ahmed, 2007: 71-78, 102) The 18th Amendment of 2010, discussed in more detail below, empowered provinces to raise loans at home and abroad, and issue security guarantees on the provincial consolidated fund. In an innovative measure, it provided for joint and equal ownership of the mineral wealth found in a province or its adjacent waters by the federation and the provinces. Also, it gave the sales tax on services (but not on commodities) to provinces. The Amendment abolished the concurrent list in principle and transferred 40 of its 47 subjects to provinces. This is a major change, the implications of which are discussed in more detail below.

The intrusive role of the federation vis-à-vis provinces operated in the domain of appointing governors, high court judges and the higher bureaucracy. Constitutional federalism has been effectively countered by bureaucratic centralism. In 1948, the civilian bureaucracy was centralized on an all-Pakistan basis. The federal government controlled recruitment, training, posting, transferring, promoting and demoting of officers. Contrary to the older pattern of recruitment of civil servants under ICS in British India on the basis of provincial cadre, the civil bureaucracy in Pakistan was recruited on the basis of federal cadre. This remained a hotbed of controversy whereby provincial governments felt helpless in the face of a centralist bureaucracy that managed the affairs of the provinces of their posting by giving priority to the interests of the federation.

Fiscal federalism

Fiscal federalism has taken a few meaningful steps forward. Article 153 of the 1973 Constitution provided for the Council of Common Interests (CCI) to take care of disputes between the Centre and a province or between provinces. It is sometimes understood to be a quasi-executive body because it comprises the Prime Minister and chief ministers of provinces and their representatives. CCI is powerful in theory but weak in practice. Procedurally, settlement of disputes often becomes a function of relations between the two or more parties involved in the dispute. The meetings of CCI are few and far between. This makes CCI ineffective as an institutional mechanism for conflict resolution. The 18th Amendment provided for periodical presentation of the CCI report to both houses of parliament. It extended the membership of CCI by adding 3 federal cabinet members, made its quarterly meetings mandatory, provided for a permanent secretariat and expanded its mandate to include supervision and control over related institutions. These changes potentially increase its importance, but it remains to be seen how it will operate in practice, and whether it will become bogged down in disputes between the centre and provinces.

The revenue raising authority is largely in the hands of the federal government at around 93%, with its expenditure at 72%, while provinces raise only 7% of the revenue but

spend 28% of it. The resource transfer paradigm has been a constant source of tension between the federal and provincial governments. A systematic method of transfer is operative through the National Finance Commission (NFC) constituted under Article 160 (1) of the Constitution. Its charter includes distributing tax receipts, issuing random transfers such as grants and recommending the borrowing of funds. From the Niemeyer Award issued under the 1935 India Act and the Raisman formula of 1947, several Awards have been issued to streamline the share of the divisible pool of tax receipts, essentially on the basis of population. Awards issued under military governments, in 1961 and 1964 under Ayub, in 1979 and 1985 under Zia, and in 2000 and 2006 under Musharraf failed to develop a consensus between provinces, and were thus deadlocked. (NFC Award, nd: 3) But, the 1974 Award under Z. A. Bhutto and the 1991 and 1996 Awards under Nawaz Sharif were based on consensus. The latter increased the share of provinces from 28% to 45% of the federal tax revenue. Among provinces, Punjab got 57.88%, Sindh 23.28%, NWFP 13.54% and Balochistan 5.30%. (Ahmed et al, 2007: 12, 19, 8)

In 2006, after NFC failed to reach a consensus, President Musharraf declared the provincial share at 45%, with 1% increase per annum up to 50% in 5 years. A major breakthrough came in 2009, when the NFC Award increased the provincial share of the divisible pool from 47% to 56% for 2010-11 and to 57.5% for the following four years. The new criteria for the Award included: population 82%, poverty 10.30%, revenue generation 5% and inverse population density 2.7%. The Award changed the ratio of distribution of resources to provinces: Punjab 51.74%, Sindh 24.55%, NWFP 14.62% and Balochistan 9.09%. (NFC Award, nd: 4) By far, this has been the most progressive step in the direction of fiscal federalism. It decreased the share of Punjab, almost doubled the share of Balochistan and expanded the criteria for the NFC Award. Later, the 18th Amendment provided for: i) prior consultation of the federal government with the government of a province where a hydro-electric power plant is to be established, ii) the provinces' share to be not less than in the previous Award, iii) biannual monitoring of implementation of the Award by the federal and provincial finance ministers, and iv) presentation of their reports to the National and provincial assemblies.

The issue of distribution of water has often led to mistrust between provinces. In 2009, Punjab made a plea to the Indus River System Authority (IRSA) for running the Chashma – Jehlum link canal because of the risk of laying waste 3 million acres in the cotton growing region. However, IRSA kept the canal discharge at 5000 cusecs against the demand for 18000 cusecs. Earlier, IRSA had reduced water release to Punjab from Taunsa-Panjinad canal from 14000 cusecs to 3000 cusecs. At its end, the Sindh Assembly debated the issue that the province got far less water than it was allotted under the 1990 Accord, i.e. 48 million acre feet that had rendered 1 million hectare land barren. It was claimed that Punjab brought an additional 3.5 million hectare land under cultivation. In May 2010, Punjab pulled its representatives from attending the meetings of IRSA, which, in its view, was bent on damaging the province and the federation. It criticized IRSA for indulging in the worst kind of figure fudging and also for not releasing 5000 cusecs of water into Chashma-Jehlum Link Canal out of its share, and thus violating the water accord that allowed control over internal distribution to provinces. Since the river and canal water remained the lifeline of the two predominantly agricultural provinces, their respective political leaderships invoked the spirit of federalism to justify their claims to water. The closely related issue of building the Kalabagh Dam on the River Indus has put the federation under great pressure. While the federal and Punjab governments often supported the project, the Sindh, Baluchistan and NWFP Assemblies passed resolutions against the Kalabagh Dam. Political parties have been internally divided along provincial lines on this issue.

Balochistan

In 2009, the PPP government presented a package of reforms for Balochistan. That province had been in a state of political turmoil after 2005. A selective military operation in and around the areas of Marri and Bugti tribes led to alienation of Baloch nationalists from the federation, and stoked separatist ambitions among them. In the background of the Baloch nationalist struggle during the six decades after partition, new pressures on the federation came to a head after the murder of Nawab Akbar Bugti in an ambush in 2006. (Jetly, 2009: 213-216) The parliament initiated a process of dialogue with the Baloch

leadership in 2007. The Report of the Sub-Committee on Provincial Autonomy in March 2007 and the Report of the Parliamentary Committee on Balochistan in November 2007 highlighted various issues and made several policy recommendations. The first report pointed to the need for constitutional amendments for transfer of subjects from the federal to the concurrent list and from the concurrent to a proposed provincial list, as well as legislative measures to frame new rules for the CCI, Public Accounts Committee (PAC), NEC and Inter-Provincial Coordination Committee (IPCC). It suggested confidence-building measures such as upgrading the universities, airports, hospitals and public schools to international standards. (Report of the Sub-Committee on Provincial Autonomy, 2007)

The second report focused on: payment of part of the gas and oil revenue receipts to the district concerned and local representation on the board of PPL (Pakistan Petroleum Limited), OGDC (Oil and Gas Development Company) and Sui Southern; formula regarding royalty and gas development surcharge to Balochistan, including huge arrears of royalty; implementation and expansion of the job quota to the armed and civil armed forces; shifting of the head office of the Gwadar Project from Karachi to the port itself; provision of share for Balochistan in employment, revenue, training and educational facilities for the youth; relocation of displaced fishermen; inquiry into lands in Gwadar district, announcement of much delayed NFC Awards; control and regulation of the operational jurisdiction by the Frontier Corps (FC) and Coast Guards; and stopping the construction of military cantonments, which were resented as part of the agenda of the perceived Punjab-dominated armed forces to subjugate the Baloch people. (Report on the Parliamentary Committee on Balochistan, 2007)

The reform package

The reform package, called Aghaz-e-Haqooq-e-Balochistan (Beginning of the Rights of Balochistan) was presented to the joint sitting of the two houses of parliament on 24 November 2009. It built on the previous reports and the government's recent goodwill measures such as the payment of Rs.2.8 billion in arrears of royalty for gas pending from

1995 and writing off the overdraft of Balochistan worth Rs.17.5 billion. It addressed the issue of ‘missing persons’, i.e. Baloch nationalists in alleged extrajudicial confinement. The package recommended the repeal of the concurrent list, rationalization of the operations of the CCI and NFC, withdrawal of army units from the Sui area and halting the construction of cantonments, as well as establishing provincial control over the Frontier Corps and Coast Guards. It upheld the previous recommendations about Gwadar, local representation on the corporate management, the need for a special development package for the province, payment of arrears in gas royalty – amounting to Rs. 120 billion for the period from 1954 to 1991 payable in 12 months, transfer of a substantive share in the Saindak project and employment opportunities for the Baloch. (Full Text of Balochistan Package, 2009)

The package was criticized on several grounds. It failed to address the public demand of shifting the head office of the Gwadar project from Karachi to the city itself. The Baloch nationalist leaders-in-exile summarily rejected Islamabad’s new initiative as a cruel joke with the people of Balochistan. They were skeptical of the ability of the civilian government to deliver on its commitments in the face of the real power holders in the form of the military establishment. At the other end, the mainstream opposition party PML-N as well as ethnic parties such as ANP generally appreciated the package. Various progressive elements remained cautiously optimistic about the reform package.

Gilgit-Baltistan: Informal federalism

In September 2009 the PPP government issued an autonomy package for Northern Areas. It re-named the area Gilgit-Baltistan, and provided it a province-like status. The area represents a political and constitutional anomaly. As a historical part of Kashmir in the context of the 1948 UN resolution, the area cannot be incorporated in the national framework pending the resolution of the larger dispute between India and Pakistan. People from Gilgit-Baltistan do not want to go back to the fold of the larger entity of Jammu and Kashmir after the region was leased to British India by Maharaja in 1936, followed by a unilateral declaration of accession to Pakistan by the local administrator

Major Brown in 1947. In the face of incessant pressures for autonomy from the local population, the government issued a series of reforms for the area. As opposed to AJK, which has its own constitution, parliament and judiciary, this region was ruled by decree, most recently under the 1994 LFO. (UNPO, n.d.: 1) The demand for autonomy is however, not separatist but integrationist in nature, inasmuch as people want a full provincial status for themselves as part of the federation of Pakistan. Being rich in natural resources such as water carrying substantial hydroelectric potential, with the current Bhasha-Deamir dam project in place, and being situated on the strategic route to China, the importance of the region is widely acknowledged. (Khan, 2009) If and when Gilgit-Baltistan becomes part of the federation, it will be the only Shia province of the predominantly Sunni state of Pakistan. During the past quarter of a century, the region has undergone a process of fierce Sunnification.

The 2009 Order

The Gilgit-Baltistan Empowerment and Self-Governance Order 2009 changed the name of the region, provided for a Chief Minister as leader of the Legislative Council, Public Services Commission, Chief Election Commissioner and Auditor General. A woman was appointed as governor. The PPP won the elections held under the new framework and formed the government. The Order was challenged in the Supreme Court with a plea to declare it *ultra vires* of the Constitution on the ground that it negated the right to self-rule and independent judiciary for the region. Across the border, India lodged a protest with Pakistan against the package for a region that was considered by Delhi to be under Pakistan's illegal occupation. It criticized the statement of the new chief minister of Gilgit-Baltistan that the region had become the fifth province of Pakistan. (*The Hindu*, 2010) Similarly, AJK's political leadership did not countenance the perceived forward march of Gilgit-Baltistan towards autonomy that would potentially undermine its claim over the territory. It is widely believed that Pakistan is indirectly and informally integrating the region in the mainstream political and administrative system. (Sering, 2009: 1)

The 18th Constitutional Amendment

The 18th Amendment passed in April 2010 was billed as the most comprehensive reform package after the passage of the 1973 Constitution. Ever since the return of the civilian rule in 2008, there was a popular demand of the whole spectrum of political leadership to repeal the 17th Amendment passed under Musharraf and reform the Constitution in the light of the Charter of Democracy.

The Charter of Democracy

The Charter of Democracy provided the work-plan for the Special Parliamentary Committee for Constitutional Reform (SPCCR). The two mainstream parties - PPP and PML-N - along with other parties signed the Charter in London in May 2006. The Charter demanded among other things: end to presidential powers of dissolution of the National Assembly and appointment of governors, armed services chiefs and the Chief Justice; abolishing the concurrent list; issuing a new NFC award; expansion of the Senate to give representation to minorities; integration of FATA with NWFP; empowerment of Gilgit-Baltistan; lifting the ban on assumption of the office of prime minister for the third time; establishing a Truth and Reconciliation Commission and a National Democracy Commission; accountability of the ISI, MI and other security agencies to the elected government; removing indemnities introduced by military governments; appointment of the higher judiciary through a commission chaired by a chief justice who had never taken oath under the Provisional Constitutional Order (PCO); and establishing a Federal Constitutional Court, with equal representation for all the federating units in order to resolve the constitutional issues. The Charter was hailed as a Declaration of Independence.

The 27-member SPCCR under Senator Raza Rabbani represented all parliamentary parties. Only 9 members belonged to the three mainstream parties - PPP, PML-N and PML-Q - while 18 belonged to ethnic parties from smaller provinces, as well as Islamic parties. Thus, the composition of the SPCCR was very progressive. President Zardari was

in a unique position to champion the cause of provincial autonomy because his election as head of state in September 2008 drew on an absolute majority of legislators from the three minority provinces of Balochistan, Sindh and NWFP.

Salient features of the 18th Amendment

The SPCCR spent 385 hours on its deliberations and received 982 proposals from the public. In the process, it expanded its agenda beyond the Charter of Democracy and dealt with various other controversial matters. The 18th Amendment made almost 100 changes, including:

- Abolishing the concurrent list in principle, transferring the residuary powers to provinces;
- Restoring parliamentary sovereignty, by repealing Article 58 (2) (B);
- Expanding the jurisdiction of the Political Parties Act to FATA, thereby encouraging political parties to field their candidates from that region in future elections;
- Making the CCI a more substantive body;
- Restricting the space for issuing presidential ordinances;
- Providing for the Chief Election Commissioner's appointment on the basis of agreement between the government and the opposition;
- Establishing a Judicial Commission comprising 7 members, including 4 judges, the law minister, the attorney general and a representative of the Supreme Court Bar Association; and
- Re-naming NWFP as Khyber Pakhtunkhwa.

Lesser voices represented various unresolved but lingering issues that failed to win a consensus of PCCR. For example, ANP demanded election of president on a rotational basis from all federating units, starting with the smaller provinces. MQM demanded creation of a few seats in the federal and provincial assemblies for overseas Pakistanis through amendments in Article 51 and 106. JI demanded for president not to exercise his

power of clemency in cases relating to Haddood or Qasas laws. PKMAP, the Pakhtun nationalist party in Balochistan, wanted a separate Chief Commissioner's province to be called Khyber Pakhtunkhwa Southern and renaming of FATA as Khyber Pakhtunkhwa Central. (PCCR Report, 2010)

Political response

Two critical perspectives surfaced even before the passage of the bill into law. The PML-N leader Nawaz Sharif objected to the composition of the Judicial Commission and renaming of NWFP. PCCR accommodated him on both counts by including a 4th judge in the Judicial Commission as a direct nominee of the Chief Justice and adding Khyber to Pakhtunkhwa. However, both issues later sparked a wave of protest. Renaming of NWFP laid out the turf for a demand for new provinces. Traditionally, this demand was underlined by 'administrative' reasons such as good governance in the backdrop of demographic pressure, geographical diversity and strategic requirements. After passage of the 18th Amendment, several political parties asked the federation to reinvent itself by creating new provinces, such as four out of Punjab, two out of Khyber Pakhtunkhwa, two out of Sindh and three out of Baluchistan. Nawaz Sharif preferred administrative rather than linguistic provinces. Prime Minister Gilani gave a positive nod to the demand for the Siraiki province in south Punjab, his own area, but thought that this was not the right time for it. President Zardari was not sure about the political fallout of such a move and settled for a wait-and-see policy. While the ongoing federalizing process in India operates as a vehicle of accommodation and management of ethnic identities in the framework of multiculturalism if and when the ethnic electorate can make a formidable demand for recognition (Bhattacharyya, 2004: 178-79), language as an instrument of federalization is not acceptable in Pakistan.

Critics of the 18th Amendment pointed to the failure to meet the agenda of the Charter of Democracy. For example, there was: no provision for a Federal Constitutional Court; no merger of FATA in Khyber Pakhtunkhwa; no independent accountability commission to replace NAB; and no accountability of ISI and MI to civilian authority. Some claimed

that the 18th Amendment, much like the 1973 Constitution itself, did not provide for an independent Election Commission, an independent judiciary, an independent commission for accountability and a mechanism for a third tier of government at the local level. The lobby for provincial autonomy, especially in Sindh, criticized the Amendment for: completely ignoring the Senate in terms of power sharing; making NEC unrepresentative of the federation by giving prime minister the power to nominate four members on his own instead of providing for representatives of four provinces, and continuing with Article 62 carrying the Islamic provisions for eligibility of electoral contestants and thus alienating religious minorities and secular-minded people in general. Some found that the Amendment diffused the demand for provincial autonomy more than addressed it frontally, averting the re-opening of the thorny issues of administrative and fiscal decentralization. (Halepoto, 2010)

Administrative response

Official circles objected to what they considered to be dismantling of large parts of the federal government by depriving it of legislative powers through abolition of the concurrent list. There were fears about the absence of a modus operandi for shifting various ministries from the Centre to provinces and the problem of implementing 35 international protocols dealing with subjects ranging from environment to quality of life. All the four provinces developed differences with Islamabad over the latter's continuing use of the Workers' Welfare Fund and the Employees' Old Age Benefits Institution on a media campaign regarding the PPP government's project Benazir Employees Stock Option Scheme. (*Dawn*, 22 June 2010).

For implementation of the 18th Amendment for transfer of ministries from the federal to provincial governments before 30 June 2011, some recommended that the SPCCR should remain in charge while others proposed a 'devolution commission'. Finally, the government constituted a 9-member Implementation Commission for Constitutional Reforms (ICCR) headed by the SPCCR Chairman. ICCR took up the task of implementing the policies, decisions and directives, reviewing laws, rules and

regulations, and monitoring the administrative mechanism to bring about the transition in the federal structure.

Legal and judicial response

Article 175A of the 18th Amendment provided for a majority of judges in the Judicial Commission and an 8-member parliamentary committee with equal representation of the treasury and opposition benches from the two houses of parliament for confirmation of the Commission's nominees as judges. Sections of some lawyers, jurists and the media felt that the Commission superseded the Chief Justice for appointment of judges. 16 petitions were filed in the Supreme Court against the Amendment in the midst of a nation-wide controversy about whether the judiciary could declare the Amendment unconstitutional. The Supreme Court elicited comments of provincial governments on the case. Punjab and Khyber Pakhtunkhwa governments requested the Court to dismiss the petition straight away. However, a situation of tussle between the courts and parliament, somewhat along the lines of the conflict during India in the last two decades, kept brewing up. The hearing of petitions polarized the legal opinion. Some found the judiciary struggling to secure the discretion of the Chief Justice for appointment of his colleagues, while others found it a test case of independence of judiciary. The latter pointed to absence of parliamentary oversight in UK in the matter of appointment of judges as a model. Others suggested that only parliament was the right institution to decide about the most suitable configuration to decide the mode of appointment. The controversy about whether the current parliament being Constituent or not was criticized as a hollow attempt on the part of the petitioners and the judiciary to undermine the sitting legislature. The relevant legal and judicial quarters were divided on whether parliament was the creation of the Constitution or the Constitution was the creation of the parliament. Since the 18th Amendment was passed by consensus, federalism faced a formidable challenge at the hands of judiciary during its finest hour for nearly four decades.

Conclusion

Our observations point to the historical, legal, institutional and moral sources of legitimacy for the structural and operational dynamics of federalism in Pakistan, as opposed to the inherently centralizing tendency immersed in the nation-building agenda. Federalism in Pakistan has a history of a forward movement under civilian rule (1973-77, 1988-99 and 2008--) and a retrogressive march under a military-led government (1958-71, 1977-88 and 1999-2008). The former tends to be populist and consensus-based. The latter looks at federalism as a recipe for dilution of state authority. However, federal governments under both civilian and military set-ups showed a tendency to control the purse and policy at the cost of provinces. Federalism as a symbol of shared sovereignty remains somewhat elusive, even as Pakistan has gradually moved towards relative liberalization of the principles of coordination and cooperation among and between provinces and the Center.

*** An earlier chapter on federalism in Pakistan, written by Kaisar Bengali and Aisha-Ghaus Pasha, was published by McGill-Queen's University Press in the Handbook of Federal Countries (2005) for the Forum of Federations.**

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