

FEDERALISM IN A POST 18TH AMENDMENT – PAKISTAN

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Abstract

This article seeks to understand the political landscape of Pakistan as it exists today and explains its structure. The study utilizes a textual analysis approach to analyze parts of 1973 constitution, and the 18th amendment as a whole. Interviews of those accountable for the 18th amendment have been conducted to gain insight into its success in establishing a democratic federation. Analysis of the interviews was done in order to determine the general theme of responses and generate a discussion with respect to the specific research questions. Subsequently the final data was subjected to an ontological and epistemological study. The analysis of the 18th amendment reveals that the document itself is highly conducive to the model of federalism.

Keywords: Eighteenth Amendment, Pakistan Politics, Federalism in Pakistan, Democracy.

Introduction

The foundation for any nation in the modern world, regardless of the form of government, is its constitution. The constitution essentially paves the way for the creation of a nation and its future existence. It is the constitution that sets out the method of governance for a nation, however, theory and practice are entirely different in nature. All forms of government can be understood to lie on a continuum, with respect to the number of people involved in the electoral or decision-making process. However, the common denominator among all forms of government is a constitution. From a purely theoretical standpoint the constitution is simply a set of rules outlining a nation's administrative governance system. It may or may not be a legal written document.

While scholars have varied opinions on the subject the first ever known, written piece of legislature that is said to qualify as a constitution is attributed to Sumerian King Ur-Nammu of the city of Ur, located along the river Euphrates in modern day Iraq.¹ Around the time of 350 B.C Aristotle is said to have been the first to make an actual distinction between common and constitutional laws. Of these distinctions the simplest and perhaps most important was that constitutional law

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revolved around the arrangement of “offices (positions of power, ministers etc) within a state”.

On the other hand, it is argued that the Islamic Prophet Muhammad (Peace Be Upon Him) was actually the first to set up a constitution. This refers to the charter of Medina setup by the Prophet Muhammad (Peace Be Upon Him) after his migration to Medina in the year 622 CE and instrumental in its establishment as a nation state.²

Similar to the Muslim world, the Western world has its own notions about the world’s first constitution. The *Magna Carta* or the Great Charter of the early 13th century is the earliest example of a constitution in Europe.³ This charter however went on to have a significant impact on the development of future charters, peace agreements and even constitutions across the Western world.

The constitution is the foundation of the political and administrative governance system of a state and, therefore, it is considered as the most important and sacred document for it. All powers are used and drawn from the principles set in it. It describes the extent to which this power can be exercised. It defines the structure of the legislature, the powers of executive and judiciary that how the government and its different institutions will be formulated with a clear mechanism of their functioning with a system of limitations. A written constitution is the first and foremost requirement of the federal form of government.

Even before its inception, Pakistan has been envisioned, under the objective’s resolution, as a nation under the federal form of governance. After its inception however its political direction has drifted under different presidencies. Considering the political history of Pakistan, this paper studies federalism in Pakistan through the 18th amendment to the constitution of Pakistan, heralded by many as step towards democracy and strengthening of federal system of governance in Pakistan’s history. While there is no doubt about the efficacy of the 18th amendment itself, this paper studies the implementation of the 18th amendment to determine if and to what extent it has been successful in reviving and implementing federalism in Pakistan.

Defining Federalism

For the purpose of this study Pakistan is referred to as a federation, in accordance with the 18th amendment. A federation is defined as “group of states, with a central government, independent in internal affairs.”⁴

Focus of the Study

This study is centered around the 18th Amendment with respect to its financial, legislative, administrative, and political concerns. This study looks towards the implications of the 18th amendment as they have come to be and compare it to proposed outcome i.e. the issue of its implementation and success. This study investigates all major concerns and implications of the 18th Amendment and the role of democratic and bureaucratic forces with reference to the constitution of Pakistan.

Theoretical Framework

The data gathered from the interviews and produced from textual analysis, was subject to the various theories of public policy, in order to understand the rationale behind policy making in Pakistan. As the currently prevalent system of governance in Pakistan seems to follow the lines of federalism, the data has been subjected to K. C. Wheare's theories on federalism due to his widely accepted authority on the matter. Principally a form of federal governance is defined as "the method of dividing powers so that the general and regional governments are each within a sphere co- ordinate and independent."⁵

Under Wheare's system of federal governance the sphere of power is divided into regional governments having the autonomy to exercise their rights to governance upon their people independently and autonomously of each other. These governments, whilst functioning independently are however bound together by the central government, which has the ability to exercise power directly over the citizens but not indirectly via the states or provinces. Where is also of the opinion that, if the central government lacks the means by which to regulate its citizens directly, a confederation form of governance is more desirable than the federal form.⁶ Note that a confederation can perhaps be characterized as the polar opposite of a federation, in which the power rests largely with the central government.⁷

Research Methodology

For the purpose of this paper a combination of both primary and secondary research will be used. The primary research will utilize a textual analysis approach to analyze the 1973 constitution and the 18th amendment. Interviews of those responsible for the 18th amendment i.e. legislators, bureaucrats, law makers, learned clergymen etc as well as those impacted by the amendment i.e. ministers and general public will be conducted. The interviews allow for a gathering of insight into how effective the 18th amendment has been. Interviews are conducted by the researchers themselves ensuring the interviewees privacy, while also adhering strictly to a set of structured interview questions.

For secondary research the work of lawmakers and bureaucrats, which deal with the 18th amendment as well as the constitutional identity of Pakistan has been utilized. Furthermore, broader works of literature revolving around democracy and its implementation has been considered as well.

Interview data was transcribed and translated into English using the double-blind translation method in order to ensure consistency. The interviews were conducted by the researcher themselves according to a set of predetermined structured questions, in order to avoid leading questions or the introduction of the researchers own prepossessed biases to the data.

Theatrical analysis of the interview was done in order to determine the general theme of responses and generate a discussion with respect to the specific research

questions. Subsequently the final data was subjected to an ontological and epistemological study.

Literature Review

There are a large number of articles which deal with problems and prospects of federalism in Pakistan and major issues of democratic Parliamentary system Majeed (2015), Waseem (2010), Bukhari (2013), Akbar (2002), Khalid I. (2013), Nazir (2012), Jahagir (2010), Shah A. (2013), Nazar (2013), Hussain M., (2012), and Khalid I, (2012)⁸ explain problems and issues of federalism after the 18th Amendment, and struggle of power assessment with the idea to hold political democracy that deals with the federal supremacy and is not province- oriented politics. Also, it upholds the idea of justice and rule of law. Meanwhile, in Pakistan the federal system did not flourish in real terms and has extreme flaws due to which there is a challenging situation for future development in economic and social field.

There are many articles that deal with different aspects of the 18th Amendment and Pakistan's political transitions after the 2010 parliamentary settlement by President Asif Zardari to strengthen parliamentary government. The aim was to continue the democratic set up in coming decades for de-centralization of power under the 18th Amendment. It gives provincial autonomy under the legal framework. This amendment consists of a hundred changes in which the most significant change is removal of 58-2(b) clause which relates to dissolution of parliament by the president which resulted in adverse consequences for the democratic state. This amendment aimed at better balance of power through a stronger connection between the state governing body and the people.

Under the 18th amendment, the parliament with mutual consensus changed the name of NWFP province to Khyber Pakhtunkhwa (KPK) but there remained some unresolved questions which could not be handled by PPP government i.e. security, education, economic and foreign policy measures (Cookman, 2010). Likewise, Siddiqui, (2010), Nabi, (2013) and Butt A.M., (2013) have also criticized the 18th amendment for not addressing issues related to education system in the provinces such as budget allocation.

The 18th amendment was also criticized for not providing proper resources to provinces and local body governance system for socio-economic development of society. Similarly, Hassan M.H., (2013) and Sial (2010) have raised concerns that even after the 18th amendment, the provinces have feelings of deprivation and it is claimed that Punjab still monopolizes the resources. These authors further argue that the 18th amendment has become a stumbling block between centre and provinces as it has engaged them in a struggle for securing more resources and this will lead to the development of harsh feelings between developed and less developed provinces. It results in province-oriented patriotism and weakening of centre. Hence, it is argued that the 18th amendment created misconception between Center and provinces and has further widened the gulf.

The Executive Committee of the National Economic Council (ECNEC), Evacuee Trust Property Board (ETPB), Employees' Old-Age Benefits Institution (EOBI), Workers Welfare Fund (WWF), Aerial Survey and Pakistan Agricultural Storage and Services Corporation (PASSCO), these departments are still waiting for the fulfillment of federal promises from their implementation which clearly shows difference between theory and practice in the implementation of 18th Amendment.

With reference of 18th Amendment, people of Pakistan are more concerned with the power sharing formula in which each province wants its due share from parliamentary government, which was elected on the basis of democratic reforms in 2013. Its main duty was to provide single set of resource to the people of all the provinces. Nevertheless, in economic and administrative sector, the government has also failed to provide equal level of facilities to all regions. Current government of KPK also raised up its voice in provincial assembly against the federal government with reference to their province's share in CPEC, which is not practically done by government.⁹

Asma Faiz explains in her book about the power of federalism and authority upon provinces after 18th Amendment and transition to democracy after 2008 and major constitutional amendment of 2010 and the relation between the center and provinces. PPP's contribution towards parliamentary democracy enhanced fundamentalist approach of parliamentarians towards people to flourish civilian government in future, hence 18th Amendment in 2010 is major milestone in Pakistani federalism. While historical events provoke more enhancement towards power sharing between the center and the provinces, re-structuring the federation and devolution of power is necessary for provinces otherwise negative relationship between the provincial revenue and federal revenue will provoke inequality within Pakistan and will provide mixed finding in terms of Indian and Pakistani federation. In short, Pakistani system is still suffering from constitutional ups and downs like Indian system.¹⁰

Kundi (1980) elaborates problems and adjustment of their issues in Pakistan constitution that affects mostly on working of civilians and internal issues promoting external threat because the unstable constitutional adjustments promote basic agenda of power division, since as federal type of system it is the duty of the center to divide power and resources. Further, the linguistic groups, instead of practicing political harmony, added fuel to fire and it resulted in the separation of Bengal and so, is the area of the settlement of disputes and conflicts of the center and provinces, the federalism of Pakistan has been ineffective.¹¹

Shriram Maheshwari attributes the ethnic groups as major problem within Pakistan, which did not permit the strengthening of the federal system in Pakistan, due to administration setup, which includes all the political and economic affairs of Pakistan directly. Quota system in election set up of Pakistan made fundamental difference between the distributions of resources, which majorly influenced the federal setup in terms of economical process.¹²

The 18th Amendment

Passed by the senate on 18th April 2010. Under this amendment the president is a figurative head of state, his power to declare a state of emergency has been removed and a total of 15 ministries have removed from federal jurisdiction and allowed to be establishment under provincial jurisdictions.

While this amendment may have been made in 2010, the groundwork for this development dates back to 2002 when local bodies system was introduced. Practically however it was the central government that had jurisdiction over the aforementioned ministries, which resulted in extremely skewed human development among provinces, particularly Baluchistan.

The 18th amendment was heralded as a revival of 1973 constitution in its true spirit and was welcomed by the nation.¹³ At the time claimed that much of Pakistan's issues with respect to development as a nation and development of its people would be resolved, there would be a balance of power between provinces and development would largely be more equitable. The issue of federalism in Pakistan is not a new one, throughout its history the nation has struggled with the division of powers under the bicameral legislature proposed by 1973 constitution.

Under this amendment the key concern is of the dissolution of evolution of power mechanisms within the principle of the supremacy of democracy, which is proposed to be achieved under an effective local government system. Amendment XVIII or the 18th Amendment of the Constitution of Pakistan, was passed by the National Assembly of Pakistan on the 8th of April 2010. It was approved by the senate on the 15th of April 2010 and became a part of the constitution when President Asif Ali Zardari countersigned it on the 19th of April 2010. Thus, marking a significant first in the political history of Pakistan where a president willingly relinquished their own powers passing the down to the parliament and the station of the prime minister. Aimed at eliminating the Presidential powers to dissolve the Parliament unilaterally. Aiming to turn change the form of governance in Pakistan from semi-presidential to a parliamentary republic. It also renamed the North-West Frontier Province to Khyber Pakhtunkhwa, in recognition of the major ethnic group of the region. These reforms were meant to ease political tensions between provinces and disseminate the powers of the Presidency. Major changes to the Constitution:

- Amendment to Article 6 in an attempt to deter future military coups.
- Article 58(2b) was repealed and substituted with the Dissolution of National Assembly
- The President retained the power to dissolve the National Assembly only in the event a vote of no confidence was passed against the prime minister
- The total strength of the cabinet was fixed at 11% of the total membership of the parliament
- All governors were required to be both residents and registered voters of their respective provinces and were to be appointed by the president under the discretion of the prime minister

- Provinces were now legally required to establish local government systems, devolve the political electoral process, administrative and financial responsibility and the authority to elect representatives
- Prime minister was to be chairperson of the Council of Common Interests, members of which are to include Chief Ministers and three members of the federal government
- An amendment to Article 157 requiring the federal government to seek provincial government approval before installing hydroelectric power stations in provinces
- The Prime Minister was granted the power to provide names of three candidates of the Council of Common Interests in consultation with the leader of the opposition, to a parliamentary committee for confirmation
- Insertion of Article 175(a) governing the appointment of judges of Supreme, High and Federal Shariah Courts
- With the substitution of Article 243 the control and command of the armed forces of Pakistan shall rest with the federal government and ultimately the President
- The President was granted the authority to appoint chairman to the Joint Chiefs of Staff the chief of army, naval and air staff
- North West Frontier Province was renamed to “Khyber Pakhtunkhwa”
- As a constitutional duty the State is to provide free and compulsory education to all citizens of Pakistan from the ages of 5 and 16 years
- Under amendment to clause 1 names of provinces “Baluchistan” and “Sind” were substituted with “Balochistan” and “Sindh” respectively
- Barring of person(s) having acquired foreign citizenship from contesting in national elections for parliament
- The electoral process for all elections in Pakistan, excluding those of the Prime Minister and Chief Minister, are to be held by secret ballot
- The concurrent legislative list in the 4th Schedule was removed in its entirety and various ministries and powers divided clearly amongst the provincial and federal governments, ensuring a clear division of power and authority

Elimination of the Concurrent Legislative List

By abolishing the concurrent list in its entirety the 18th amendment has created an unprecedented change. It is aimed at providing greater autonomy to the people of Pakistan and to the provinces of Pakistan with respect to their rights to governance.

The concurrent list of the 4th schedule of the 1973 Constitution of Pakistan, was a comprehensive list of 47 subjects upon which both the Parliament and Provincial Assembly could jointly legislate. Under the 18th amendment with the abolishment of the concurrent list one item namely; Boilers, which appeared at serial number 29 has been shifted to part 1 of the federal legislative lists. While two items namely; Electricity, and Legal, Medical and other professions, have been shifted to part 2 of the federal legislative list.

With the omission provisions have been made to provide the provincial assemblies with powers to legislate any matter not appearing on the federal legislative list including but not limited to the remaining 44 subjects. The Parliament has been essentially restricted to legislate only the subject appearing on the federal legislative list and nothing else. As a result, a number of subjects and activities being previously legislated by the parliament have now been shifted to the authority of the provincial assembly.

With the elimination changes have also been made to both parts of the federal legislative list. Under provision of Article 154(1) the council of common interests has been granted authority to formulate and regulate policies with deal with legislation and governance of subjects appearing in part 2 of the federal legislative list. The following subjects have been sifted from part 1 of the federal legislative list to part 2:

- Major ports, that is to say, the declaration and delimitation of such ports, and the constitution and powers of port authorities therein
- Census
- Extension of the powers and jurisdiction of members of a police force belonging to any province to any area in another province, but not so as to enable the police of one province to exercise powers and jurisdiction in another province without the consent of the government of that province; extension of the powers and jurisdiction of members of a police force belonging to any province to railway areas outside that province, and
- National Planning and National Economic Coordination including Planning and Coordination of Scientific and Technological Research.

New Subjects added to part 1 of the federal legislative list vis a vi the 18th amendment:

- All regulatory authorities established under a Federal law
- Supervision and management of public debt
- Standards in institutions for higher education and research, scientific and technical institutions, and
- Inter-Provincial Matters and Coordination

The issue of Sharing of Ownership in Oil, Gas and Territorial Waters has also been discussed and provided for under the 18th amendment by Article 172(c) and Article 172(3). Providing for joint ownership but limiting powers with respect to development.

Implementation of the Eighteenth Amendment

Under Article 270 AA clause 9 the 18th amendment has provided for the creation of an implementation commission, formulated by the federal government as they see fit. Under this the implementation a commission was created which was headed by Senator Mian Raza Rabbani.

Devolution Process

The implementation commission decided to carry of the process of devolution in three distinct stages. The Commission recommended devolution of functions of devolved organizations in the following manner:

- Employees working in various field organizations under the aforesaid devolved Ministries/Divisions will be transferred to the respective administrations of the provinces and federal areas (Islamabad Capital territory, Federally Administered Tribal Areas and Gilgit-Baltistan) under Section 10 of the Civil Servants Act, 1973, pending formulation of a new enabling law on the subject
- Employees working in any Ministry being abolished and not taken by the provinces/federal areas will be adjusted in other Ministries/ Divisions. None of the employee will be retrenched/laid-off
- Funds for transferred activities and manpower of devolved ministries budgeted in the year 2010-11 will be transferred to the provinces/federal territories on pro rata basis
- Development projects of these Ministries/Divisions will also be transferred to the provinces/federal territories along with project employees and unreleased part of revised allocation of funds for these projects in the year 2010-11
- Office buildings, furniture, fixture, equipment, and transport in use of these offices will be handed over to the provinces. Final determination of issues relating to assets and liabilities shall be decided with the approval of the Federal Cabinet

Interview Analysis

In order to discover the grassroot impact of the 18th amendment and provide an answer to how successful it has been in strengthening federalism and democracy, in depth interviews of key individual were conducted. These ranged from ministers of devolved ministers, political party leaders, judiciary, academics as well as the implementation commission was conducted.

The general consensus amongst all participants was that the 18th amendment was indeed instrumental in restoring democracy and providing structure to the system of governance in Pakistan. Instrumentally the amendment was considered as providing clear guidelines on conduct of government business, government structure and making efforts to any conceivable avenue for disruption of the government. The interviewees also concurred that the amendment provides for complete, absolute, and clear division of powers between the federal and provincial governments. In particular the omission of the concurrent legislative list was often quoted as being key towards clarity in division of power. It was also agreed that the 18th amendment provided grassroot level democracy with in inclusion of many democratic freedoms previously not included in the constitution.

However, the opinion on its success of the 18th amendment was mixed amongst the interviewees. The general consensus here was the 18th amendment indeed supports and makes provision for a federal system of governance. The opinion however was split

on how successfully the proposed process of the 18th amendment was implemented and where the faults lay.

In particular it was found that those who were serving in the ministries themselves, were of the opinion that both the implementation commission and provincial governments were at fault for a lack of grassroot level federal system. This set of interviewees was of the opinion that the implementation was conducted hastily and without proper consideration of the provincial governments ability to manage the ministry. Often at the time of devolution, provinces were lacking in necessary infrastructure to run these ministries effectively. They also voiced the opinion that the highest echelons of the political parties themselves were largely uninterested in making a grassroot level federal system as they sought to consolidate their own power and place those closest to them in powerful positions.

Political leaders and significant persons of political parties were largely content with the aspect of federalism under the 18th amendment and were of the opinion that it has been implemented in true letter and spirit. They however show concern over the devolution process and held the implementation committee responsible for mismanagement of the devolution process.

Those heralding from the judicial diaspora were for the most part against the change proposed by the amendment with respect to the appointment of judges. In their opinion the process provided for appointment of judges made it highly subjective to the personal preferences of the highest echelons of federal and provincial government, increasing the likelihood for practices of corruption and putting the government above the law.

The academics interviewed were of the opinion that the 18th amendment was only partially successful in establishing a federal system of governance. They considered the division and devolution of powers to be adequate, however voicing concerns over political parties themselves not wanting a grassroot level federal system of governance. They also pointed out a major flaw of the 18th amendment which made the provinces and federal government responsible for their own resources, revenue generation and expenditure. However, the federal government lacked the resources of the provinces and could only collect revenues from limited taxation of the provinces. The federal government was still solely responsible for the expenditure on military, defense, and servicing of foreign debt. This has created a situation where the provinces get to access the security and stability, created by the presence of an armed forces but do not actively pay for this security. Similarly, the provinces benefit from projects financed by foreign debt but are liable to service this debt. Thus, the federal government has to an extent been put in a position where their expenditure offsets their revenues. Academics have also pointed out that while the amendment deals with the macro level issue of federalism very well, it does not provide for guidelines to implement a grassroot level federal government, leaving that entirely up to the provincial government.

Findings

The research provides concrete evidence for the 18th amendment being a document that favors, provides for, and attempts to produce a democratic federal system of governance in Pakistan. With respect to providing a democratic system it has been highly successful in undoing a large part of the damage done by various rulers. It divides powers and provides mechanisms for governance that ensure that the democratic process be following in all business conducted by the government.

With respect to question of the success of the 18th amendment in establishing a federal system of governance, it has been found that the amendment has only been partially successful. Its success lies in providing for the means, rules and divisions of power required to establish a federal system of governance. A federal system has indeed been established at the macro level, however the amendment has lacked any clear framework for a grassroots level federal system, thus being unable to fulfill its intended purpose.

Significance

The study is instrumental as it represents the first research of its kind on the subject. The insight it has provided into the political landscape of Pakistan adds to the gap in knowledge overall that has been present to a lack of in-depth research on the subject. This research looks at the 18th amendment as a whole alongside the actors responsible for its execution and implementation. In doing so it is able to provide concrete reasoning which explains the political structure of Pakistan as it is today.

Conclusion

The analysis of the 18th amendment reveals that the document itself is highly conducive to existence of a theoretically perfect model of federalism. The problem lies in the fact that the amendment has to undo decades of damage to the political landscape of Pakistan under the various rulers. Some of this damage is highly intangible in nature, which can only be erased with time. The major hurdles in establishing a grassroots level democratic government, seems to be the political parties in power within the various provinces. Years of autocratic and dictatorial rule has rendered those in charge of these parties unwilling to provide an environment truly conducive to the perfect model of federalism.

NOTES

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