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## **The 18<sup>th</sup> Amendment: Pakistan's Constitution Redesigned**

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### **Abstract**

*In the midst of all the economic and political turmoil in the country, or perhaps because of it, Pakistan's political forces of many different colours and ideologies have come together to reshape the 1973 constitution and create a new political order. The constitution was disfigured by a number of amendments inserted into it by military leaders who wanted to create a much more centralised structure than was permitted by the available constitutional framework. The end result was to give the country a hybrid system of governance that operated a presidential system within the guise of a parliamentary structure. There were problems with the system thus created. It had a president at the apex who was responsible to no one other than himself (or perhaps to the army high command) and provinces with only small amounts of authority. There was a consensus among the political forces that the system had to be changed. This was done with the adoption of the 18<sup>th</sup> amendment to the constitution on 19 April 2010. This was aimed at achieving the following two objectives. Firstly, to revert executive authority to the prime minister and his cabinet and hold them accountable to parliament. Secondly, to allow much greater autonomy to the provinces. This paper discusses how this amendment was processed and how its content will change the system of governance.*

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## Introduction

The main purpose of this paper is to suggest that Pakistan needs a different development paradigm to deal with its many economic, social and political problems. It needs to be different from the one followed in recent years which, after several years of high growth, plunged the country into a deep crisis. This manifested itself in many different ways. The rate of economic progress slowed down and the incidence of poverty increased. Domestic terrorism grew to the point that most contacts with the outside world were severed. The last was particularly troubling since Pakistan depends on external capital flows. Any slack in their quantity has a deadening impact on the economy. Poor economic performance, accompanied by palpably poor governance, have created an environment in which inter-regional, intra-provincial, inter-economic classes and sectarian conflicts which have risen to the surface and to the point at which they threaten the very integrity of the Pakistani state. These have come with heavy economic, social and political costs that will further set back progress on a number of different fronts.<sup>2</sup>

As has been said by a number of people who have influence over world affairs, including Hillary Clinton, United States (US) Secretary of State, that Pakistan faces an existential threat. Dealing with it must be a high priority for those who hold the reins of power in the country today. A new development paradigm must therefore work to restore not only the confidence of the domestic players in the economy, it must also revive external interest in the country's economic future.

An important part of the suggested paradigm is the notion that one way of rebalancing the economy and the social and political systems is to bring the government closer to the people. The award made by the 7<sup>th</sup> National Finance Commission in late 2009 is a step in the right direction. This however is the subject of another chapter in this report. The other is the passage and signing into law the 18<sup>th</sup> amendment to the constitution by President Asif Ali Zardari on 19 April 2010. Notwithstanding these momentous developments and the comprehensiveness with which the drafters of the 18<sup>th</sup> amendment carried out their assignment, further tinkering may still be required to make the constitution more meaningful for the times. The constitution was so thoroughly disfigured by a number of authoritarian rulers that governed the country for long periods of time that making it an effective instrument of governance may require even more changes. But a good start has been made. Decentralisation of policy-making as well as the implementation of the policies made are some of the important outcomes of the 18<sup>th</sup> amendment. But it will need much more than that to address the problems the country faces today.

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<sup>2</sup> Some of the costs to the economy resulting from terrorism and power shortages were estimated by the Institute of Public Policy, Baeconhouse National University, Lahore, in its second annual report issued in May 2009. See *State of the Economy: Emerging from the Crises* (Lahore, 2009). These estimates have been updated in this report while the costs of two other shortages – gas and water – have been added to the calculus.

Highlighting these and suggesting some ways of dealing with them is the main theme of this paper.

The paper will first provide a quick overview of the situation in the country to lay the context for the discussion of the recently enacted 18<sup>th</sup> amendment. It will then briefly discuss the history of constitution-making in the country, suggesting that the tendency towards having a highly centralised system of governance has deep historical roots. It will then discuss the 18<sup>th</sup> amendment, focusing on both the process used for arriving at a consensus among different political parties on the substance of the amendment and then moving on to analyse its content. Finally, using experiences of other countries, the chapter will examine how effective the amendment to the constitution will be in bringing about effective decentralisation and providing services to the people for which the government must take full responsibility.

### **The Need for a New Development Paradigm to Sail Out of the Perfect Storm the Country Faces**

How can policy-makers navigate through the perfect storm that has hit the country at this time? It has been produced by a number of interacting factors that include domestic terrorism; economic stagnation; serious shortages of power, gas and water; and political unease in the less developed provinces and in the country's more backward areas. How can this situation be addressed? The problem posed by terrorism that is taking a heavy toll on the economy deserves the most attention. The use of force is one part of the solution to combat this scourge and it has begun to show some results in the areas of the country where it was applied. In 2009-10, the military carried out successful operations in Swat and Buner districts of Malakand division and in South Waziristan tribal agency. As some analysts have suggested following the arrest of Faisal Hayat, a US citizen of Pakistani origin, for attempting to set off a home-made bomb in the middle of Times Square in New York, Pakistan cannot afford to draw distinctions between bad (South Waziristan) and not-so-bad (North Waziristan) centers of terrorist activities<sup>3</sup>. This is also the position taken by the US administration.

Even if further progress is made to cleanse all areas in which terrorists are concentrating their activities and where they have found sanctuaries, the difficult part is the effort to bring the disaffected into the mainstream of economics and politics. To achieve the latter result, Pakistan must move towards a new development paradigm. The one we have in mind has several elements of which the following four are particularly important. The first is improving the quality of

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<sup>3</sup> Ahmed Rashid, 'North Waziristan: Terrorism's new hub', *The Washington Post* (5 May 2010), p.17.

governance. The second focuses effort on improving the country's resource situation<sup>4</sup>. The third would provide the young with education and skills they can use to enter the economic and social mainstreams. The fourth is to make Pakistan a functioning part of the global economic and political system.

This paper will focus on the first – the need to improve the quality of governance and bring the state closer to the people. The 18<sup>th</sup> amendment to the constitution has done more than go back to the original system. The 1973 constitution provided the country with a federal system in which the provinces were to have considerable authority over economic issues. This was a promise that was to be fulfilled after a period of political maturation which was defined as ten years. The subjects over which the provinces were to exercise total control were lumped together in the 'concurrent list', over which during the interim period, both the central government and the provinces were to share responsibility. But the promise was not kept.

### **Some Historical Background**

Most of the press coverage of the 18<sup>th</sup> amendment focused on the division of power between the president and the prime minister. Since the 1973 constitution established a parliamentary form of government in the country, it has been the contention of those who favoured the reduction in the authority of the president that executive authority must reside in the parliament. That was the intention of the framers of the constitution. However, the parliament's powers were repeatedly usurped by the governments dominated by the military. Through constitutional amendments or simply by practice, the president became the chief executive of the Pakistani state. The military leaders introduced changes in the constitution through the 8<sup>th</sup> amendment inserted by President Ziaul Haq and the 17<sup>th</sup> amendment by President Pervez Musharraf to provide legal covers to their efforts to monopolise power. The 18<sup>th</sup> amendment seeks to correct that anomaly by restoring the powers given to parliament under the 1973 constitution. At this point, it might be useful to pause a bit and provide a brief historical background to the evolution of Pakistan's constitution with respect to provincial rights.

What has escaped notice by most analysts and commentators is another part of the amendment, a significant increase in the powers of the federating provinces. Granting provincial autonomy was also the intention of the original constitution. This became a political necessity when East Pakistan was part of the Pakistani federation. It was larger in size in terms of the population compared to the combined population of the four provinces in the country's western wing. In the mid-1950s, a political solution was found by merging the four western provinces into the One

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<sup>4</sup> For a brief discussion of this, see Shahid Javed Burki, 'Managing external flows', *Dawn* (11 May 2010), p.7.

Unit of West Pakistan which led to the adoption of what came to be called the system of 'parity', or simply 'the system of fifty-fifty'. Under the system, East and West Pakistan were assigned equal number of seats in the national parliament created in the constitution promulgated in 1956. This was the first of three constitutions Pakistan was to adopt in a period of only 17 years, one indication of the political turmoil through which the country has passed at various times in its history. However, the principle of parity meant depriving East Pakistan the representation it deserved on account of its larger population. The Bengali acquiesced to this arrangement in the expectation that it would bring to an end the system of politics that had been dominated by the civil and military bureaucracies working with one powerful group – the landed aristocracy of Punjab and Sindh. Punjab also had a large presence in the bureaucracies which gave it enormous power in the political and economic systems.

The arrangement did not work to the satisfaction of the Pakistani military, which seeing the yo-yo style of politics the constitution of 1956 had set in motion, decided to intervene. The men in uniform had become apprehensive that political turmoil would damage the economy and create problems for national security. They struck on 7 October 1958 and put the country under martial law. National and provincial assemblies were dissolved, the constitution was abrogated and eventually, a military presidency was established. Nearly four years after assuming power, the military gave the country another constitution, promulgated in 1962. It sets the pattern of extreme centralisation of authority that was to be followed for the next several decades, not only when the country was under the direct rule of the military. Civilian rulers also continued with this tradition of centralisation.

President Ayub Khan was pushed out of power in March 1969 by General Yahya Khan, following a movement that focused on the outcome of his economic policies that produced high rates of economic growth but some income inequality. Under the new leader, the military opted for another spell of political engineering. The 1962 constitution was abrogated; the One Unit of West Pakistan was dissolved and replaced by four provinces; a Legal Framework Order was promulgated under which a new assembly was to be created, elected on the basis of adult franchise and charged with the task of providing the country with yet another constitution; and East Pakistan was given a share in the assembly proportionate to its population. Elections were held in December 1970, the first time the people of Pakistan were allowed to vote directly for their representatives in the national assembly. The script however, was not played out on the political stage the way it was written. West Pakistanis, under the leadership of Zulfikar Ali Bhutto, refused to grant power to East Pakistan's Awami League which under Mujibur Rahman, had won all but one seat from that wing of the country and an outright majority in the national assembly. The stand-off eventually led to a civil war, the departure of East Pakistan from the Pakistani federation and the emergence of Bangladesh as an independent state. The military in

West Pakistan – now Pakistan – lost power and was replaced by Zulfikar Ali Bhutto as the chief martial administrator and president.

Bhutto began the process of providing Pakistan with another constitution. He and the framers of the new constitution recognised that the failure to run a federal system allowing significant provincial autonomy was the main reason for the break-up of Pakistan in 1971 and the emergence of Bangladesh as an independent state. They were also concerned with the fact that the country that emerged after 1971 had one very large province – the Punjab – in the federation. It could, and perhaps would, dominate the federation even more than was the case in the 1947-1971 period when Bangladesh, as East Pakistan, was a part of Pakistan. During that period, in terms of the country's total population, the share of the Punjab was about 30 per cent. It was slightly more than that in terms of its contribution to the country's gross domestic product. With the departure of East Pakistan, these ratios had climbed to 60 per cent.

Accordingly, the smaller provinces demanded that their rights should be protected in the new state that was being organised after the break-up of original Pakistan. This was ensured in the form of several provisions in the 1973 constitution. Without these it is unlikely that Zulfikar Ali Bhutto would have won the support of all the provinces to the constitution that he and his advisors put in front of them. One important provision in the draft was the inclusion of a 'concurrent list' that included the subjects that will be the joint responsibility of the federal government and the provinces. The constitution had two lists, one for federal subjects and the other that were to be the joint responsibility of the federal government and the provinces. The concurrent list included 47 matters, such as civil and criminal law, preventive detention, arms and explosives, drugs, marriage and divorce, adoption, bankruptcy, arbitration, trusts, transfer of property and registration of property, population planning, electricity, tourism, trade unions, and other matters of common interest.

The constitution also had provisions for the settlement of disputes between the governments at federal and provincial levels. The Chief Justice was assigned the responsibility for arbitrating these disputes. The President could establish a Council of Common Interests (CCI) to deal with the matters identified in both the federal as well as the concurrent lists. According to Hamid Khan, a prominent constitutional authority, 'this was meant to be an important body for the provinces to air their grievances. If the federal government or a provincial government was dissatisfied with the decision of the Council, it could refer the matter to parliament for a joint sitting [of the two houses], whose decision would be final.'<sup>5</sup>

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<sup>5</sup> Hamid Khan, *Constitutional and Political History of Pakistan* (Karachi: Oxford University Press, 2001), p.495.

There was no list of subjects for the provinces, the assumption being that all the residual areas will be taken care of by them. Bhutto and his colleagues reached an understanding that the concurrent list will be removed from the constitution ten years after its promulgation. That of course did not happen and the country continued to be run from the centre at Islamabad. Under the 18<sup>th</sup> amendment, there is once again a promise that decentralisation will be achieved not just on paper but also in practice.

The country has also attempted to bring government closer to the citizenry by constituting local bodies, directly elected by the people. A number of different systems have been tried since independence but did not survive long enough to provide services only local governments can effectively deliver. Had one system been allowed to remain in place with changes introduced from time to time, Pakistan would possibly have developed an effective system of local governance. This did not happen. The most elaborate of the previous systems was designed by President Ayub Khan as a part of the 1962 constitution. It was to perform two functions – provide a mechanism for the people to have representation at six different levels of government and to deliver a number of basic services to the people at these levels. The six levels were union, a large village or a cluster of smaller ones; *tehsil*; district; division; province; and finally, the nation. Each of the bottom four jurisdictions had councils made up of elected representatives of the people and government functionaries. The top two tiers had assemblies. The people directly elected only the Union Councilors, while members of other councils were elected indirectly by the members of the bottom tier. The Union Councilors, 80,000 in all – 40,000 from each wing of the country – also served as the electoral college for the office of the president.<sup>6</sup>

Called the system of ‘basic democracies’, the new structure was successful in bringing development to the country’s villages, and to create the economic and administrative environment for the launch of Pakistan’s first green revolution in the late 1960s and early 1970s. But the structure was not accepted by the political establishment as an appropriate system of representation. It was not representative enough, particularly for electing the president and the members of the provincial and national assemblies. As already indicated, the system was dissolved in 1969.

The most recent of the attempts to create a system of local government was made by the administration headed by President Pervez Musharraf that provided the stool of governance with its third leg – governments at the local level. The design that was incorporated in the ordinance issued in 2001 by the president drew inspiration from the system of ‘basic democracies’. The provinces were instructed to issue their own local government laws as long as the basic construction proposed by Islamabad was not tempered with.

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<sup>6</sup> For the reason why the military leaders developed this elaborate structure, see Muhammad Ayub Khan, *Friends not Masters, A Political Autobiography* (London: Oxford University Press, 1967).

There is a default constitutional condition in Pakistan, where the country reverts back periodically to a highly centralised system of management. It has happened during the periods of military rule as well as when politicians with strong popular backing were in power. The military accustomed to a centralised command and control system of management was not willing to devolve power to other institutions that could possibly challenge its authority. Strong political men and one politically powerful woman who have governed Pakistan were equally reluctant to share power. This trend started with Zulfikar Ali Bhutto, who did not fully subscribe to the spirit of the constitution he had helped write and was responsible for having it accepted by all major parties. He began to subvert it the moment it was promulgated. The provisions that came under attack were precisely those that were meant to create a functioning federal state. Once the constitutional dust had settled down, the prime minister turned his attention to removing the administrations that were not in the control of his political party, the Pakistan People's Party (PPP). These were in Balochistan and the Northwest Frontier Province (NWFP).

### **The 18<sup>th</sup> Amendment**

The 18<sup>th</sup> amendment does more than repeal the 17<sup>th</sup> amendment that had given enormous authority to the president. It also removes the clutter that had accumulated in the constitution as a result of the tinkering by two military leaders, first President Ziaul Haq and then President Pervez Musharraf. Will the passage of this amendment ensure Pakistan's move towards making parliament sovereign and introducing genuine federalism in the country? Only time will answer this question. As has been shown by the experience of several other federal systems, decentralisation of power to governments at the sub-national level takes more than provisions in the constitution. Ultimately it depends upon how the various parts of the government structure act out their roles.

There cannot be any doubt that the 18<sup>th</sup> amendment will have a profound impact on the way the country is governed and its economy is managed. If the federating units – the provinces – receive additional powers as a result of the abolition of the concurrent list put into the 1973 constitution by its framers, it will mean transferring large amounts of economic authority to the provinces. They will, for instance, have the right to manage labour laws; environmental impact of development in both the public and the private sectors of the economy; generation of much larger amounts of electricity than currently permitted; development of infrastructure; movement of goods and commodities within their own boundaries; improving the level of education and providing for the acquisition of usable skills by the populace. This will happen only if the provinces find a way of financing these activities. If they remain dependent on the central government for funds, the autonomy promised by the amendment will remain illusory. What is



the meaning of the 18<sup>th</sup> amendment for economic decentralisation? We will take up this matter in a later part of the paper. For the moment, we will discuss the process adopted to write the amendment as well as its content. Both are worth noting in some detail.

## The Process

The amendment has as its source the Charter of Democracy (COD), signed in London by Benazir Bhutto, chairperson of the PPP, and Mian Nawaz Sharif, president of his faction of Pakistan Muslim League, [PML(N)]. The signing took place in 2006 when President Pervez Musharraf was at the peak of his power and was engaged in creating circumstances that would help to prolong his tenure. At the time of the signing, the Charter seemed like a hope that would take a miracle to realise. But miracles happened. These included the decision by President Musharraf to allow the two former prime ministers to return home from exile; his decision to withdraw the emergency under which he had placed the country in November 2007 after dismissing the Supreme Court Chief Justice for the second time in less than eight months; to hold free and fair elections in February 2008; and to resign from his office in August 2008. Normalcy did not return immediately after the departure of the military president. President Asif Ali Zardari, who succeeded Musharraf, initially resisted the effort to restore the Chief Justice to his position and to cleanse the constitution of the distortions introduced by the military presidents. However, he finally agreed to set into motion a process that would result in the incorporation of the COD in the constitution by way of the 18<sup>th</sup> amendment.

A 28-member Constitutional Reforms Committee was constituted in 2008 under the chairmanship of Raza Rabbani, a PPP member of the national assembly who had shown the ability to act independently of his party's leadership. This became evident when the lawyers launched a movement in the country to restore the Chief Justice to his position from which he had been fired twice by President Pervez Musharraf. The composition of the committee deviated considerably from the party composition in the national assembly. Only 13 of its 26 members were from the four large parties – the PPP; the PML(N); the PML(Q), a faction of the Muslim League that had supported Musharraf while he was in power; and the Mutahida Qaumi Movement (MQM), a party that was created to protect the interests of the refugees who had migrated from India after 1947 and had settled in Karachi and other cities of southern Sindh. The PPP had five members, three each from the two Muslim League factions and two from the MQM. The remaining 13 belonged to ten different parties and groups. This composition was meant to provide confidence to the smaller parties that their wishes would not be ignored.

The committee assigned itself an ambitious mandate. The most important objective was to strengthen parliament as well as the provincial assemblies. The chief executives – the prime

minister and the provincial chief ministers – would be guided by their respective assemblies and would be accountable to them. This would ensure government transparency and also reduce individual discretion. The constitution would also revert to its original intent, ie. accommodate provincial autonomy. Fundamental rights will be strengthened by expanding their reach. Judiciary would also be strengthened.

The committee conducted its business in relative secrecy in order not to have a national debate while it was deliberating the various clauses in the draft amendment. The members agreed not to give public statements and speak to the press on the issues that were being discussed even when the committee was not in session.

The amendment was voted by the committee after a slight hiccup when Nawaz Sharif and his party refused to give ground on two issues: the renaming of the NWFP as Pakhtunkhawa, and the mechanism for appointing judges to the superior courts. The committee made some accommodations in the final draft to keep the party on board. The draft amendment was placed first before the National Assembly and then before the Senate. The vote in assembly was 292 in favour and none against. The vote in the Senate was 90 in favour and none against. This represented an enormous display of confidence in both the processes that was followed by the drafting committee in producing the amendment as well as in its content.

## The Content

The amendment met the long-standing demand of the Pakhtun population of the NWFP to rename their province by identifying it with the main ethnic group living in the area. The group would have preferred the province to be named Pakhtunkhawa but this was resisted by other ethnic groups, in particular the Hindkoh speakers who live in the areas bordering Punjab. A compromise was struck and the province was given the unwieldy, hyphenated name of Khyber-Pakhtunkhawa. That did not satisfy the Hindkoh speakers. There were riots in the area after the amendment was passed, leaving several people dead. Giving the NWFP a long name may have stalled the move that is gaining some momentum in the country to create a number of new provinces to accommodate different linguistic groups. If that move was to succeed, Pakistan will follow the example of neighbouring India that reorganised the country essentially on linguistic grounds soon after achieving independence.

One of the more important changes in the constitution pertains to the powers of the president. All the authority bestowed on this office by General Ziaul Haq's 8<sup>th</sup> amendment and General Pervez Musharraf's 17<sup>th</sup> amendment were withdrawn. While the president retains the right to be informed on all matters pertaining to domestic and external policies, he cannot now require

reports on any administrative or legislative matters to be submitted to him. These reports were the basis of one dismissal of the prime minister of the day by President Ziaul Haq (Mohammad Khan Junejo), two dismissals by President Ghulam Ishaq Khan (Benazir Bhutto and Mian Nawaz Sharif) and one by President Farooq Leghari (Benazir Butto). In other words, the notorious section 58.2(b) that allowed the president to dismiss the prime minister on such vague charges as incompetence and poor governance was used more frequently by civilians than by military leaders. This clause was inserted in 1985 by the 8<sup>th</sup> amendment brought in by Ziaul Haq when he began the process of sharing power with politicians. It was removed in 1997 by the 13<sup>th</sup> amendment piloted through the national assembly by Prime Minister Nawaz Sharif who wanted to become the chief executive of the state by diluting the powers of the president. It was reinserted by Pervez Musharraf in 2002 when the National Assembly, at his urging, passed the 17<sup>th</sup> amendment. The need for this arose after Musharraf held elections and was in the process of transferring some executive authority to an elected prime minister. The 18<sup>th</sup> amendment has removed the clause once again.

Further limits have been placed on the powers of the president. Time limits have been fixed for the president to act on the advice given to him by the prime minister and his cabinet. President's discretionary powers to dissolve the National Assembly or to refer a matter to referendum have been removed. Referendums were conducted by both Presidents Ziaul Haq and Pervez Musharraf to win legitimacy for their rules. In both cases, the results were massively rigged. The president is now to appoint the provincial governors and service chiefs on the advice of the prime minister which is binding.

The amendment has several provisions to give more power to the smaller provinces. The constitution had created a bicameral legislature in which the Senate, the upper house, was to have equal representation of all provinces. The amendment seeks to strengthen the Senate. The membership of the Senate increased from 100 to 104; the prime minister and his cabinet will be responsible to both the National Assembly as well as the Senate; the body must meet for at least 110 days a year rather than only 90 days; the president cannot issue an ordinance when the Senate is in session; the Senate can discuss money bills (budget etc.) for 14 rather than seven days; and the government's annual report on implementation of principles of policy must be placed before both houses of the parliament.

The amendment strengthened Article 6 of the constitution that was originally inserted to deter military takeovers. In the original constitution, any effort to dislodge a duly constituted government was made a capital offense punishable by death. This did not however prevent the coups staged by Generals Ziaul Haq in 1977 and Pervez Musharraf in 1999. In both cases, when challenged, the acts were given legal cover by the Supreme Court. Using legal contortions – the 'doctrine of necessity' among them – the superior courts managed to justify the string of military

takeovers and also the subsequent indemnification of the measures they had adopted in office. The amended article expands the definition of high treason by including in it an act of suspending the constitution or holding it in abeyance. Further, the Supreme Court or the High Courts cannot validate assaults on the constitution.

The number of fundamental rights have been increased to include the right to fair trial, the right to information and the right to education. It is now compulsory for children between the ages of five to 16 years to be in schools and for the state to provide them with free education. This provision will have enormous implications for a resource-strapped state that spends just under two percent of the gross domestic product on education. Meeting this condition could quadruple this proportion.

For the appointment of judges – a contentious area that held up the final agreement on the draft for a few days – the amendment appoints a seven member Judicial Commission headed by the Chief Justice of the Supreme Court. The recommendations of the Commission will be sent to an eight member Parliamentary Committee with the authority to reject the nomination by no less than 75 per cent majority. This section of the amendment has been challenged in the Supreme Court by some members of the legal community who believe that it will politicise the judicial system and not necessarily make it independent of executive control. Whether it remains a part of the amended constitution will be decided by the Supreme Court. The amendment has created a new high court at Islamabad, the federal territory, and has established two additional benches of the High Courts at Mingora in Khyber-Pukhtunkhwa and at Turab in Balochistan. The motives for this were to accommodate the wishes of the people of these two provinces. The Taliban led rebellion in Swat of which Mingora is the capital was prompted in part by people's unhappiness with the time it took the courts to settle disputes and render justice. There is an expectation that by reducing the physical distance between some of the far-flung areas in some of the more backward provinces and judicial centers will help to take care of some of the grievances of the people.

For the focus of this paper – the need to bring the government closer to the people – the most important changes in the constitution relate to the assigning of responsibilities to governments at different levels. The concurrent list in the original document that gave joint responsibilities to the federal as well as provincial governments has been removed. However, criminal laws, criminal procedures and the rules of evidence remain subjects on which both Parliament and Provincial Legislatures can make laws. The Council of Common Interests (CCI) has been greatly strengthened. It shall now be chaired by the prime minister and meet at least once a quarter. There will be a permanent secretariat, comprising of the prime minister, three federal ministers and the four chief ministers. The list of subjects that will fall within the purview of the CCI has been substantially expanded, including some of the subjects that were on the abolished

concurrent list. Some of the subjects which will now be subject to deliberation by the CCI include major ports; electricity, presumably all aspect of it including generation, transmission and distribution; all regulatory authorities; national planning; public debt; census; legal, medical and other professions; higher education; and inter-provincial matters and coordination. The federation will not be allowed to build hydroelectric stations in any province without consultation with that province.

The amendment has removed the sixth schedule to the constitution that had given protection to 35 laws and ordinances promulgated during the Musharraf period. These could only be amended with the consent of the president. Included in these was the Local Government Ordinance of 2001. This leaves open the question whether the provinces would continue the systems that were in place as a result of the 2001 Ordinance. However, the provision inserted by the 17<sup>th</sup> amendment by President Musharraf relating to the devolution of power to local governments has been retained and expanded to provide that elections should be held to local councils by the Election Commission.

An effort has been made to strengthen the Election Commission and make it autonomous. The term of office of the Chief Election Commissioner (CEC) has been increased from three to five years and the number of Commissioners has been fixed at five. The CEC will be appointed by the president after he has received a binding recommendation from a committee of the parliament that will include the leader of the opposition. A panel of three members will be sent to the committee for its consideration; the committee will select one person from the panel and forward his (or her) name to the president for appointment. The commission's powers have been expanded to include the preparation of electoral rolls, holding elections to the seats that fall vacant, appointment of election tribunals to handle complaints, and staff recruitment.

There are a number of provisions pertaining to strengthening the finances of the provinces. They will have the right to raise domestic or foreign loans with the approval of the National Economic Council, a body chaired by the Prime Minister with its Secretariat in the Ministry of Finance. They will collect the entire amount generated by excise duty on oil and natural gas. Future National Finance Commissions cannot issue awards that reduce the combined share of the provinces in the central 'divisible pool'. In other awards, the amount given to the provinces by the seventh award has been frozen in time. The only discretion they have is to change the proportions allocated to the provinces.

There are some other amendments to the constitution pertaining to political matters that warrant some mention. As a nod to the peculiar political circumstances in Pakistan with the heads of the three of the four major political parties – the PPP, the PML(N) and the MQM – not present in the parliament, disqualification of members defection will be undertaken only on the initiative of the

party head and not by the parliamentary leader. Inserted in the constitution by the 13<sup>th</sup> amendment to deal with horse-trading that had marked politics in the 1990s, members of the assembly who cross the floor may risk losing their seats. The new provision means that the absent leaders will be able to rule over their parties from outside the parliament or the provincial assemblies. Also, the clause in the 17<sup>th</sup> amendment that limited the tenure of the prime minister to two terms has been removed, thus enabling Nawaz Sharif to once again aim for that position, which were held twice in the 1990s. These changes will have intended or unintended consequences of strengthening the hold of some of the powerful families over the political process.<sup>7</sup>

### **Will the 18<sup>th</sup> Amendment Deliver Decentralisation?**

With the passage of the 18<sup>th</sup> amendment, Pakistan may be on the way towards establishing not only a fully democratic system with political authority vesting in a directly elected parliament, where the military will have to come under the control of the civilian authority. The country may also be moving towards the creation of a federal system in which there is sharing of power between governments at different levels, between the federal and provincial governments and between provincial and local governments. If this happens, what will be the impact on the economy and on delivering services to the people? The answer to this question has been provided by many theoretical and empirical studies done over the years by scholars from both developed and developing countries. While many benefits have been claimed for federalism, it is ‘paradoxical that we observe so few countries in the world which possess all the attributes of a strong federalist structure’, writes Dennis C. Mueller of University of Vienna. ‘There are two possible explanations for this paradox. First, there may also be several disadvantages associated with federalism, so many that for most countries the disadvantages outweigh the advantages. Thus full blown federalism may be rare, because in fact it is undesirable. The second possible explanation for federalism’s rarity is that it is somehow inherently unstable. When chosen, it fails to survive not because of any fundamental difficulty in the outcome it produces, but because of the existence of forces in a democracy which undermines it.’<sup>8</sup>

To explain the case for federalism, we should perhaps start with the reason why the state is involved in economic matters in the first place. The main reason for this is made in the public choice literature according to which markets fail in many situations, particularly when public

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<sup>7</sup> Pakistan is not the only country in South Asia that has developed the tradition of dynastic politics. It is prevalent in Bangladesh, India and Sri Lanka as well. It has been argued in a recent article that the new breed of leaders emerging in India have strong family connection to political families that have played important roles in the country. See James Lamont, ‘The loom of youth’, *Financial Times* (11 May 2010), p.7.

<sup>8</sup> Dennis Mueller, *Federalism: A Constitutional Perspective* (Vienna: University of Vienna, n.d.), mimeo.

goods such as defense of the borders, police protection, providing a bridge connecting two places across a river, or where what economists call externalities become important. There are positive externalities (when educated people work together to bring about positive change) and negative externalities (when industrialisation produces air and water pollution). Markets are less efficient providers in both cases. The governments, at least in theory, do a better job. But what type of government? There are three possibilities: a unitary state, a federalist system, or a confederation. We will concern ourselves with the first two.

A unitary system need not be distant from the people especially when the state is decentralised with government departments organised to reach people where they are located. This was the system used by the British during their long rule of India and was the one that Pakistan inherited when it became an independent state. But it was not a federalist system in the sense that elected representatives of the people were not responsible for providing public goods to the people. The responsibility rested with the officials appointed by a highly centralised state. In British India, the responsibility for providing public services rested with the members of the powerful Indian Civil Service (ICS). The ICS was variously called the ‘steel frame’ of the British raj in India or the ‘mai bap’ of the people over whom its members ruled.<sup>9</sup> In a unitary system, responsibility to the people is only at the central level. In a federal system, people have control over those who serve them through elections. This in theory is the system that Pakistan attempted to establish following the adoption of the 1973 constitution.

Once the decision is made to establish a federal system, the next question concerns its optimal design. How many levels of government should there be? What should be the division of responsibility among them? How should the governments at various levels finance their activities? The 1973 constitution established two tiers of government, one at the central level and the other at the provincial level. The 17<sup>th</sup> amendment inserted into the constitution by President Pervez Musharraf effectively introduced a third tier into the structure. This was done by devolving various state responsibilities to an elaborate system of local government, patterned to some extent on Ayub Khan’s multi-tiered system of ‘Basic Democracies’. A new position was created to assign responsibility for delivering public services to an elected official called the *nazim*. This official was to be elected by the people and the bureaucracy at the local level was made responsible to him (or her). The *nazim* effectively replaced the Deputy Commissioner who was the anchor of the administrative system Pakistan had inherited from the British.

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<sup>9</sup> Perhaps the best account of the role performed by the Indian Civil Service is to be found in Philip Woodruff, *The Men Who Ruled India* (London: W.W. Norton, 1985). The book was initially issued as a two-volume study under the titles of *The Men Who Ruled India: The Founders* and *The Men Who Ruled India: The Guardians*. The author used the pseudonym of Phil Mason to hide his identity when the books were first published since at that time he was still in the service of the government.

The 1973 constitution, even when amended by President Musharraf, did not provide many resource generation responsibilities to the governments at the sub-national levels. They were mostly dependent on the central government for financing their activities. The provincial governments were given some say in the amount of resources they obtained from the centre by their representation in the National Finance Commission (NFC). The NFC was to be convened every five years. According to Section 160 of the constitution, ‘Within six months of the commencing day and thereafter at intervals not exceeding every five years, the president shall constitute a National Finance Commission consisting of the Minister of Finance of the Federal Government, the Ministers of Finance of the Provincial Governments, and such other persons as may be appointed by the president after consultation with the governors of the provinces.’<sup>10</sup> The NFC would decide on the formula to be followed for allocating the resources available in what was called the divisible pool. However this provision, like so many others in the constitution, was largely ignored. For instance, the most recent NFC award was signed in 2009, almost 13 years after the one it replaced. Whatever shares were agreed upon were provided to the provinces in the form of grants. According to many economists, this way of providing resources to the federating units introduces serious distortions.

More than a hundred years ago, the economist Knut Wicksell established what has come to be called the Wicksellian connection. According to this, each public expenditure should be coupled with a tax to finance it so that the voting public knows how much it is paying for the services being provided. Some experts go a step further. They suggest that the people receiving services from the state, no matter where the state is located, should be charged for the services being provided. This approach serves several purposes. It forces the state to be efficient in the business in which it is involved. It also makes it possible for the people to bypass the state and go to the private sector if they are not happy with the services being made available by the state. This is what has happened in the case of education and health services for the more well-to-do segments of the Pakistani society. The people who can afford to go to the private sector have largely abandoned the state in these areas. It also forces the state to choose between different programs constrained as it would be by the envelope of available resources.

There is a virtual consensus among economists that inter-governmental grants lead to an expansion of the public sector, as there is empirical evidence to suggest that a local government generally spends a far larger fraction of an unconditional grant from a higher level of government than its citizens would consider to be optimal. Applying this finding to Pakistan where financing for the provinces will come mostly from the NFC awards, the 18<sup>th</sup> amendment induced autonomy will not necessarily lead to economic efficiency. The provinces must be given

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<sup>10</sup> Yasmeen Rehman, *The Constitution of the Islamic Republic of Pakistan, 1973 as Amended by Constitution (18th Amendment) Act, 2010* (Lahore: Punjab Law Book House, 2010).



a way to finance most of their own development and take full responsibility for the resources they mobilise, including servicing them if they were obtained through borrowing.

## Conclusion

While the 18<sup>th</sup> amendment to the constitution has taken a major step forward in moving Pakistan towards a federal system, the real test of the efficiency will come once the envisaged system begins to take shape. The passage of the amendment and its signing into law has not stilled the controversy that surrounds many aspects of governance in Pakistan. Many petitions have been moved in the Supreme Court challenging the Parliament's right to bring about such a major change in the original structure. Some legal experts contend that parliament, even when voting unanimously, as was the case with the votes in favour of the amendment, cannot bring about a fundamental change in the original structure. Others maintain the opposite.<sup>11</sup>

Another test will come in terms of providing services for which the provinces will have the responsibility with the abolition of the concurrent list by the 18<sup>th</sup> amendment. Most economists agree that basic services are better provided by the governments that are closer to the intended beneficiaries. Decentralisation of government's authority should help in addressing the problem the country faces as the number of people living in absolute poverty increases. But will the provinces have the resources to carry out this mandate? The amendment has largely left this as an open question, which is a mistake. It is only when the devolution of responsibility is coupled with the responsibility of raising resources that the real test of the new system will come. Preceding the passage of the amendment was the announcement of the 7<sup>th</sup> NFC award which has broken new ground in increasing the combined share of the provinces in the resources generated by the federal government. The NFC also provides a much larger share – 9.1 per cent of the divisible pool – to Balochistan, the country's most backward province. However, grants made as part of the NFC rewards do not necessarily produce fiscal efficiency.

Then there is a lesson Pakistan's history has to teach. The process of centralisation within a federalist structure does not remain fixed. Pakistan's history is so pervasive worldwide that it has come to be referred to as the Popitz law, named after the German economist who in the early part of the previous century, identified the tendency toward centralisation in state revenues and expenditures. According to a 2004 study by Alberto Diaz-Cayeros, it is suggested that this law has the support of empirical evidence. His conclusion is based on a study of 20 countries, where he states, 'Starting from highly decentralised tax systems in 1930s, unitary and federal countries

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<sup>11</sup> One example of the sharp dispute on this issue is the exchange outside the Supreme Court between two prominent lawyers, Aitzaz Ahsan and Akram Sheikh. See Nasir Iqbal, 'Aitzaz, Akram spar over parliament', *Dawn* (21 April 2010), pp. 1 and 5.

alike concentrated fiscal authority in the hands of the national governments'.<sup>12</sup> Will Pakistan once again revert to that situation? Again, only time will tell.

Then there is the question of the impact of globalisation on regional development within federalist structures. It has been noted by several scholars that with the easy movement of capital across national frontiers, there is intense competition among federating units within federal structures. This has been seen in federalist systems in both developed (Australia, Canada, the United States) as well as in the emerging parts of the developing world (Brazil, China, India, South Africa). Economists call it 'competitive federalism'.<sup>13</sup> This aspect of decentralisation is not touched upon in this brief analysis. However, it is important to underscore that if the provinces of Pakistan do acquire significant amount of economic authority, they may start competing with one another for securing scarce foreign capital flows, in particular foreign direct investment. This has already happened to some extent with Sindh working to pull in real estate investments from the Middle East and the Punjab working with China to establish an industrial estate.

There is no doubt that the 18<sup>th</sup> amendment to the constitution has taken a giant step towards instituting political and fiscal federalism in the country as the basis for improving the quality of governance. Its success or failure would depend upon how those charged with policy-making decide to move forward and make use of the opportunities made available.

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<sup>12</sup> Alberto Diaz-Cayeros, 'The centralization of fiscal authority: An empirical investigation of Popitz's law', *paper presented at the Annual Meeting of the American political Science Association* (2 – 4 September 2004).

<sup>13</sup> This subject was covered in an international symposium held in New Delhi in August 2003 and reported in a Indian journal. See 'Federalism in a Global World: Challenges and Responses', *Economic and Political Weekly*, (6 September), pp. 1-16.