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Re-contextualizing the 18th Amendment: Working of Federalism in Pakistan¹

Abstract

This paper tries to understand the working of federalism in Pakistan during democratic era. studies have been made on the working of federalism in Pakistan but centre Punjab relations during the period 2008 to 2013 is overlooked by the historians and this paper attempts to fill up that important gap in the literature of Pakistani history. In the history of Pakistan, the 18th amendment was a first brave and great step towards the provincial autonomy, the autonomy with strong legislative and financial powers. The role of main political parties and parties in power at the centre and provinces must be given credit for this positive step of constitutional transformation which helped strengthened the federation of Pakistan. Therefore, underlying hypothesis of the study is that though relations between the PPP (Government in the center) PMLN (Government in the Punjab) never remained ideal during the period from 2008-2013, however both PPP and PMLN showed more reasonable attitude towards each other and it resulted in strengthening the federal structure. It helped them to bring a constitutional amendment, namely, 18th Constitutional Amendment, in 2010 which further strengthened the federal structure of Pakistan as it transferred concurrent list to the provinces and restored parliamentary democracy as envisioned in the 1973 Constitution. Therefore, it is of immense importance to understand the nature and character of Centre-Punjab relations in the context of the 18th amendment. In fact this amendment was a fruit of good centre- Punjab relations

Introduction

The spirit gained in the Charter of Democracy (CoD) remained intact and leaders in both of the parties PPP (at centre) and PMLN (at Punjab) remained committed to that accord. The process which both of the parties followed the process of democracy and the commitment which was observed was to regain the real spirit of the constitution of 1973. For this said purpose a mechanism through the parliamentary committees was followed, the leading figures in these committees were the Raza Rabbani, Ishaq Dar, and Farhat Ullah Babar. They played the most important role in bringing back the constitution in its real form and repealed the 17th amendment made by the military dictator. The cooperation and coordination of the federal government and the province of the Punjab (since the ruling party in the Punjab was the opposition party of PMLN at federal

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government) remained excellent. After a long struggle ultimately the judiciary was restored, yet the tension between the two leading parties was not over. It turned extreme bitter in terms of relationship, particularly after the imposition of Governor Rule in the Punjab. This paper while analyzing the causes and effects of the 18th Amendment, argues that it was the fruit of good centre- Punjab relations which brought about the constitutional amendment.²

The 18th Amendment

In fact, attempts to decentralize the political and executive system of the country from had started from 2008. It was a way towards a successful and new federation.³ According to the constitution of 1973 of the country, the system of government was parliamentary, as it is always considered the best suitable system of rule for the people of Pakistan. However the spirit of the parliamentary system of constitution is distorted twice before the 18th amendment. Both of the times it was amended by the military dictators for keeping the maximum executive powers into their own hands. At first it was amended by General Zia, who included the 8th amendment and gave special powers to the president to dissolve the assemblies. One must keep in mind that he himself was the president of the country. These special powers of the president brought immense political instability in the years to come and four consecutive democratic governments were sent home by these special powers which the dictator introduced in the constitution. In 1997, PMLN won the election by a convincing majority and single party was able to amend the constitution. Therefore soon after the formation of the government, the government prepared to amend the constitution. The 13th amendment was introduced in the constitution by the elected parliament of Pakistan and it trimmed the special powers of the president to dissolve the national assembly. This constitutional amendment was supported by the opposition parties and was unanimously passed. Thus the amendment removed the article 58(2) (b) and brought back the constitutional spirit of the parliamentary system of government. Since the political history of Pakistan has witnessed the upheavals, ups and downs, therefore in October 1999, the democratic regime was ended up with a military take over. It was the start of a new era of military dictatorship with grabbing all the powers into the hands of the dictator. Again it was the same story as it was observed in the days of general Zia. In December 2003, the 17th amendment of the constitution was passed. This amendment brought many changes to the constitution. Most of these empowered the office of the president and a reversal of the 13th amendment.

The 17th amendment of the constitution reflects that again it was a dictatorial regime and the constitution was again amended for grabbing the powers into the hand of one personality, the personality of the dictator, who was in front of the nation as president of Pakistan. The constitution was again made semi presidential, instead parliamentary. It is observed that the 17th amendment was not only aimed to strengthened the seat of president by giving him unilateral powers to dissolve the assemblies but this amendment also put a ban to the 3rd time selection of the seat of Prime Minister and Chief Ministers. Basically the prime objective of 3rd time ban was to keep aside the main leadership of the country, particularly Benazir Bhutto and Nawaz Sharif. This has remained the psychology of all the dictators in Pakistan who have occupied civilian structure since 1958. The democracy was again restored in 2008 and the democratic forces think always opposite to what a

dictator thinks. In this perspective and to remove the ambiguities of the constitution, which were created by general Musharraf, the PPP government was working on the draft of the constitutional amendment. The prime objective was to restore the 1973 constitution on its true spirit. The main opposition party PMLN was in full support with the government to remove the unilateral powers of the President. The expected changes in the constitution were given space in the world wide famous world press.⁴

After a period of almost two years and consultations with other political parties the draft of the 18th amendment was prepared and was passed unanimously by the National Assembly of Pakistan on 8th April 2010. The amendment removed the dictatorial footprints from the constitution and supremacy of the parliament was ensured.⁵ The 18th amendment removed the special powers of the office of the President to dissolve the assemblies, including the National and Provincial Assemblies. The province of NWFP was renamed as Kybar Pukhtune khwa. “The different infringements over the decades messed by the military dictators were also removed from the constitution”.⁶ The Prime Minister hailed the house unanimously on the most important constitutional amendment since the adoption of the original constitution in 1973 as the fruit of the PPP led coalition government’s reconciliation policy.⁷ The opposition party was also happy over this development and the restoration of parliamentary democracy in the country. The opposition leader Choudhry Nisar Ali khan declared in the Nation Assembly “...a win win situation for Pakistan.”⁸ Indeed it was a moment of joy in the constitutional history of the country. “Pakistani parliament's lawmaking lower house has unanimously approved an amendment in the country's constitution, curbing crucial powers of the president.”⁹ The 18th amendment was welcomed by the leaders of the main political parties and they gave their messages of congratulations. The Prime Minister said a special thanks to the President Asif Ali Zardari and PMLN leader Mian Nawaz Sharif “...for their role in bringing about this change.”¹⁰ It was a moment of joy for the leadership of PPP that they brought about the changes in constitution which were essentially needed to restore its parliamentary position and true spirit of 1973 constitution. The leadership of PPP was very excited over this constitutional development and they were describing it as a result of political wisdom of the leadership of Asif Ali Zardari and Yousaf Raza Galani. “Zulfiqar Ali Bhutto,s constitution has finally been restored to its original form.”¹¹ The broad based reconciliation of the PPP and joining hands with the PLMQ brought a rift between the PPP and PMLN, the parties ruling respectively at the federal level and the Punjab. It was a time of April 2011 that PPP and PLMQ came close to each other and a power sharing formula was set up at the federal level. On Saturday 23 April 2011, a high-level delegation of the Pakistan Peoples’ Party called on the leadership of the Pakistan Muslim League-Quaid, which has now agreed to join a proposed national government.¹²

The 18th amendment

The 18th amendment was a strong effort for strengthening the federation of the country. The main objective of the amendment was to restore the parliamentary spirit of democracy as it envisioned in the constitution of 1973.¹³ The 18th amendment not only reserved the changes brought by the general Musharraf (LFO and as a result of 17th amendment), but also strengthened the people of Pakistan in many ways. The amendment carries 102 important articles and has given new

rights to the people of Pakistan. The amendment has given strength to the previously existing rights for the people of the country.¹⁴ The 18th amendment include empowerment to the existing rights “...such as those pertaining to freedom of association and expression, excess to education etc.”¹⁵

The major changes enshrined in the Amendment.

The 18th amendment of the constitution was passed by the upper house of legislature on 19th Of April, 2010. The major changes were that concurrent list of legislation was abolished. The amendment brought about revolutionary steps in the constitution of 1973. It was an effort to bring about the true spirit of the system of federation with the transformation of various subjects to the provinces and ensured provincial autonomy. With the major exception of electricity, the concurrent lists functions have to be devolved to the provinces. The amendment ensured provincial autonomy, brought changes in the judicial structure and the appointment of the judges, powers of the Prime Minister and the role of the opposition was enhanced. Fiscal federalism¹⁶ was also introduced through the amendment.

There were also some of the changes made in the federal list of legislation. Certain subjects were transferred from part one of the federal legislative to the part two.

The authority was given to the provinces to raise domestic and international loans according to the Article 167(4).

“A province may raise domestic or international loans, or gives guarantees on the security of the provincial consolidated fund within such limits and subject to such conditions as may be specified by the National Economic Council.”¹⁷

The 18th amendment, according to the Article 172 (3), provides for equal federal and provincial ownership of mineral oil and natural gas. “Subject to the existing commitments and obligations, mineral oil and natural gas within the province or the territorial waters adjacent thereto shall vest jointly and equally in that province and the federal government.”¹⁸ After the amendment the local governments have the formal recognition in the article 140 A. “Each province shall, by law, establish a local government system and devolve political, administrative and financial responsibility and authority to the elected representatives of the local governments.”¹⁹ Addressing the concept of provincial autonomy, a more balanced distribution of functions empowered the province. Provincial autonomy is taken as a key concept of successful federation. The 18th amendment also provided ways for potential and better opportunities for better governance.

Phases of devolution

The devolution process under the 18th amendment was undertaken in three phases.

Phase one:

1. Special initiatives
2. Zakat and Usher
3. Youth affairs
4. Population welfare
5. Local government and rural development

Phase Two:

1. Education
2. Social welfare and special education
3. Livestock and dairy development
4. Culture
5. Tourism

Phase Three:

1. Food and agriculture
2. Health
3. Labor and manpower
4. Woman development
5. Sports
6. Environment
7. Minority affairs

Higher education commission

Entry No. 38 in the concurrent list containing the subjects, curriculum, syllabus, planning, policy, centers of excellence and standards of education, stands abolished. A new entry at No. 12 of federal legislative list-2 has been inserted, standards in institutions for higher education and research, scientific and technical institutions which is purview of Council of Common interest and not federal government alone. So in 28th April 2011, council of common interest decided that a limited extent body would continue to work as commission of standards in institutions of higher education.²⁰

Tourism Development Corporation

In the 18th amendment the tourism development corporation and its subsidiaries were allocated to Inter Provincial Coordination Division. Since the subject of tourism is residuary subject, the federal government cannot exercise its authority regarding any matter relating to tourism. The government of the Punjab had the view that they will not support any parallel administrative setup in the form of Pakistan tourism board.²¹

Size of Government and Cabinet in the 18th amendment

The amendment has also drawn guiding principles for the good governance in the country. It is included in the amendment that the "...the size of the central and provincial governments should not exceed 11 percent of the members of the assemblies."²²

How national assembly can be dissolved

It was provided that the national assembly can only be dissolved if following a motion of no confidence in the Prime Minister. It was in a situation that if no one else is in a position to be the next Prime Minister. “²³

Appointment of the Supreme Court Judges

In the 18th amendment it was included that the appointment of the Supreme Court judges will be done through a commission which will be named for a period of two years.²⁴ The commission will be presided by the Chief Justice of Pakistan. The other members will be the senior most two judges of the Supreme Court and one member will be retired Chief Justice or a retired Supreme Court judge along with the Attorney General and the minister of law and justice. Commission also include one senior advocate of the Supreme Court through the bar council. This process of the selection of the judges was taken from the famous Charter of Democracy signed between the PPP and MPLN in May 2006.²⁵ Some of the issues relating to the amendment were challenged in the in the supreme court of Pakistan. They were about the higher education commission (HEC), changing the name of the North West Frontier Province (NWFP), procedure of the appointment of the judges, removal of the concurrent list from the constitution and election of political parties were challenged in the Supreme Court.²⁶ About the HEC, the devolution of HEC was also challenged in the Lahore High Court. Advocate Fahad Ahmad Siddiqi challenged it and stated in the petition that the federal government will not transfer the funds of HEC and stated in the petition that the Court should call Raza Rabbani, the chairman of the commission and to know about HEC and why it cannot work under the federal government.²⁷ The larger bench of the Supreme Court, headed by the Chief Justice of Pakistan concluded the case and gave their remarks. “Our Parliament is 2nd to none in comparison to the Parliament of any other country in the world. We should respect it. Our parliamentarians are men of character and they possess all the merits the parliamentarians of the other countries have.”²⁸

So far as implementation process of the amendment is concerned, there were many issues faced by the federal government, these were about the dissolved ministries and the devolution of the financial, administrative and issues relating to the employees and funds transactions. The government of the Punjab was also showing concerns towards the federal government. And was facing issues towards the practical implementation of the devolved subjects. Parliamentary commission on the implementation of the 18th amendment was working with Raza Rabbani as chairman and Ishaq Dar as deputy chairman. By April 2011, PPP came close to PMLQ and was on its way to form a broad based alliance in the government benches. In that environment Ishaq Dar resigned from his office as deputy chairman of the implementation commission of the 18th amendment. Dar,s resignation came on 20th April 2011 and he explained the reasons of the resignation. He said that the government has failed to adhere to the understanding reached at the commission under which it was bound to convene the joint session by April 19.²⁹ Ishaq Dar comprehensively explained the reasons and issues that were coming across in the implementation commission. He wrote in his resignation that ‘the core function of the HEC including scholarships to students, foreign assistance, accreditation etc. could neither be delayed nor it would be desirable to place such functions under different federal divisions as it would

severely hamper the objectives for which HEC was originally formed.’³⁰ Dar also explained some of the other matters like some of the violations of the federal finance law and said that his objections and points were every time ignored in the commission meetings. Mian Raza Rabbani, the chairman of the implementation commission told the press that there was no division in the commission after the resignation of the deputy chairman.³¹ He did not comment on the resignation of Ishaq Dar. Ultimately the implementation report was presented in the National assembly on 29th of April 2011 and before the Senate on 3rd May 2011. The report included 58 pages and explained all the steps taken up for the devolution of powers to the federating units. There were 50 meetings held by the commission to prepare the recommendations. The provincial bureaucracy and the procedural handling was consulted with the provinces as well. This is how implementation process of the 18th amendment continued however bureaucratic hurdles were observed and mentioned by RazaRabbani as well.

Post 18th amendment constitutional issues

Issues taken up with the federal government

The post 18th amendment scenario between the federation and the provinces was not in a comfortable situation. The departments and powers were not easily devalued to the provinces. In the post 18th amendment these were the issues taken up by the government of the Punjab with the federal government as powers were not trickled down to the provinces properly.

1. Devolution of National College of Arts of Lahore and Rawalpindi campuses.
2. Devolution of the functions and assets of Pakistan Tourism Development Corporation
3. Devolution of Sheikh Zayed Hospital and allied institutions devolution of functions of the ministry of health regarding drug control administration.
4. Devolution of Aiwan-e-Iqbal complex, Lahore and Iqbal academy Lahore.
5. Devolution of Pakistan Bait-ul-Mall
6. Allocation of hunting areas in the Punjab.
7. Devolution of Evacuee properties.
8. Devolution of workers welfare fund (WWF) and employees old age benefits institution (EOBI)
9. Devolution of functions relating to the sports.

So far as practical implementation of the 18th amendment is concerned the federal government devolved some of the ministered to the federating units and also retained some of the subjects. And federal government was of the view that they have retained some of the subjects due to legal constraints on the way to devolution. Under the article 270 AA(6) of the constitution of Pakistan after the 18th amendment ‘shall continue to remain in force until altered, repealed or amended by the competent authority.’³² However the Prime Minister Yousaf Raza

Gilani presented the reason of legislative gap a hurdle on way of complete devolution of subjects.³³ The process for the transformation of the subjects was slow and many subjects were retained by the federation. The reasons were the problems and the bureaucratic hurdles towards devolution. The provinces including the Punjab showed reservation and also protested. It was observed that some of the matters were challenged in the courts.

The government of the Punjab and PLMN, the opposition party in the federation, like other provinces was happy over this development of the 18th amendment³⁴ and was very keen for the devolution of the subjects. But the slow process of the devolution and the hurdles created resentment and the chief minister wrote a letter to the Prime Minister and demanded a call of meeting for the Council of Common Interest (CCI). Some of the institutes relating to the social delivery which were supposed to come under the government of the Punjab after the 18th amendment were still retained by the federal government. These institutes include Evacuee Trust Properties Board, The Hockey Federation, Pakistan Cricket Board, Bait-ul-Mall, Pakistan agricultural storage and services corporation, Aiwan-i- Iqbal complex, Iqbal Academy, Tuberculosis Centre Complex, Women and Chest Diseases Hospital Rawalpindi, National College of Arts Lahore and Rawalpindi, workers welfare fund, Employees Old age Benefit Institute, Sheikh Zayed Post Graduate Medical Institute Lahore, Sheikh Fatima Institute of nursing and Health Sciences Lahore. Some of the institutes relating to agriculture were also retained by the federal government. These include Pakistan Central Cotton Committee and Federal Seed Certification and Registration Department and Pakistan Agriculture Research Council. The government of the Punjab was doing protest through various ways including correspondence with the federal government and at the public forums. There is also a list of subjects that were devolved by the federal government and came under the supervision of the government of the Punjab. These include National Museum of Science and Technology Lahore, Pakistan Chair Board, Centers of Excellence, Soil survey of Pakistan, Area study Centers, Sheikh Zayed Islamic Centers, Pakistan Study Centers and also the institutes relating to special education and special welfare. These institutes came under the supervision of the Punjab and likewise in the other federating units of the federation of Pakistan. However it is observed that the government of the Punjab protested against the subjects which were still retained by the federal government and according to the officials these were the cash rich institutes. The Chief Minister of the Punjab again wrote letter to the Prime Minister and the demand was to hand over the remaining important subjects which were supposed to be delivered to the provinces after the 18th amendment.³⁵ The Punjab government officials were of the view that the Chief Minister of the Punjab wanted the subjects with their financial assets. The stance of the Punjab government was that the federal government is not fair enough and is discriminatory in its dealing with the government of the Punjab. The federal government had devolved some of the institutes to the government of Sindh and to the government of Balochistan but according to the official stance of the government of the Punjab, the federal government was using delaying tactics in its dealings regarding the post 18th amendment procedures. National institute of child health and Jinnah post graduate medical Centre was delivered to the Sindh government similarly Sheikh Khalifa Bin Zayed hospital was also delivered to the

government of Balochistan. However the Punjab government was still waiting from the Federal Government Post Graduate Medical Institute and the Sheikh Zayed Hospital to be delivered to the government of the Punjab. The Punjab government was demanding for the devolution of these social sector institutes. The power generation became a shared responsibility of the federation and the federating units after the 18th amendment. The crises of power had gone worse in these years. The power generation capacity decreases every year but the demand goes high around 6 percent every year. The situation of load shedding was beyond control and the province of Punjab was suffering more as compare to the other provinces. Though the situation of revenue generation was better in the Punjab and the power distribution companies were collecting more revenue as compare to the other parts of the country.³⁶ In the Council of Common Interest (CCI), the Chief Minister of the Punjab protested against the unjust attitude of the federal government and demanded for the equal load management in all parts of the country. In this regard the Council of Common Interest (CCI) passed a resolution for the equal load management throughout the country.³⁷ The Employees' Old-Age Benefits Institution (EOBI) and WWF were also on the list to be delivered to the government of the Punjab. The government of the Punjab was showing resentment and was demanding over the issue of delaying. One can find that the ministry of labour was devolved and the provinces were entitled to make legislation for the empowerment of the labours according to the Article 142(c).³⁸

The department of education became a provincial matter. The Higher Education Commission of Pakistan was supposed to be delivered to the provinces after the 18th amendment in connection to the department of education. However it was observed that some of the political parties and some of the university's faculty did not like that the HEC should be delivered to the provinces. So the issue was challenged to the Supreme Court and the Lahore High Court as well. In the courts the petitioners took a stand that this devolution is a violation of some federal laws and also the provinces are supposed to make a proper legislation before the devolution of the Higher Education Commission of Pakistan. In this regard the Supreme Court declared that HEC will continue its functions according to the HEC Ordinance of 2002 which are also covered by the constitutional provisions. And the same provisions will serve the purpose unless the new legislation. Till the promulgation of the new legislation HEC will continue performing its responsibilities. The Council of Common Interest also showed its consent to the HEC to continue its responsibilities by the year of 2014-15. About HEC a notification was issued by the Cabinet Division of Pakistan by November 14, 2012, the notification declared that the HEC will function under the newly established NRS National Regulation and Services Division. In the same notification a new department was also established by the name of External Equivalence of Degrees and Diplomas.³⁹ It is obvious that the relations between the PPP (Government in the center) PMLN (Government in the Punjab) never remained ideal during the period from 2008-2013 and they remained political rivals as traditionally they were. However both of the parties PPP and PMLN showed accommodative attitude towards each other in terms constitutional development. It can be sad that Centre-Punjab relations remained much better than previously in history and thus federalism worked smoothly and resulted in strengthening the federal structure. The 18th Constitutional Amendment in 2010

was the result of this mature cooperation which further strengthened the federal structure of Pakistan as it transferred concurrent list to the provinces and restored parliamentary spirit as envisioned in the 1973 Constitution. However, despite these some positive steps overall relations between the two major parties did not remain as cordial and friendly as one was expecting.

Conclusion

The hallmark of the period was the enforcement of unanimously passed 18th Amendment. This is believed by many that the 18th amendment was a one of the bravest and greatest step towards the provincial autonomy in the history of Pakistan which resulted in the strong federal structure. For that matter the party in power namely PPP at the federation must be given credit for transferring most of Federal powers to the provinces and also for transformation and repealing the amendment made by the military dictator-General Musharraf. Also Credit for such historic move should be given to all major parliamentary political parties for making this undisputed 18th amendment possible and strengthening the federal structure of Pakistan. Most importantly, Punjab, hitherto has had been branded, rightly or wrongly, as a champion of strong Centre and provincial autonomy, should be hailed for supporting the 18th Amendment and therefore, paved the way for loose Centre and strong provincial autonomy. That step shows how mature and refined political leadership in the Centre and provinces had come into power and were taking historic decisions for the greater and bigger autonomy of the provinces. Pakistan was clearly showing a sign of positive change and moving towards a strong federal structure.

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⁴ [Pakistan Weighs Changes to Revise Constitution](#), *The New York Times*, 2010-04-06. Accessed on 19.09.2017

⁵Ibid.

⁶ ["Pakistan lawmakers approve weakening of presidential powers"](#). *CNN*. April 9, 2010. Accessed on 19.09.2017

⁷ Dawn: April 09, 2010.

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⁹ [Pakistani National Assembly Votes to Limit Presidential Powers](#), *Voice of America*, 2010-04-08. Accessed on 19.09.2017

¹⁰*The Daily Dawn*, Karachi, April 09, 2010.

¹¹ It was said by the PPP Punjab President Rana Aftab Ahmad Khan who declared it a victory of democracy. Ibid.

¹²*The Express Tribune*, April 24th, 2011. Accessed on October 17, 2017.

¹³ The Nation, August 7, 2016.

¹⁴ Christophe Jaffrelot, *Pakistan Paradox, Instability and Resilience*, 264.

¹⁵ Ibid.

¹⁶ It's about the distribution of revenues between the federation and the units. It is also meant to remove the fiscal disparities between the units and the federation. The main

objective of the fiscal federalism is to independent the provinces in the expenditures and and to remove their reservations. (MianRazaRabbani)

¹⁷Manzoor Ahmad, *The constitution of the Islamic Republic of Pakistan, As Amended by the constitution* (Eighteenth Amendment Act 2010), (Karachi: Kousar Law Book Publishers, 2011), 110.

¹⁸Ibid., 112.

¹⁹Ibid., 95.

²⁰http://www.ipc.gov.pk/ipc/userfiles1/file/CCI_%20New.pdf. Accessed on 20.09.2017.

²¹This information is taken from the key officers who drafted such communication and attended the meeting on the part of Punjab government to the government of Pakistan.

²²Christophe Jaffrelot, *Pakistan Paradox, Instability and Resilience*, 264.

²³Ibid.

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³⁶*Social development in Pakistan, Annual review 2012*, p.114.Accessed on October 25, 2017.

³⁷Ibid.,113.114.

³⁸Ibid., 118.

³⁹Ibid.