

Federalism & Provincial Rights

[Implications of the 18th Amendment]



Human Rights Commission of Pakistan

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Consultation on Federalism and Provincial Rights

On November 15, 2010, the Human Rights Commission of Pakistan held a day-long consultation on federalism and provincial rights at Lahore. Among others, political leaders and parliamentarians including Senator Haji Muhammad Adeel and Ehsan Wyne of the Awami National Party, Senator Jahangir Badr and Syed Zafar Ali Shah, member of the National Assembly (MNA), of the Pakistan People's Party, Senator Professor Muhammad Ibrahim of the Jamaat-e-Islami, and Naseer Ahmed Bhutta MNA of the Pakistan Muslim League-Nawaz, renowned economist Dr Pervaiz Tahir, civil rights activist Zafarullah Khan and noted civil society activists and lawyers including Hina Jilani, S. M. Masood, Imtiaz Alam, Farooq Tariq, HRCPC Chairperson Dr Mehdi Hasan and Secretary General I. A. Rehman participated in the deliberations. An account of the deliberations follows:

I. A. Rehman

Everyone agrees that for good governance it is imperative that the government's actions are in accordance with the constitution and the law. The question of the constitution is a complicated one in Pakistan.

The country has two histories, one began in 1947 and the other on December 20-21, 1971. The Pakistan of 1947 ceased to exist in December 1971, after which a new and smaller Pakistan emerged. There was a broad agreement in the country that military rule during 1958-71 had led to the state's dismemberment. Thus, when an interim constitution was made in April 1972, President Zulfikar Ali Bhutto said that the country would get a constitution that would ensure that there was no scope for or possibility of subversion of the constitution and martial laws would become a thing of the past. However, in the first 25 years of Pakistan's history, the country was under martial law rule for 12 years, in the

38 years after the interim constitution the country has remained under military rule for 20 years. Throughout these years the students of politics have grappled with the question as to why the constitution does not work in Pakistan. Many reasons are cited but a fundamental cause is that we have failed to fulfil the demands of federalism.

The federation has been a blessing in one sense and a curse in another; a blessing because the diversity of cultures and aspirations of the various nations that call Pakistan their home have repeatedly blocked the rise of fascism in the country. All movements for the people's rights and democracy traditionally sprouted from the federating units' demands, and these movements have kept the federation intact. Federalism has been a curse because failure to fulfil its demands has caused one crisis after another. The first text on the subject that used to be taught in colleges and universities is Lord Dicey's work on constitutionalism which says at the very beginning that in a federation there must be different peoples and diversity. If there is no diversity a federation is not needed. However, we have constantly tried to deny this reality and the history of this denial is quite interesting. After the 1857 war of independence, the people started feeling that the centralized system of governance was not suited to the subcontinent. Therefore, the grant of as much power to the provinces as possible began to be demanded. This demand received support from the British policy of introducing the system of representative government from the bottom upwards and not from top to the bottom. Therefore, establishment of municipalities and other local bodies began in the subcontinent before the creation of any representative provincial assembly.

The British objective in establishing this bottom-up democracy was obvious: they wanted the people to be so occupied with their local affairs that they could not concentrate on the fact of their being ruled by a foreign nation.

In the 1919 constitutional plan, the provinces were given powers for the first time in the sense that the elected ministers for the transferred subjects were invested with authority to a considerable extent. The transferred subjects were those that had a direct bearing on



A general view of the consultation.

the people's lives, such as education, health, public works, small industries, and because of this the people's sense of provincial identity was strengthened.

The people had the experience of using their authority at the provincial level first and at the central level much later. Therefore, their association during the constitutional period was with respect to the provinces. Even today, we hear in constitutional debates that the provinces pre-existed Pakistan. As is well known, a federation may come into being in two ways, either various independent entities agree to come together in a federation, or a decision is made that because of cultural, linguistic and political diversity in a country a federal scheme would be more suitable.

An interesting aspect of the constitutional debate in India was that on account of the public experience under the British rule the two main political parties, Congress and Muslim League, favoured a centre with limited powers. However, in the mid-1940s Congress changed its stance and under Nehru's leadership it began arguing for a strong centre and centralized planning, while earlier on Maulana Azad as head of Congress had pleaded that the centre should only have three subjects, finance, foreign affairs and communications, and all other matters should be left with the provinces.

The Muslim League had favoured provincial autonomy from the beginning, mainly because its leaders thought that they would thus have a majority in three or four provinces as otherwise, on account of the majority of non-Muslims at the centre, they would not have much of a say in national affair. By 1940 the people had developed their interest in provincial autonomy to such an extent that it had to be said in the 1940 Lahore Resolution that Muslim majority areas be demarcated as states in which the units would be independent and sovereign. Many historians believe that without a clear acknowledgement of provincial rights it would not have been possible for the Muslim League to get the 1940 Resolution adopted.

After Pakistan came into being, however, it is said that the problems confronting the state were so grave that the government became increasingly centralised. First, the centre was short of financial resources, therefore, initially it demanded the right to charge some taxes that were to be levied by the provinces. Later, the change was made permanent under a new economic package. Secondly, while tackling the problems encountered in constitution-making, the rights of the units making up the federation were ignored. The 1956 Constitution, barring a few provisions, was essentially a copy of the Government of India Act of 1935, especially with reference to power-sharing. That caused strains in the province-centre relations and eventually forced the Bengalis out of Pakistan. By that point the ruling elite had realized that a failure to address the concerns of provincial entities could again jeopardise the country's integrity. That is why in the 1973 Constitution some concessions were given to the federating units.

A factor contributing to this shift was the fact that only two of the four provinces were ruled by the majority party. Therefore, following consultation in the All-Parties Conference which lasted four days, a consensus on increasing the powers of the provinces took shape. In his speech while presenting the constitution bill Law Minister Abdul Hafiz Pirzada praised federalism to the extent of suggesting that it was inconceivable to think of Pakistan without

thinking about federalism. He said that for several years there had been demands for a balance between the powers of the president and the prime minister, whereas the real problem was the absence of federalism. Towards the end of his speech he had said that “we are at the moment on crossroads and we are engaged in a very onerous and honourable task—to give this country a lasting constitution, a viable constitution, a workable constitution, so as to bring happiness and sunshine back to the country of which it has been deprived for the last 25 years”. But it was not that lasting, viable and workable a constitution, because while raising the structure of the federation, the political rights that should have been conceded to the provinces were not given.

As long as we were under the British rule, the argument was largely constitutional – that the provinces should have political rights—but after independence and emergence of an independent federation two arguments became strong, economic and political. The political argument was that the federating units should have political powers. The economic argument was that the provinces should have a share in resources, jobs and the authority to address their problems. Since that did not happen, the old squabbles returned.

After India’s independence, Congress also encountered similar problems but managed to overcome them in three decades. Under Indian Independence Act, the centre’s authority under the Government of India Act 1935 to dismiss a provincial government was withdrawn. The Indian government resumed the practice of dismissing provincial governments, especially those formed by parties other than congress, e.g, the Communist governments in Kerala and West Bengal. This continued till the Indira Gandhi era when she was obliged to reinstate the Andhra Pradesh government she had dismissed. We did not learn that lesson for a long time, and perhaps have not learnt it to this day. In Pakistan, the centre started interfering in the provincial domain within a month of the country’s independence.

Then Section 92-A was introduced that legitimized the centre’s dismissal of provincial governments. The question of political empowerment remained pending until 1970, because the centre manoeuvred unilaterally to merge the Western provinces into a One Unit and until 1970 the entire struggle remained focused on doing away with the One Unit. Eventually, One Unit was unscrambled in 1970 and so was the parity formula. After the country’s dismemberment’ in 1971 began the second of the two histories of Pakistan that I had referred to earlier. The provinces’ demand for their due share in resources and administration remains unfulfilled to this day and the centre remains under pressure in that respect.

The army benefited from all these happenings. That is where the political wrangling would eventually end. The experts are unanimous that federalism can grow only in a democracy. Dictatorship does not accept federation because it is by definition a centralized government. Therefore, whenever pressure grew on the federation and the government was unable to deal with it within the constitutional framework the drift paved the way for the military to take over.

The system that was established after 2008 for the first time paid attention to this problem. I am not suggesting that they paid sufficient or appropriate importance to the matter but they did do something. It was decided that major changes should be made to the constitution. However, I am a bit surprised by the terms of reference of parliamentary constitutional reform committee for the 18th Amendment. The committee shall propose

amendments to the constitution keeping in view the 17th Amendment, Charter of Democracy and provincial autonomy, in order to meet the democratic and Islamic aspirations of the people of Pakistan”. I have two objections. Firstly, why did they stop at the 17th Amendment? What about Ziaul Haq’s amendments to the constitution? And secondly, “in order to meet the democratic and Islamic aspirations of the people of Pakistan”. I would have been happy if they had said “and in order to meet the demands of the pluralist society of Pakistan”. That would have made sense to us, would have made it clear that political autonomy is not an administrative issue alone. You insist again and again on a unity that is not there, which is artificial, and this denial of diversity leads to other problems.

Despite all these shortcomings, the 18th Amendment is a big achievement. Proposing 101 changes in the constitution and then getting them approved from parliament is no mean feat. However, there has been so much controversy on two or three changes, particularly Article 175-A, that people tend to forget that 100 or so other changes had also been made to the constitution. In one way or another, we have been seeking to evade federalism, and as a consequence good governance has remained a mirage in Pakistan. Because if in any region of the country the people think that they are being kept in a federation against their will or that their rights are not being respected and ensured, then that region would always remain unstable. That is why the Human Rights Commission of Pakistan (HRCP) thinks that it is important to contribute to the discourse and emphasise that there is more to the problems of governance than merely adding a few more words to the constitution.

One challenge in Pakistan is that governance is considered a synonym for administration, while administration is a clerical job and governance a creative political endeavour. Governance is prioritisation by political representatives of the people of the people’s needs. It is not governance to issue an order to top police official in a province stating that notice has been of taken of a crime and that the culprits must be apprehended within 24 hours. This is something unheard of in a modern state. Why should it even need to be said that culprits must be brought to account? And this trend has spread to such an extent that every branch of government in Pakistan only issues meaningless orders. There is no persuasion, discourse or dialogue, only orders. Even the branch that was supposed to interpret laws issues such orders, as does the branch that was supposed to legislate. Therefore, HRCP considers that expanding this discourse is essential and this consultation is a step in that direction.

Dr Mehdi Hassan

I will make three brief points. Firstly, Pakistan had come into being on the basis of provinces in 1947. The provinces had decided through resolutions that they wanted to make a new country. Secondly, unless political parties in a federation decentralize, i.e., unless their branches in different federating units have the authority to make decisions and draw up policies about themselves, the requirements of federalism are not fulfilled. There is no such decentralization in any political party in Pakistan, and devolution of power to units is not in practice and that was one reason for Bengal becoming Bangladesh. Additionally, because of a cultural and philosophical vacuum, and lack of a national philosophy, every government overstressed national oneness and artificial unity. The various cultures and ways of life of the federating units and regions were not only ignored, they were also discouraged and the people working for their promotion accused of being traitors. This

rhetoric and overstressing of oneness undermined federalism and Pakistan's federal structure. Finally, while for more than three decades military dictators and also civilian dictators have ruled the country—and dictatorships operate on the basis of centralism—they could not have tried to empower the people. Unless there are effective local bodies, until the people are empowered, at the provincial and local levels, federalism and federal structure cannot be successful.

Zafarullah Khan¹

In the 28 federal states of the world, politics and political parties are also federally organised. Unfortunately, this element has seldom been debated in Pakistan. In some political parties, decentralization seems impossible; they are top-heavy political parties. But despite all the shortcomings, two hopeful developments can be identified: Charter of Democracy and the 2008 elections.

In the Charter of Democracy the two main political parties evolved a broad consensus on some vital issues. The political arithmetic that emerged after the 2008 elections demonstrated that, given the number of parliamentarians, attainment of simple majority may now be a challenge for any political party, and the age of rule by two-thirds majority seems to be over although the impossible can happen in Pakistan. After the elections, the peripheral political parties increased cooperation with the mainstream ones and the acceptance of reconciliation as a political objective encouraged a debate on federalism, provincial rights and many other issues.

The process and the product (18th Amendment) can both be criticised. The process was held *in camera* and after a pillar of state had some concerns the *in camera* process was discontinued and details shared with the media, to say what decisions were being made, especially with regard to the judiciary. The product may not be ideal either; there are many grey areas which I have touched upon in my paper. May be many other issues could have been addressed. But the outcome still reflects a grand political consensus. It even goes beyond the political consensus of the 1973 constitution. Abdul Samad Achakzai's party also participated in this amendment when in 1973 there were many disagreements. It is said about Mr Bizenjo that he had sought a number of assurances before signing the 1973 constitution but in the 18th Amendment process his party was also on board. So on one level, numerically and symbolically, the process of the 18th Amendment seems to have gone farther than that of the 1973 constitution. Rather than dwelling on the specifics of this amendment, taking note of two things would perhaps yield more arguments about today's topic. The first is the 11 recommendations articulated by the parliamentary committee in its report, many of which could have been made articles of the constitution. Two members of the committee, Senator Haji Muhammad Adeel and Senator Professor Muhammad Ibrahim, are here and can better explain why that was not done. For instance, one sees the issue of FATA's integration with Pakistan as a challenge to federalism is there in the recommendations. And even more important, the contradictions that have been left out and the issues that have been postponed are reflected in the notes of reiteration. It is unfortunate indeed that

¹ A paper written by Mr Zafarullah Khan for the consultation on political aspects of the 18th Amendment is appended.

that these things have not been covered in media reports and in public discourse.

There are as many as 19 notes of reiteration appended to the 18th Amendment, which emphasise that the process of constituting new provinces should be simplified; one note says that Article 2A should remain part of the constitution while another says it should not; the question of future of FATA has been mentioned; with regard to language and national identity, it seems strange that it is said that promotion of diversity or designating all languages as national languages did not require any resources and only an admission would have been enough. The highest number of notes of reiteration, more than four, is about languages and about acknowledging nations. With regard to the problems of the implementation commission that we now see in the devolution process, in one note of reiteration the Awami National Party had said that at the time of taking loans the centre had never asked the provinces what it was taking on their behalf. Now when it is time to devolve the ministries to the provinces the centre also wants to pass on the liabilities, while these liabilities had not been accumulated with the provinces' consent. This too has been postponed, although agreements and similar things have been included in part two of the Federal List.

When we talk about rights of the provinces, many such questions have emerged more as concerns rather than as amendments to be incorporated. With regard to discourse on the basic law, it has rightly been said that the constitution has remained an unfamiliar document for us.

Due process is not a highlight of our national experience. We want instant justice, and due process often becomes a casualty. I have calculated the ratio of the discourse in the public sphere during and after the 18th Amendment process and found that in around 70



Left to right: Senator Muhammad Ibrahim, Mr Zafrullah Khan and Dr Ikram-ul-Haq. Back row: Mr S. M. Mirza and Ms Hina Jilani

percent of the discourse the constitution is considered an unnecessary document and it has been stated that it will not bring food on the table or that it has nothing for the people. Perhaps the misgivings are not that unfounded because in our constitutional experience we have seen military dictators refer to the constitution as a piece of paper that can be trashed at will. Then they have amended the constitution at will by announcing provisional constitution orders at press conferences and subsequently these amendments have received judicial endorsement under the so-called doctrine of necessity. In the eyes of the citizens ours has remained a very insignificant and irrelevant social contract. There is another angle. In our curriculum, we have included the teaching of the Islamic provisions of even past Pakistani constitutions. I do not oppose that but it must be noted that the constitution does not find a place in the curriculum. We need to educate people about fundamental rights and other provisions to highlight the bearing the constitution has on the lives of the people. If a party is not even aware of its social contract then what can it say about that?

Furthermore, our constitutional mortality ratio has been very high. Despite three artificial stimuli—One Unit, the parity formula and the Objectives Resolution—the 1956 constitution did not work. The same happened with the 1962 Constitution. But the 1973 Constitution has at least a certain resilience. Granted that out of the 37 years of its life it remained in abeyance for 12 years and for another 10 we witnessed a hybrid constitution with the president in uniform, a prime minister from a cosmetically elected parliament, yet no one could completely scrap it. Perhaps for the first time in our constitutional process the concepts of distributive justice and federalism were embedded and acknowledged. Although if one asks whether that has actually materialised, the answer will certainly be in the negative. The issues that have been left untouched in this amendment include the 8th Amendment to the constitution by General Ziaul Haq. We now have multiple judicial systems. Nothing was said about the Federal Shariat Court that had been protected under the 8th Amendment. However, the restoration of a word that Gen Zia had deleted to the Objectives Resolution is good. But then many of the notes of reiteration are about Article 2-A.

The Parliament has resolved a thorny issue by renaming the former NWFP as Khyber Pakhtunkhwa. This was the most celebrated and also unfortunately the most contested issue. But because of this process, for the first time we see flexibility in the discourse that the mechanism to form provinces should be simplified and to me that is a positive political development and if provincial communities want redefining of boundaries then that course should be easily available.

Regarding safeguards for the constitution itself, Article 6 was already there but now new fences have been added to that. Whether these fences can protect the democratic process only time will tell. As regards fundamental rights not only three new rights—right to fair trial and due process, right to education and right to information—have been acknowledged but three rights have been expanded as well, including quota system for under-represented areas.

I would specifically want to make a point about Article 17(4) of the constitution, on which I hold a different opinion. There has been a lot of commotion that the provision about elections in political parties has been deleted. For a start, the demands of ifs and buts in Article 17 are an injustice to political parties because this article is about the right to

association. Germany's is the only constitution where a separate article in the basic law is about political parties. You may have a separate article for political parties but when you talk about the right to association, that also covers trade chambers, bar associations, trade unions and press clubs. Elections to these bodies are not mentioned in Article 17. There are laws for elections in all these bodies, and the same goes for political parties. The Political Parties Order 2002 provides for intra-party elections. But the question of culture in political parties is more important. In my opinion, under the 2002 law the only demand is that there should be internal elections in the party and the gap between two elections should not be more than four years. In 2002, when party elections were held, the so-called King's Party broke into five factions after the elections when those who lost formed their own factions the next day. After party elections in Jamiat Ulema-e-Islam (Fazl) a separate ideological faction emerged. The administrative clause in absence of the required culture in the parties meant that all parties had to experience factionalism. So that clause in fact destroyed political parties.

The point of all this is not to suggest that political parties should not have internal democracy. It should be there as a culture and in a federally decentralized form.

A right with regard to which there have been much controversy is about the provinces' share in services. Again, although it has been suggested that we include reference to a sense of justice in some articles, we see a categorical mention of that mainly in the recommendations, i.e., there should be more representation for the under-represented people in Balochistan. Fundamental rights are not implemented merely by insertion of clauses in the basic law, although such insertion is invaluable in that we can at least demand implementation. If one analyses whether the laws expanded or redefined in the 18th Amendment are sufficient, one has to say that they perhaps are not. Pakistan has ratified the International Covenant on Economic Social and Cultural Rights and the International Covenant on Civil and Political Rights in addition to endorsement of many other international human rights instruments and a whole new set of rights has developed. We do not see that in the chapter on fundamental rights in the constitution.

With regard to parliament's supremacy, the common perception is that the president has delegated his powers to the prime minister. But to my modest understanding, for the first time another attempt has been made, to embed many of these powers in parliament rather than giving them to the premier. For example, the judges' appointment is to be made by the judicial commission; the chief election commissioner will also be named by the parliamentary committee after consultation over names; the prime minister and the cabinet were earlier answerable to the National Assembly, they are now answerable to the Senate as well, as the Senate is a territorial chamber where representatives of the provinces can question them more effectively. The report on Principles of Policy was previously presented to the National Assembly alone but now it will also be submitted to the Senate and this may lead to imbalances in development being properly debated in the Senate. Previously, the president was authorised to issue an ordinance when the Senate was in session, after this amendment he cannot do that any more and now an ordinance can only be promulgated once and its extension would require a resolution of the National Assembly or the Senate.

Although local government has been acknowledged in Article 140-A as the third tier

and the Election Commission has been vested with the responsibility to hold elections, we know that in practical terms no progress has been made in that respect in any province. Previously the president was authorised to put a question through a referendum, now the authority has been given to parliament. In terms of provincial rights, for provincial governors' appointment it has been made mandatory that the governor must be a resident and registered voter of the same province. The Council of Common Interests (CCI) has been made more functional, at least with regard to subjects in part two of the Federal List and must have at least one meeting in each quarter. With regard to provinces' problems, National Finance Commission and National Economic Council composition has also been reformed. There is also now a constitutional guarantee that percentages of the provinces' shares cannot be arbitrarily changed.

I have tried to map the main political discourse with regard to the 18th Amendemnet, which also raises the point as to where do the main political parties stand with regard to federalism. The emphasis of the nationalist parties remained on the 1940 Resolution and on provinces' control over natural resources. But unfortunately the majority of these parties lacked parliamentary representation and their discourse was discerned from media reports and public rallies. The centre left parties' focus was on maximum provincial autonomy and respect for diversity and that is reflected not only in their debates but also in their notes of reiteration. Centre right parties' point of view on reforms was restoration of the original constitution of 1973, supremacy of parliament and balance of power, while religious political parties' focus was on Islamisation. The civil society also submitted its proposals on the secular character of the constitution, independence of judiciary, expanding the scope of fundamental rights and for making the Principles of Policy enforceable. The committee had received 982 proposals. The question is whether all issues have been addressed after the 18th Amendment. Perhaps not and it is not necessary that all issues be addressed in the constitutional realm. There are many questions of governance as well. The people of Balochistan may be more interested in the question of missing persons than in the Aghaz-e-Huqooq-e-Balochistan package. Dera Bugti that provides natural gas to the whole country is at the bottom of the UN Human Development Index report, so who determines development priorities and what the political voices there are should be treated as important questions. Sindh has reservations with regard to dams and water sharing.

In Khyber Pakhtunkhwa, there is a conflict and a terror-related situation and a new identity quest in Hazara. Islamabad is completely bureaucratically organised without local government. FATA remains a grey area. Although some progress has been made in Gilgit Baltistan, things are far from ideal. There are issues for which we often blame political parties and wonder why issues of governance are not resolved. Perhaps there is a need to consider how the provinces can be involved in the formulation of foreign policy, because many of the country's global ventures are not owned by all provinces.

The predicament that we are in is not so much because of poverty or bad governance but because of foreign policy decisions and the many proxy wars that have landed us in a quagmire. What can be the provinces' voice in that process is unclear. Then in the notes of reiteration and set of recommendations it is said that the provinces will for the first time get

many powers under the 18th Amendment after the abolition of the concurrent legislative list. In India education was a provincial subject, but in quest of standardization now all Indian states are demanding that there should be some national forum where they can raise issues about standardisation of education. This is referred to as de facto concurrency, where although it is not written in the constitution, the provinces demand that they should have some common platform for certain services.

Then there is the question of identity. Even the provinces are not monolithic entities. Beneath the main umbrella, there are other communities often referred to as nationalities or nations and identities as well. There are Seraikis and Pothoharis in Punjab; after the change of name of NWFP to Khyber Pakhtunkhwa we have seen that there is a Hazara identity. The same is the case with Sindh and Balochistan and that has found a mention in the notes of reiteration.

The security paradigm also needs to be considered. Many of our security forces, such as Frontier Constabulary, Rangers and Scouts, are federally organised. They are considered oppressive instruments of the state to control everything, including disappearances, I wonder if that has been debated at all. These have been noted as issues of provincial concern but have neither been mentioned in the recommendations nor in the notes of reiteration.

Having said all that, I would like to conclude that Pakistan is a federation where all the provinces had certainly existed before the state came into being, but they did not voluntarily organise themselves as a federation. In one province, a referendum was held, two provinces were divided, and then we reconstituted a province, Balochistan. I may be wrong, but the provinces were there as definite identities and units but the constitution of the federation was not voluntary, i.e., all of them had not sat down to decide that they wanted to form a federation. It is more like what we call in political science a 'holding together' federation, that we are so interdependent on each other that we can only make progress as a federation. But a federation does not simply happen on account of a constitutional arrangement. It is basically a culture of sharing, and an ever evolving product. It may well be that our experience may bring forth new contours and parameters of federation.

We can discuss the whole process intellectually as well. All these issues are also part of the political discourse. But citizens seem to be outsiders in this entire discourse. I had said in the beginning that constitution does not give you food, but it does. You would not seek essentials of life from the Iranian or the Afghan president, because your social contract is with your government and is linked to the method of choosing it. Civic education is of vital importance. There is no mention in our curriculum, textbooks or other educational texts of the constitution or the federation. In the 7th grade textbook of political studies in India, the students are taught what a federation is, how does it come about, what is the process of constituting more states and why the number of states has increased in India since independence.

In our schools, where Islamic provisions of the 1973 constitution are taught, fundamental rights should also be part of the curriculum so that the citizens know what is written in their social contract. And most importantly, even if we as citizens become aware at best we can earn penalty corners. Converting those penalty corners into goals is the task

of normative political forces, political parties. Unless these parties become democratic and federally organised, and truly reflective of people's aspirations, whatever we may say will be little more than talk and will not translate into reality and bring a change in citizens' lives.

Senator Haji Muhammad Adeel

There is considerable emphasis on Islam in the Constitution of Pakistan. But even if the early caliphs of Islam were to somehow see the Islam that is practised in Pakistan they might not recognise it. There is a different Islam for each sect and even each party has its own version of Islam. Although we take Islam's name but even in the constitution we dare not talk about it. I represent my party in both the National Finance Commission and the Parliamentary Constitutional Reform Committee for the 18th Amendment. Even today I stand by what I had said with regard to the 18th Amendment, and which led to an appeal to the Senate that my membership should be annulled. Two cases are still pending against me in the Peshawar High Court. All this because my party and I had demanded that the constitutional provision stipulating that a non-Muslim cannot be the country's president and the prime minister must also be Muslim, because although a non-Muslim may be a member of the National Assembly but when he takes oath for the PM's office, only a Muslim can take that oath. We had demanded that these stipulations should be removed. Our demand was not accepted and we repeated that demand in our notes of reiteration.

We have made the effort because my party believes in secularism. In our party's manifesto we call for a Seraiki province or unit, and that demand has been there since the days of NAP. We have really strived for many objectives, for example for agricultural income tax. Since income tax is a provincial subject, we have strived to somehow bring feudal landowners in the tax net, but we have failed. We had even suggested that Articles 246 and 247 with regard to the Federally Administered Tribal Area (FATA) and Provincially Administered Tribal Areas (PATA) should be repealed. Legislative authority for PATA should be given to the provincial assemblies and for FATA to the National Assembly. This too was not accepted. Separately, the government had itself formed a committee on Frontier Crimes Regulation (FCR), which had made some recommendations. Unfortunately, we learned that those recommendations and our recommendations for FCR were put aside because the powers that are now in FATA and are conducting operations there were not prepared for that.

With regard to the NFC Award, if the 18th Amendment had been approved before the NFC Award was finalised then the award would have been even better. At the time of the NFC Award we had before us the pre-18th Amendment constitution, which is why the provinces and the federation have differences over where the budget for the ministries/ departments/ divisions that are being wound up or handed over to the provinces would come from. Had the 18th Amendment been adopted first and the NFC Award later, the situation would have been clearer and the NFC Award would have been better than what it is.

Our parliament is bicameral but the Senate has no real power. After a lot of efforts by us, I managed to get an amendment approved to the effect that the cabinet would be answerable not just to the National Assembly but also to the Senate. Members of the

National Assembly had earlier vociferously opposed such an amendment. Finally I presented a paper that when the 1973 Constitution was framed, there were no special seats in the National Assembly and that such seats were added later. Today, there are 70 special members of the National Assembly (MNAs), 60 women and 10 members of the minorities. These 70 MNAs can vote on money bills, as well as on confidence and no-confidence motions. So these members, who do not even contest elections and are nominated by their parties, have much authority but the 100 elected members of the Senate do not have the authority to have the cabinet answerable to it. So a few powers have been given to the Senate. However, despite our efforts, the Senate was not given the power to consider money bills.

About national languages, once again I would say that even the Companions of Prophet Muhammad (PBUH) are likely to be confused by the interpretations of religious commandments.

Similarly, when we were working on these amendments, many things dawned on us for the first time regarding what is and what should be the interpretation of these amendments. With regard to national languages, when all the main and some small parties rejected that amendment, we suggested another amendment that all these languages should be declared Pakistani languages. One would have thought that such an idea would not be opposed by anyone (that Pashtu, Sindhi, Balochi, Seraiki, Punjabi should be cited in the constitution as Pakistani languages) but no one was prepared to consider even that. All parties supported the change of NWFP's name to Khyber Pakhtunkhwa. Only two factions of the Pakistan Muslim League had reservations, and the Jamaat-e-Islami said that if the majority supported that name they would have no problem. In 71 meetings of the committee and around 100 sideline meetings, not a single party at any moment talked about a Hazara province. All of a sudden, because of local politics in two and a half districts, this demand has been raised. Nevertheless, we do not have any objection to formation of small provinces; there would only be a couple of provinces of in Khyber Pakhtunkhwa but the bigger provinces may have to be divided into a dozen or so units.

Three points on the Charter of Democracy (CoD) we could not get approved, formation of a constitutional court; exclusion of PCO judges from the judicial commission. However, now many of them are PCO judges. The bigger parties compromised on that and said that the circumstances had changed.

Thirdly, I



Left to right: Mr Altaf Qureshi, Dr Pervez Tahir, Mr S. M. Masood and Senator Haji Muhammad Adeel

concede that as regards intra-party elections there has been an omission on our part, but I think that does not matter because the Political Parties Order is there. Another issue that generated heat is that earlier the parliamentary party leader was entitled to move for unseating any party parliamentarian. Now the political party's head is entitled to do that. I am the ANP parliamentary party leader in the Senate and the party has six senators including myself. The parliamentary party leader can have a disagreement with a parliamentarian of his party, but the party's head has to consider matters at the national level. So I think this is a better arrangement. There are restrictions on the party head's power to seek such unseating, which the critics do not take into account. The party head can ask for a member of the party to be unseated if a parliamentarian of the ruling party opposes the money bill/budget or does not give vote of confidence to the leader of the house, or a parliamentarian from an opposition party goes against the no-confidence motion moved by the opposition. I think these are reasonable restrictions on a person elected on a party's ticket.

The ANP has always advocated provincial autonomy with the centre having only four subjects: foreign affairs, currency, defence and communication to some extent.

Through the 18th Amendment, with the abolition of the concurrent list we have empowered the Council of Common Interests and increased the scope of its work. The procedure for calling a meeting of the Council of Common Interests has been changed. Now any province can call a meeting. Regarding the mineral resources in a province or in the territorial waters along its coast, any mineral resources, be it gas, oil or any other thing, were previously the federal government's property. Now the centre and the province have a 50/50 share. Vide another important amendment, whenever a water reservoir is to be constructed for hydroelectric power generation, it will not be built without the consent of the government of the province where the reservoir site is located. We consider this provision to be a major success for the smaller provinces.

The whole of Pakistan thinks that the 18th Amendment is about Article 175-A alone and the court has also given an order to the Parliamentary Constitutional Reform Committee and the committee is once again considering the matter. We are sad that although we have given to institutions the powers that were with individuals — we have given the prime minister's powers to parliament and the chief justice's powers to the judicial commission— but it seems that the chief justice is not ready for that. In any case, we have at least taken one step forward.

I. A. Rehman: The scope of the 18th Amendment is substantial. Although some progress has been made with regard to provincial rights, the articles in the amendment specifically talking about provincial rights are not very many. A real issue is that the amendments that have been made need to be implemented. The 18th Amendment was published in the gazette in April and little by way of implementation has been done until now, the middle of November. We have been so entangled in this debate about the 18th Amendment that the problems with regard to implementation—issues such as whether the provinces have the skills and the capacity to exercise their powers—and the problems that the provinces will face with regard to provincial rights have not received due attention. The amendment is supposed to be implemented by June 30, 2011.

Several participants argued that the focus was on devolution of authority under the 18th

Amendment to the provinces, but the question is that below that tier there are other tiers as well. They wanted to know whether devolution was achieved with the transfer of power from the centre to the provinces or whether it was necessary to devolve further and how?

Haji Muhammad Adeel: Under the 18th Amendment, local bodies elections have now been provided for in the constitution. It was not so earlier. Secondly, now the Election Commission of Pakistan will conduct these elections, whereas in the past each province had its own local bodies election authority. Furthermore, once the incumbent Chief Election Commissioner retires, his successor will have a fixed tenure, which can neither be extended nor reduced.

Dr Mehdi Hasan: As I had said earlier, if our political parties agree to devolve power from the centre to the provinces, then on many issues their voices will be heard in the provinces and if they are the ruling parties they can implement decentralization too. Our problem is that in our political parties all powers are concentrated at the top. Even decisions about local issues are made by the party's president. Until you decentralise political parties, the country's politics will not be decentralised. It is saddening indeed that throughout the country's history our military dictators have shown interest in local bodies but no civilian government has been interested in local government. That has been the case since Pakistan's independence. The reasons for that may be explained by the politicians present here.

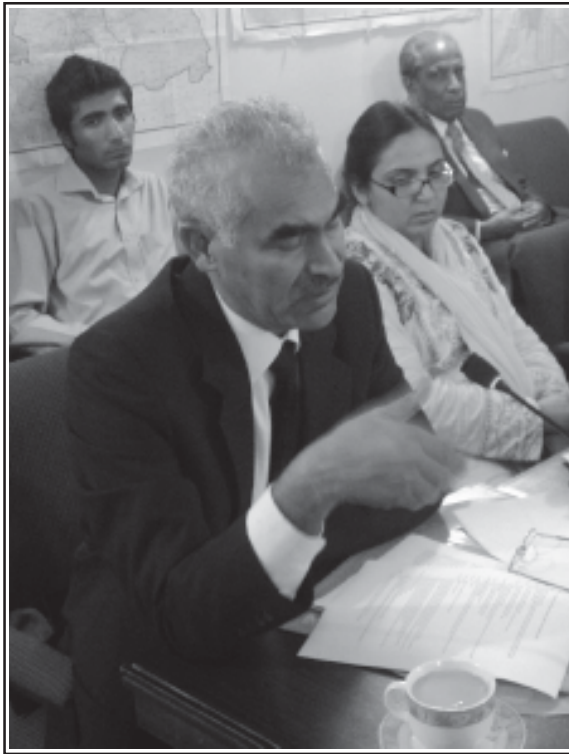
Syed Zafar Ali Shah, MNA

The courts are today working in a manner that no one can say that they are taking orders from the government. There is confidence in courts. As I come from a smaller province it is a source of satisfaction for me that whether it is a matter of interpretation of laws, individual rights and rights between the provincial governments and the centre the courts can be relied upon. That has a very stabilising effect.

One Unit was a conspiracy, not only against the smaller provinces but against Pakistan itself. The seven-member team that had gone to Washington to negotiate the Indus Basin Treaty was looking after the interest of one province only.

For smaller provinces, independence of the judiciary and independence of the election commission are crucial and without that adult franchise is completely meaningless. Regarding the Senate, it should of course be empowered but the senators should also be directly elected, as is the case in the United States. Then the arrangement will be acceptable to us. As things stand today in the province of Sindh, for instance, more than half of the senators are not residents of the province, and are elected because the decision lies with the parties. With regard to creating new provinces, it is often said that if we make provinces smaller our problems will be resolved. But that is oversimplification in my view.

It is good that now the provinces will have a say in the matter of taking of loans. Everyone has stated that they will reduce the size of the federal government. However, the federal government has only grown in size. Furthermore, have a look at ordinances: when you want to create an institution you do that through an ordinance and afterwards it is deemed the duty of the National Assembly and the Senate to pass it at all cost, whether it has a financial liability or not. To quote one example, the Institute of Fashion and Design, a



Left to right: Mr Naseer Bhutta, MNA and Dr Nadia Saleem. Back row right: Dr Zafar Omer

federal government institution, was established in Lahore, through an ordinance by Pervez Musharraf and the ordinance was then brought before the parliament. We say that such institutions should be made, by all means. It has campuses in Karachi and in Islamabad, but it is a liability. On the one hand you say that barring research, etc., education as a subject has been devolved to the provinces and yet the federal government makes such institutions. So it became a fait accompli that it must be maintained, because it was once created through an ordinance. There should be no place for any ordinance.

I do not think that the 18th Amendment has quite addressed the problems of the provinces. I am all for provincial autonomy but I fear the time when bad leadership takes over in a province that is accountable to no one, where elections are rigged;

there would be anarchy then. I endorse the view that the centre should only retain four or five subjects, but the voter has not been trained. Still we need some proper basis, such as elections within the parties and the parties' parliamentary board should be elected.

Senator Prof. Muhammad Ibrahim: I concede that the 18th Amendment is not an ideal measure but in the present scenario it is the most practical step. Just imagine a committee where the Pakistan People's Party, Pakistan Muslim League-Nawaz (PML-N), PML-Quaid, Awami National Party, Muttahida Qaumi Movement, Jamaat-e-Islami, Jamiat Ulema-e-Islam, and nationalist parties from Sindh and Blochistan are present and all of them reach a consensus on something. Could such a body produce an ideal scheme? Impossible. But the government and parliament deserve credit that after the 1973 constitution they have once again managed to achieve a consensus.

Many things that we and the other parties, including the ruling Pakistan People's Party, suggested were adopted in the 18th Amendment and many were not. Wherever consensus could not be achieved, the right to reiterate the point through a note of reiteration was given. In that respect, the 18th Amendment is very important. Granted that it is not a complete social contract but it can form the basis for one.

Ehsan Wyne: It would be erroneous to suggest that the ANP is satisfied with the quantum of provincial autonomy. We believe that it is an ongoing political process and through this process we will continue to strive for even greater provincial autonomy in

order to strengthen the federation by granting the federating units more rights.

Dr Pervaiz Tahir²

One has to begin with the political side of things because flawed politics leads to a flawed economy and when the economy is flawed that affects everything. In this age of lack of tolerance, this consensus on the 18th Amendment and the National Finance Commission (NFC) Award is a big achievement and if some problems have not been touched upon then I believe the decision was tactical and not strategic. At least dialogue has begun on these matters. The journey that we had started with the slogan one God, one nation, and, by implication, one economy, it has become clear to a large extent that that credo lacks sustainability.

One example can be the sales tax. It offers an excellent entry point for understanding the link between economy and politics and to analyse what happened to federal ideas. The provinces had this tax and they voluntarily gave it to the centre, so that the latter could have some much needed financial support for some time. Soon after that, the centre assumed complete control of that. Fast forward to the 1973 Constitution, in the sales tax there was no clear reference to services. Reference was only made to purchases and sales. In the Fifth Constitutional Amendment, the matter becomes a bit clearer. Subsequently, the current NFC Award made it abundantly clear that it is the right of the provinces and the 18th Amendment endorsed that, saying that sales tax on services is provinces' right.

However, in 2008 an agreement was reached with the International Monetary Fund that the federal government would impose this tax in value-added form, which requires an integrated jurisdiction if you want to impose it in its true spirit. The signatories forgot that there was a constitution in Pakistan, because the so-called economic team used to make such promises and say that the matter would be dealt with later on. Now, for the first time there was a hurdle in that, when one province said that it would collect the tax. If consensus can take the matter forward, why was action in a roughshod manner deemed necessary here? Why did no one pay attention in the NFC Award to this promise made to the IMF? Partly because the NFC award came first and the 18th Amendment later.

Now under the 18th Amendment, the provinces did get new responsibilities with the abolition of the concurrent list. That means that in the education sector—with the exception of standards of higher education and Pakistani students going abroad and foreign students coming to study in Pakistan—the federal government has no authority. At the same time the right to education has become a fundamental right. This is a huge responsibility. Even the issue of standards is now with the Council of Common Interests.

Similarly, health, family planning, rural development and local government are now in the provinces' domain. It can be said that the social sector is under the provinces' complete control under the 18th Amendment. The same is the case with some segments of the economic sector. Then there were some things that had not been mentioned in the concurrent list but the federal government had been involved with them. For instance, the federal

² A paper written by Dr Pervaiz Tahir and Dr Nadia Saleem for the consultation, on economic rights, financial autonomy and devolution, is appended.

government had been involved in many things with regard to agriculture. After the 18th Amendment the federal government has no authority in that regard. Same is the case with industries. The federal government can through legislation go for industrialization for a specific purpose but otherwise it is not a federal subject. A closer look therefore suggests that the basic economy is now with the provinces.

The NFC Award had come about before the 18th Amendment and on the basis of the NFC Award the provinces had already formulated grand development programmes and deficit budgets. Also, more subjects came within their domain after the abolition of the concurrent list. So there was this disconnect. As a consequence of the 18th Amendment some resources also were given to the provinces. There is a lot in the 18th Amendment about provinces' control over natural resources. The point is that the 18th Amendment does not provide enough resources for the provinces to shoulder these responsibilities.

In the NFC Award, resource sharing had already been reversed and what was earlier the federal government's share became the share of the provinces. As a result, Balochistan benefited the most as its share increased by 3.98 percent. The shares of Pakhtunkhwa and Sindh also increased while the share of Punjab decreased. However, in absolute terms, the share of no province has decreased, because the federal government made up for any decrease by reducing its own share and hence created a win-win situation. Therefore, it seems strange when the provinces ask the federation for help during floods, because the provinces now have more resources at their disposal. In absolute terms, in vertical distribution, the share of the federal government has decreased. From next year, the federation's share would be 42.5 percent of the federal divisible pool. Under the head of cost of collection, the federal government used to deduct in advance 5 percent of the federal divisible pool. Now that has been reduced to one percent. In 2008-09, I had seen that the entire expenditure of the Federal Board of Revenue was 0.74 percent of the divisible pool and they used to get 5 percent. Now the share has been generously set at one percent, but that too after the auditor general's approval.

As a special concession this time, before distribution of the divisible pool, Khyber Pakhtunkhwa will be given one percent to meet the expenses of the war on terror. A very specific promise has been made to Balochistan. Projections are made for the five-year NFC Award. The resources generated are never in accordance with the projections, they are always lower. When the provinces complain that they did not get their share, they are actually saying that they did not get their projected share, although they get their percentage share from the available kitty and that cannot go anywhere else. The very special concession to Balochistan is that the province will get whatever has been projected. Which means that this will be an extra burden on the federal government. In special provisions, the provinces have the right over whatever is found in the territorial waters, including fisheries. The federal government used to give excise duty on gas to the province where gas was discovered but the same was not the case with oil, now excise duty on oil will also be given.

In the social sector, it is worth noting that all issues with regard to labour are now in the provinces' domain. Now the provinces can have their own minimum wage legislation, and institutions such as Employees Old-age Benefit Institution (EOBI) have been provincialised. There may be problems, such as if a worker works in Karachi, Sindh and his

family lives in Swat, in Khyber Pakhtunkhwa. How will his family be paid pension?

Under the 18th Amendment, all issues with regard to workers, labour legislation and all related issues are now in the provinces' domain. Environment, social welfare, Zakat, religious affairs, including Islamic education, are now with the provinces. The Benazir Income Support Programme is also a social transfer programme and under the constitution, under the 18th Amendment, it should be with the provinces. It has been said that the provinces can now negotiate foreign loans. Now they can obtain any kind of loan. The justification stated for not allowing that earlier had been the difficulty that would arise in framing the country's monetary policy because of too many jurisdictions. For example one province may take so much loan that it may cause inflation across the country. Perhaps that is why, although permission (for foreign loans) has been given, the matter must first be discussed in the National Economic Council.

There have been many institutional changes at the point where the provinces and the centre interact. The Council of Common Interests (CII) has now become a very important institution with regard to resolving inter-provincial and province-centre issues. Membership of the CII has now been clarified in the constitution; the minimum number of its meetings has been mentioned; it will submit an annual report; and will have complete authority over Part II of the Federal List. Although legislation would be by the federal government, these are matters of the federation, not of the federal government. There used to be eight entries in the CII, now there are 18. The new entries include regulatory authorities such as NEPRA, standard of education, etc. Composition of the National Economic Council with proper representation of the provinces has also been mentioned which must also regularly report to parliament. The Planning Commission, which is technically the secretariat of the National Economic Council, can no longer be what it is now. It will have to be reconstituted in such a manner that each province nominates its representative to the council. Obviously such matters are covered not by the constitution, but by rules. However, conceptually, unless the provinces have representation at the secretariat of the National Economic Council—where all the papers are prepared—matters will not be in accordance with its spirit. The share that has been allocated to a province can no longer be reduced. During the year, or during the five years, there was earlier little monitoring of what went on in the NFC. Now regular monitoring has been institutionalised and reports are to be submitted to parliament.

My paper is not so much an analysis as it is an attempt to understand the 18th Amendment, because I doubt if the provinces, the centre and all of us have quite understood its implications. In terms of provincial autonomy, it is somewhat lopsided. Responsibilities have been identified, but provinces still do not have any major taxes of their own. Of course, these will be distributed through the NFC Award. But it is a point to ponder that if the provinces do not have authority over their taxation and have authority only on their expenses then that can lead to only two consequences: there would be no real control over expenses either, or a province will resort to reckless borrowing and the entire country would face the consequences. This lopsidedness needs to be considered, as there is talk of another amendment to the constitution. The issue of local governments also needs attention. Previously, the provinces were not as keen on the local government system because without asking the provinces, the federal government used to give the provinces' powers to the

local governments, whereas the federal government itself would not cede its own authority to the provinces. Now the federal government has devolved powers to the provinces and the old excuse for resisting further devolution to the local government no longer holds true.

With regard to taxation, there are three bases of taxation: income, consumption and property. Income tax, including agriculture income tax, and customs are the natural base of the federal government. Consumption is the tax base of the provinces. Local governments can be run on property tax if that is collected. So this is a really straightforward system.

I am talking about the main taxes, there may be many small ones, but every level of government should have one main tax. If nothing else can be done on the value-added tax, and there is considerable pressure, then one suggestion can be that throughout the world often the revenue collection authority for all levels of government is the same. It is simply a collecting agent, on behalf of various levels of government. The suggestion is that the Federal Board of Revenue may cease to be a federal government organ and it may be attached to the Council of Common Interests, where all the provinces can control it, members are appointed after consultation with the provinces and the federal government must have no say in its affairs. Whatever tax revenue this agency collects could be directly paid to the relevant level of government after deducting the collection costs. That may be a solution within the constitution.

Senator Haji Muhammad Adeel: We have mentioned in the National Finance Commission (NFC) award that there will be a meeting of the NFC every three months. Then according to an amendment to Article 160 of the constitution there will be a bi-annual meeting and the federal finance minister will submit reports before parliament and provincial finance ministers before provincial assemblies regarding implementation of the NFC award. Previously, there were intervals of five years or more in that. So there is now one safeguard for provincial rights in the NFC and another in the constitution.

Another safeguard in the NFC and the constitution is that there will be no reduction in the percentage share that the provinces get now, though there may be an increase in that.

Under an amendment to Article 55, disputes over water sharing from reservoirs also can now be taken to the Council of Common Interests.

The biggest thing in NFC award now is that Balochistan was unhappy because gas development surcharge had largely been spent in Sindh. Balochistan provided gas to Pakistan for a long time. Today 20 percent of Pakistan's gas need is met by Balochistan and 72.2 percent from Sindh. The tragedy is that when gas was discovered in Balochistan the gas development surcharge in that agreement was around one or two rupees, and they were given 12.5 percent gas development surcharge. When gas was discovered in Sindh and some also in Punjab and Khyber Pakhtunkhwa that surcharge rose to nine rupees. So the people would get cheap gas from Balochistan and the more expensive gas from elsewhere at the same price. The NFC Award for the first time addressed this problem and said that 12.5 percent gas development surcharge will be levied on the average gas price across Pakistan. The federal government will give the government of Balochistan 10 billion rupees as arrears, because the demand was made five years earlier. Furthermore, in the Aghaz-e-Huqooq-e-Balochistan package the federal government admitted that another 12 billion rupees will be paid to Balochistan because gas development surcharge for the province was

collected and spent in Sindh. For a number of reasons, there has not been further development in the gas sector in Balochistan. Now we believe that as far as Balochistan's biggest complaint with regard to gas is concerned that has been addressed.

Central Excise Duty on gas has been raised from 5.20 rupees to 10 rupees and that will be directly transferred to the province. After making changes in the entire formula and based on current gas production, Balochistan will receive an additional three billion rupees every year, Sindh another 2 billion rupees, Punjab will get 700 million rupees more and Khyber Pakhtunkhwa 300 million rupees more every year. We think that these changes redress to a considerable extent the financial injustices to Balochistan in the past.

A tribunal had decided that for 15 years, that is up to 2005, Rs.110 billion were to be paid to Khyber Pakhtunkhwa in terms of net hydel profit. We had refused to attend the National Finance Commission meeting in Karachi until the first cheque for 10 billion rupees was given to us as per the prime minister's announcement. The cheque was given to us after 24 hours. In July this year, another installment of 25 billion rupees was given to us and we will be given another three installments. Punjab was also given 5 billion rupees as net hydel profit for Ghazi Barotha.

Under the 1991 water accord, it was decided that for all provinces excess floodwater projects would be developed. Greater Thal Canal project has begun in Punjab and there is another project in Sindh and one in Balochistan. In Khyber Pakhtunkhwa no project was initiated and we had been giving 2.58 million acre feet of our water to Punjab without getting anything in return, while Punjab received *malia* and *aabiyana* (water tax) on that. We calculated that our province had lost 60 billion rupees in that way. In return they said that they would give us a project and we demanded Chasma Right Bank Canal Uplift Programme-I. Unfortunately, in this year's budget only 400 million rupees were given. That means that we will have to wait for 16 years to cover the project's cost and what will the cost will be after 16 years is another matter. However, we have agreed on that in principle. In addition to the one percent of the federal divisible pool given to Khyber Pakhtunkhwa for the war on terror, it is clearly stated in the NFC Award that compensation for any damage in the war on terror will be given by the so-called Friends of Democratic Pakistan or, if they do not give, the federal government will. Had the 18th Amendment been made prior to this NFC Award, the award would have been even better, but even so this is the best NFC Award in 60 years and the role of all political parties deserves to be praised in that respect for coming up with a good consensus award.

Senator Prof. Muhammad Ibrahim: As has been stated, recognition of ethno-lingual diversity demands resources and there is a dearth of that. Politically, I believe that this debate in the country has almost reached its conclusion and unlike the 1960s and the 70s people have admitted that there are many nations in Pakistan. The renaming of Khyber Pakhtunkhwa and the demand for Hazara province in particular have taken the national discussion towards the need for restructuring the country on ethno-linguistic basis. The people who as a policy demand administrative units also, in their demand for Hazara province, admit the ethno-linguistic basis. There will be very serious problems on this path. In addition to the main nations, there are some smaller identities in Pakistan, which cannot be ignored. One must remember that it is not necessary that they should all be distinct provinces.

Within provinces one can have autonomous regions to ensure security for the smaller entities. Even the manifestos of the various political parties that have made considerable sacrifices for provincial autonomy talk about restructuring with regard to provinces but do not talk much about the urgently needed basic reform for unit/provincial bureaucracy. The tilt should be towards the provinces. The centre may engage people for its needs but why should all key posts in the provinces be filled by the centralized bureaucracy? That should be done away with. When induction in service is mainly on provincial basis, the centre may request the requisite expertise from the provinces. So this unified unitary structure needs to be looked at. For instance, while there is no federal police, all key police officials are from the federal services. There is virtually no need for inducting police at the federal level. Transfer of ministries and responsibilities has to be accompanied by transfer of resources. And the units also should not only get money from the centre but must also be able to generate their own resources. All that would lead to a political culture of plurality. Lastly, federalism cannot work without democracy, because it is more than a mere administrative affair. I believe that not only is democracy indispensable for federalism but also federalism is indispensable for democracy, in order to acknowledge plural realities and to restructure the state accordingly.

Farooq Tariq: With regard to workers' rights, all worker-related issues are now going to be in the provinces' domain. There is considerable confusion regarding the future of the national level trade unions. After the 18th Amendment, there remains no basis for national level unions, as they may be registered at the provincial level as the relevant departments have devolved to the provinces. Now the big debate is whether this is an attempt to undermine the unified power of the working class or a bid to strengthen it at the provincial level. For instance, all trade unions of Punjab, including the Pakistan Federal Union of Journalists, and Pakistan Workers Confederation, oppose that and insist that labour and workers' rights should remain a national level subject.

Dr Pervaiz Tahir: Although the intention was not to harm working class movement, the effect indeed is that although there is now no restriction on forming associations but when you have to legally deal with departments that will perhaps have to be at the provincial level. So the issue is not so much economic as it is of rights. That is why it is pertinent to understand the implications of the 18th Amendment. And this is the biggest change affecting the working class and deserves consideration. But I do not believe that anyone's intention was to divide the movement of the working class because all movements for autonomy have been progressive movements by definition, and not anti-worker movements.

Zafarullah Khan: A very positive change is that, in Article 232 regarding the imposition of emergency, a resolution of the provincial assembly concerned has been made necessary. If one looks at Article 267-A, the judiciary has wasted a lot of our time. As debates about various aspects of an amendment began right after its adoption, the authors of the 18th Amendment have given us an option. They realized that there might be problems and gave us a very simple and time-bound mechanism for removal of difficulties — that if there is any difficulty within one year of enforcement, a joint sitting of parliament can solve the issue by a resolution. The trivial petitions challenging various changes made under the 18th Amendment have caused a loss of many months and now this partial judgement has been given and the matter will now linger on until January. In practical terms then, we will only

have three months for benefiting from this convenient way to remove a difficulty. There may not be enough time either for the provinces or the central government, or indeed for all the people concerned, to be able to do their homework.

About loss, again Article 270-AA (vi) offers a safeguard. Until provinces or the concerned departments, whichever the regulatory bodies may be, frame new rules or amend the old ones, the old rules will remain operational. Thus it is not that everything has been wound up. The entire chapter about transition is worth reading. It is disappointing that the media also did not highlight this debate. For instance, a very convenient mechanism was given for removal of difficulties within one year. A proper debate would have highlighted the questions and helped find the answers. Now the nation has to wait until January again for the Supreme Court decision. Furthermore, the inaction that one sees on the part of provinces has to do with the fact that everyone has been saying that the amendment may be declared void by the court. Such has been the discourse instead of serious examination of matters. Maybe one outcome of this process here today could be that we form a citizen implementation commission that views all these things, raises alarm where need be, and facilitates the provincial and federal governments in this process, in whatever areas the members of such commission have expertise in, be it labour, education, etc. The deadline for transfer of ministries is also time bound, until June 2011. The debate that has emerged after interaction with at least three members of the implementation commission demonstrates that there is a desire on the part of the political component of the government. The bureaucratic realm, centrally organised bureaucracy, is the biggest speed breaker on the way to all these things. We do not have a lot of time and we need to actively support the process if we believe in that. Later on, any amendment would need a two-thirds majority.

S. M. Masood

Many powers have been given to the provinces under the 18th Amendment. I would focus on education. Any federation founded on an ideology of federalism must have the same education system in all its parts. Otherwise, neither federalism succeeds nor the country functions properly. But if education in one province is in one language and in a different language in another then a national language cannot develop. Therefore, provisions should have been included in the constitution towards that end. The manner in which the 18th Amendment was kept secret for nine months is exceedingly unfortunate. If the people are empowered a country's constitution reflects the people's ideologies but unfortunately the draft amendment was kept under wraps and then silently and unanimously adopted.

I see this amendment taking us towards theocracy. For all the struggle that we had waged against Ziaul Haq, we have not undone even one change that Zia had made to the constitution. Mere removal of his name from the constitution is not enough. The 18th Amendment implies that the changes he made to the constitution were justified. What does that say about our entire struggle against him? Article 2-A and the Federal Shariat Court (FSC) are still part of the constitution. This despite, a promise made in the Charter of Democracy that all the amendments made to the constitution by dictators will be undone. It is specifically stated in the Charter of Democracy that parallel judiciary will be done away with. The parallel judicial system that Zia had included in the constitution through the Federal Shariat Court is still there. Then there is the matter of appointment of judges. All

FSC judges must be Muslim. This body controls all the laws made by parliament. What else is a theocratic state? There has been no discussion on that and no one has paid attention to it that we are further strengthening it. In fact, four of the judges must have 15 years experience of Islamic laws and research. Therefore, that is what is called theocracy.

I want to ask one thing! Can parliament do land reforms which have already been declared un-Islamic by the FSC? What remedy has been suggested for that in the constitution? I do not see anything in it that resembles the Pakistan that Jinnah had envisaged in his speech of August 11, 1947. What has been given to us is an absolute negation of that. Even the word Majlis-e-Shura has not been omitted from the constitution. Religious parties have been more successful than the parties that call themselves liberal. If we are to secure the right of the people and of the provinces and strengthen federalism then we must remove these contradictions and move toward Jinnah's speech of August 11 and not towards theocracy.

Imtiaz Alam

The 18th Amendment is a compromise, it is good in certain terms and not so good in others. In the matter of devolution, financial devolution is still weak. Centralised bureaucracy, army, armed forces and intelligences agencies are not representative of the federal structure or rights of the federation. The centre still has tools from the unitary government period that remain unchanged. Civil service reforms have not been done. Reforms in the military or the judiciary cannot be done. These are centralised fiefdoms that are in conflict with the federal structure.

We have moved closer to a cooperative federation in some respects, but not in others. Enhancement of powers of the Council of Common Interests (CCI) is a very good development. I disagree with the assertion that education should have any ideological agenda. It should be totally free of any ideology. Education should be decentralised.

Another issue is centre's resistance to devolution to the province, which in turn resists devolution to the district, which resists devolution to the local council. The governance that we see in Punjab amounts to the chief minister and his cabinet having direct leverage at the district level. They are running it again through bureaucracy. It should also be emphasised that this devolution must not stop at the district level, but should go all the way down to the local level. The model of mayors that we saw in Musharraf's era was not impressive. An audit of the Musharraf era local governments will not find a single council where massive fraud had not occurred. Therefore, checks and balances need to be considered.

There is no semblance of federalism in our state institutions. How are the army officers and soldiers recruited? How is their budget made? How does all that happen in the intelligence agencies? Who appoints all the secretaries? Your provincial chief secretaries and Inspectors-General too? You do it out of the federal pool. Therefore, this leap with the 18th Amendment in some areas should be accompanied by reform of the civil service, armed forces and other wings of the security establishment. With regard to financial autonomy, we must move towards a scenario where the provinces impose taxes and share the revenue collected by them with the centre. Financial devolution will enhance participation and partnership and also prevent army's dominance and repeated takeovers.

Senator Prof. Muhammad Ibrahim: With respect, I would disagree with the assertion

that the provinces had existed before Pakistan and had decided to come together as a country. In fact, India had split into two countries. I agree that the 1940 Resolution is erroneously called Pakistan Resolution. Until 1946, the struggle for constitutional guarantees for Muslims within the Indian Union continued. When it was established in 1946 that constitutional guarantees would not come about, only then was the demand for partition of India made. The partition formula was devised after that.

I do not agree that the Parliamentary Constitutional Reform Committee's work should have been open. It has been said that one committee has been given the power to decide the fate of the whole country. However, this 27-member committee was representative of parliament, which in turn represents the people. The work to finalise a constitutional amendment draft, after inviting proposals from civil society, developing a consensus and submitting the draft to parliament was difficult indeed. If the parliamentary committee's work was not *in camera* the task would have taken many years instead of the seven months that it took.

It is true that military generals believe in unity of command while our system is that of trichotomy of power. But it is also true that political governments too believe in unity of command. The problem that we now face is that devolution from the centre to the province is not leading to further devolution to the local governments. No provincial government is ready to hold local government elections.

Ehsan Wyne: Centralised civil services are not compatible with the concept of autonomy under the 18th Amendment. And I believe that this matter has been touched upon in the recommendations of the 18th Amendment committee. These service structures are such that even when the number of departments is reduced and the provinces have greater responsibility, the recruitment, training and control of the people who are to actually do this work are controlled by the centre. It is this control that the army takes advantage of when it takes over.

Hina Jilani

The 18th Amendment may have many advantages in terms of provincial autonomy but while the advantages may be there in long-term, the short-term risks and threats are very acute and these can obstruct the process by which devolution to the provinces is to be implemented. The process of devolution will obviously be slow. Some of these threats have been mentioned by Mr S. M. Masood and these should not be dismissed in a hurry. If the so-called centralised ideology of Pakistan that has been manufactured creeps into education and if the provinces have the authority to overemphasise it then this could create such a mindset that takes us towards theocracy. This is a threat. And it has happened in the form of Nizam-e-Adl in Khyber Pakhtunkhwa.

We have this apprehension that with such autonomy authority may be used in a manner that it would undermine equality before the law and equal protection of the law. The constitution of Pakistan must be applied in a uniform manner in each province, irrespective of provincial autonomy. Does the constitution clearly tell us what we want as a nation? We have not been able to get any guidance from this constitution with regard to religion, nor about that common interest on the basis of which the establishment of this federation is

sought. The constitution does not attach due importance to your nationality. Unfortunately, we are not a single nation. Islam as an entity is in our lives because we are Muslim, but in addition to that we also have many other identities in this country. We may be Muslims, but believers of other religion live here too. They are also citizens of Pakistan. We also have an ethnic identity and a gender identity. If we are to give equality then the constitution must give that equality in a complete sense and provincial autonomy must be such that it cannot reduce that equality in any manner. These are our concerns.

The experiments with the local government that we have seen so far have been done by the army for preserving its own power. It is now the responsibility of political elements to make local government the third tier of government in the real sense, as mentioned in the constitution. It will not become the third tier of government until local government is established on political basis. Non-political local governments will not succeed and they have not succeeded. So a formula for local government which is political and at the same time does not suffer from politicisation is important.

Another issue with regard to governance is that provincial autonomy is given and such a scheme of government formulated that allows the provinces to establish the best systems of government. But we do not see any guidance, direction or guideline that makes it the provinces' responsibility—although it is there in Principles of Policy in the constitution—that a nation that has become ungovernable what steps would you take for it. The system that you seek to establish, if you manage to implement that honestly at the government level, even then there will be difficulties. Here, governance is not the only difficult task, our population is ungovernable and we have done all that we could in the last 25 years to make it ungovernable. Therefore, as has been suggested, while the provinces will have complete control over social sectors, what would be the guidelines to ensure uniformity across the country and for the provinces to agree what would be the basic social policy for these social sectors? Would the Council of Common Interests do it? Would there be a system where a uniform, and very fundamental—it will not infringe on the provinces' power to do things in the way that they want to and they can have their own methodology—but is there any possibility of including basic social policies within the concept of provincial autonomy?

Farooq Tariq: Some things that could have been done to empower people and have not been done include failure to delink religion and the state. The religious provisions of the constitution have not been touched. Issues such as suppression of rights on religious basis and the whole Eighth Amendment have not been tackled. The present provincial government of Balochistan is not the true representative of the people because of exclusion of the main political parties that had boycotted the 2008 election. The merits of that boycott can be argued, but 22 political parties had boycotted the election and not once did the Election Commission ask the parties why they were boycotting the process, nor did it try to persuade them to participate. Now the political idea behind not participating in the election has been dismissed here. Boycott is a political strategy and we must not negate it in such a manner that those boycotting an election are not even deemed worthy of consultation. Because of that exclusion I do not think the present government of Balochistan is representative of the people.

Then there is the matter of election patterns. Irrespective of how much you empower

the Election Commission, until proportional system is introduced here, for which we need constitutional changes, there is no way that a common citizen from any province can be elected through this system of election.

Zafarullah Khan: Granted that the country has many challenges, but if we look at the 18th Amendment as the art of the possible, it is not a bad deal. The assumption that several services that the federal government was previously providing have been given to the province without giving them the money for that also needs to be analysed. In the one sector that we have examined, education, already the provinces had been financing 80 percent of education. The only change is that previously the provinces' concept of higher education would end at the college level and would not cover universities. There are only seven federally managed universities. The same is the case with health, there are only 12 federally managed hospitals.

There are solutions for these matters as well. If a proper local government system is introduced in Islamabad, the schools and colleges in the federal capital can be managed. The point is that we should be a bit creative while looking at this opportunity. Devolution has been a longstanding demand and as far as commitment goes the question has been answered to some extent. The challenges of capacity are huge. In addition to the question of reform of civil services, the various streams in provincial civil services need to be examined. Our last local government law had envisaged district and provincial cadres, but that was not implemented. As long as a federal bureaucracy's representative runs the affairs of the province he will not have any stake in developing provincial capacity for self-governance. The provincial civil service is usually deemed inferior to the federal one and it needs to be upgraded urgently.

Pakistan is made up of six governance zones where we have different governance systems—cantonment areas; FATA; Islamabad; Gilgit Baltistan; and the rest of the country. Which of these levels will the devolution that we are talking about reach? The kind of engaged debate that should be there in our country on each one of these issues is missing. It will not be an overstatement to say that many people still do not even realize the enormous magnitude of these challenges. But the cost of inaction is no secret: With a population of 170 million, half of the population illiterate according to official figures, and an even bigger part of the population lacking access to drinking water, we will not need any other enemy. According to one analysis of what has been done vide the 18th Amendment is that in 2010, in order to save the country, four of the six points submitted by Sheikh Mujibur Rehman have been accepted. What has been said about the curriculum, preparation of textbooks is already the right of the provinces. Only the authority to devise a framework was with the federal government and after 63 years of this policy the product today should not really surprise anyone. If the federal government retains this power then it will continue to prepare *mujahideen* and promote the identity that suits it.

This is a small window of opportunity which needs to be used. The political mandate bearers have a major role. Unfortunately, according to the announced accounts of Pakistani political parties, none of them has a think tank that undertakes policy research and explores options. In our interaction with one of the implementation ministers, one province's implementation minister stated that many powers have been given to the provinces this

time but if the provinces do not prove themselves worthy of these powers none would be given to them in future.

We must not condemn the provinces. If the federal government today has some capacity—which in itself is questionable — that is not divine but has been developed at taxpayers' expense. The provinces may be deficient in capacity today, but there should be some understanding that gradually in this transition their capacity should be enhanced. Even unitary systems in the world are devolving, because in the modern age you cannot centrally govern a big population.

Imtiaz Alam: Citizenship should not have a link to religion and the ambiguities in the constitution should be removed. From PEMRA law to information law, all these laws are centralised. We hope that this process of decentralization continues and the Council of Common Interests (CCI) is further strengthened and from WAPDA to Railways and everything else should go to the CCI so that the spirit of this amendment can be respected.

Senator Haji Muhammad Adeel: In Hazara, the demand for a separate province is not on the basis of language, they are demanding it for administrative reasons. If a province could be made on the basis of language or culture that would be the Seraiki province, which my party supports.

Since the passage of the 18th Amendment, we have worked on basic education in Khyber Pakkhtunkhwa. The biggest demand used to be that children should be given education in their mother tongue. We are not opposed to education in English, many of our schools are English medium, but if a child wants basic education in his or her mother tongue, we have given the child the options of Pashto, Hindko, Chitrali and Seraiki. The syllabus for this scheme will become effective from next year. No child will be compelled to get basic education in Pashto. But one language of the child's choice, her or his mother tongue, will be compulsory. Each province should have its own education system, syllabus and curriculum.

Today, almost all the departments that were at the central level are there in our province, such as forests, Haj, Auqaf and Zakat, education, local government and health. All these departments of Khyber Pakhtunkhwa are providing services—including education, health, public works, irrigation, road building, even fisheries—in FATA. There are no prisons in FATA and all those who are sentenced in FATA to prison terms serve their period in prisons in Khyber Pakhtunkhwa and the provincial government bears all expenses on these prisoners.

Until three years ago, the provincial government was paying the salaries of the staff also. Now the federal government has agreed to pay their salaries, but their pension and other facilities are still to be paid for by the provincial government. No resident of FATA has any restriction on contesting provincial assembly or National Assembly election in Khyber Pakhtunkhwa, or on employment by virtue of his domicile. So we had all those departments that the centre had. Now this duplication will gradually come to an end. We will certainly ask the centre for funds if it wants us to absorb all their staff.

All provinces, through their assemblies, referendum or *Shahi Jirga*, had agreed to join the federation of Pakistan.

We do not oppose broadening the tax base but we want all Pakistanis, all government

employees, to pay tax irrespective of their source of income, if their earnings reach the threshold. This is going to be a problem for the provinces, because they have no authority to impose taxes.

Regarding representation in the constitutional committee from Balochistan, I agree that the provinces suffered excesses in the past and their protests are justified, but as far as drafting of the 18th Amendment is concerned, with the exception of Baloch-majority area of that province, all political parties that had boycotted the general elections were represented in the Senate and were given representation in the committee.

Imtiaz Alam: In Balochistan, the Aghaz-e-Huqooq-e-Balochistan package has not had any effect. There is almost martial law in Balochistan. The provincial government has no writ. Another difficulty is that the assembly is sleeping. At the political and psychological level, at least the Baloch-majority area of Balochistan has seceded from Pakistan. I do not know if this process can be reversed or not. The government is not even talking about Balochistan. The government has not followed up on the steps it had initially taken. Therefore, in our deliberations we should take up Balochistan as a special issue and should send out a message on Balochistan.

Dr Mehdi Hasan: I will add that the opposition also is not serious about Balochistan. I suggest that all political parties' chiefs should go to Balochistan and engage the disgruntled elements in a dialogue and ask them what their complaints are.

Naseer Bhutta, MNA

A lot needs to be done for provincial autonomy even after the 18th Amendment, especially in order to build the capacity of the provinces. Secondly, the issue about renaming NWFP as Khyber Pakhtunkhwa, which was resolved through a political dialogue, has been followed by a wave of demands for new provinces. To design a basic structure for achieving devolution we need to have a big heart. The parliamentary committee overseeing the devolution process is perhaps not satisfied with the pace of devolution. Some things such as the NFC Award have created a good impression and the provinces have sat together and reached an agreement on division of economic resources among themselves.

With this move towards autonomy, questions are arising whether the centre is becoming so weak that its command over the provinces would suffer. If the provinces start to operate in an appropriate manner, with nationalism and a touch of federalism, then I believe such a feeling would subside. For the present I think such a feeling is present in the federation and is growing, that perhaps it has been too generous with devolution. That impression needs to be removed. That is crucial because we are at a crossroads. In view of the experiences that we have had in our geographical and constitutional histories we need to tread carefully.

Senator Jahangir Badr

The deliberations here were supposed to be about governance issues but the discussion has largely been in the context of the 18th Amendment and how provincial autonomy can be consolidated. Today we have pointed out shortcomings in what has already been done and future desires and suggestions have been mentioned only in passing. Deficiencies have been highlighted in implementing decentralization and in the provinces' preparation to

implement things. In politics whatever future agenda there is and whenever that materialises preparations for implementation must be there. I suggest that this honourable forum should also hold deliberations on the role of political parties in good governance in a democracy. My party, the Pakistan People's Party, believes in both social and economic justice and provincial autonomy in the federation. It is in our interest to explore how the common man can play an effective role in the political structure of the federation.

Hina Jilani: I believe that until we understand what has been devolved under the 18th Amendment it would be difficult to give recommendations on its mechanism and machinery. Now whatever has come before us we should start working with it because if the process of implementation is now deadlocked then it will have grave consequences. The capacity of provinces should be enhanced to enable them to play their role. But federalism does not mean that after devolution the federal government would be marginalised. The federal government will have to become more specialized. My worry is that both the provinces and the federal government are lagging behind, and not necessarily because of incompetence or lack of interest. We have to look at all that. The whole discussion is aimed at thrashing out the agenda for going forward. I agree with Mr Jahangir Badr that we have to form an agenda, in which we include from today's discussion points such as capacity of civil society, and of political parties, and see what needs to be done.

Dr Ikramul Haq: With regard to economic empowerment, we need to focus on the fact that you are making Pakistan a highly indebted state. There is no element of self-reliance in it and because of more and more dependence the impact on the people of your provinces will be such that the state would not be financially viable. I believe that 70 percent of our tax is from indirect sources. You will not be able to establish true federalism until you reverse the ratio of your direct and indirect taxes and after division of tax proceeds ensure that they are utilised for the good of the people and not for further extravagances by vested interests. Until these parameters are met the state will not become egalitarian and the concept of equality between the federation and the federating units will remain a far cry.

I. A. Rehman: It emerges from today's discussion that federalism and provincial rights are defined by a state's orientation and it is a real problem if that orientation offers no scope for federalism and provincial rights. When Muhammad Ali Jinnah said in August 1947 that 'now we are a state and we should become a nation, he knew that almost all the people who live here are Muslims. Despite that he declared that the Pakistani nation was to be formed on the basis of citizenship. When you look things in that perspective you can talk correctly about federalism and provincial autonomy. The 18th Amendment was relevant to today's discussion only to the extent of assessing how far it has promoted federalism and provincial rights, and what issues it has resolved. It seems clear that a major shift of resources towards the provinces has either occurred or is about to occur. Of course, that is not ideal, there are other demands. But this is a start. Let me quote from the 18th Amendment Act "Whereas the people of Pakistan have valiantly struggled for democracy and for attaining the ideals of a federal, Islamic, democratic, parliamentary and modern progressive welfare state". One question is who will resolve the contradictions within all these words? And what is the test of all that? The Act says: "wherein the rights of the citizens are secured and the provinces have equitable share in the federation". If this becomes our standard then it

should help us understand many things.

A basic aspect referred to by many friends today is that we have needlessly become so entangled in sophistry over Article 175-A and it has so paralysed the state structure that we have not even done what we should have done. And if one waits for the Supreme Court decision in January, we will waste more time. There has been no opportunity to consider all these matters in the time given until June 2011 to complete the transition. It is crucial that the civil society does all it can to resolve whatever issues need to be resolved.

It is clear that this federation will remain intact only so long as the federal principle is honoured and the federal principle does not tolerate any ideological constraints. It demands democratic dispensation pure and simple, and that should be ensured.

There are indeed differences and only time will resolve them. Politics is the art of the possible. Who says it is the art of attaining the ideal? Who says democracy is ideal? It is a messy system, but it is better than the silence of graveyards under dictatorship. And if we still do not know how bad dictatorship is we never will.

Political aspects of the 18th Amendment: Steps towards democratic federalism

By: Zafarullah Khan¹

The passage of historic 18th Constitutional Amendment could be regarded as a step forward towards a negotiated rejuvenation of inclusive and democratic federalism in Pakistan. First it epitomizes ‘grand national political consensus’ as all mainstream and peripheral parliamentary-political parties participated and legitimized this process. The process also documented about fifteen ‘notes of reiteration’ for the sake of history and possible future opportunities to expand the scope of provincial autonomy and address remaining contentious issues. A set of eleven recommendations articulated by the Parliamentary Committee on Constitutional Reforms (*annex-iii*) testify that it was fully aware of the critical concerns to make Pakistan a vibrant federation with an inclusive approach. Nevertheless, hammering out a political consensus in the Parliament where no one enjoys even a simple majority, let alone the required two-third majority to amend the Constitution, reflects the maturity of mandate bearers.

At societal level, though 982 suggestions/recommendations from individuals and organizations reached the Parliamentary Committee on Constitutional Reforms, the popular discourse in public sphere and in the mediated discussions, by and large, was woven around cynicism. This is quite understandable in a country where the Constitution was reduced to a mere piece of paper that could be amended by usurpers in uniform through a series of Provisional Constitutional Orders (PCOs). Such a shameful engineering of ‘convenient’ Constitution was endorsed by the hand-picked judiciary under the doctrine of necessity. For ordinary citizens the Constitution was systematically reduced to an ‘irrelevant

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social contract.’ The textbooks taught in the nations’ classrooms only highlighted the Islamic provisions of the dead (1956, 1962) and living (1973) Constitutions. Therefore the Constitution remained an ‘alien document’ in our national life.

Similarly as a nation we had been plagued by a high rate of Constitutional mortality. The Constitution of 1956 despite artificial stimulators like the Objectives Resolution, One Unit and Parity formula died within two years. The 1962 Constitution perished with its authoritarian author within seven years. Denial of legitimate Constitutional rights, representative democratic institutions and rejection of cultural diversity, besides other contributing factors, resulted in dismemberment of the country in 1971.

The thirty seven years old Constitution of 1973 has shown amazing resilience as there is normative political consensus embedded in its foundations. However, it was held in abeyance by General Ziaul Haq (July-1977-December-1985) and General Pervaiz Musharraf (1999-2003) for more than a decade. They also lived with its distorted hybrid character for another decade (Zia 1985-1988, Musharraf 2003-2010).

However, normative political voices, civic society activists and intellectuals kept the hope alive to reclaim the original social contract between the 170 million citizens and their state. The Charter of Democracy (2006) inked by Shaheed Mohtarma Benazir Bhutto and Mian Mohammad Nawaz Sharif and the outcome of 2008 Election provided impetus for this serious engagement to cleanse the Constitution of aberrations incorporated by military regimes and redefine the relationship between the citizens and the state by expanding the scope of fundamental rights, restoring the supremacy of the federal parliamentary democracy, and by addressing the lingering mistrust between the Centre and the federating units. The very existence of fifteen notes of reiteration (*annex-iv*) reflects that the 18th Amendment is not the ideal outcome but ‘best possible’ step forward in a highly divided society. There are many contested ideological notions that are yet to be settled like the final fate of the Federal Sharia’t Court established by Zia regime. The return of word “freely” to the original text of the Objectives Resolution is a positive sign, but making it an operational part of the Constitution through Article 2-A during Zia regime has not been nullified.

Key aspects of the 18th Amendment

Identity: The amendment renames the former NWFP as Khyber Pakhtunkhwa to settle the lingering quest for identity of its majority population.

Analysis: This was the most celebrated amendment all over the country however it also ignited demand for more provinces, especially Hazara province. There was political flexibility to accommodate such demands.

Vanguarding the Constitution: The definition of High Treason (subversion of the Constitution) has been expanded. Attempts or acts of abrogation, subversion, suspension, and putting in abeyance now constitute high treason. Judicial validation of Constitutional subversion will also no longer be regarded as legitimate.

Analysis: The original Article 6 failed to deter General Zia and General Musharraf from takeovers and were never out on trial for subverting the Constitution. The test of these new fences will come only if we will be unlucky in future as well.

Expanded Fundamental Rights: The 18th amendment has expanded the scope of

fundamental human rights. The amendment affirms three new rights namely: the Right to fair trial and due process, Right to information and Right to education. The amendment slightly modifies three other fundamental rights. In Article 17, Freedom of Association, intra party election condition has been deleted. Similarly, proviso related to sectarian, ethnic and regional hatred and militant wing of parties has been eliminated. These were added by Legal Framework Order-2002 and were retained by the 17th Amendment (2003). In Article 25 pertaining to Equality of Citizens the word ‘alone’ from ‘No discrimination on the basis of sex alone’ has been dropped. In Article 27: Safeguard against Discrimination in Service, the following has been added, ‘Provided also that under representation of any class or area in the service of Pakistan may be redressed in such manner as may be determined by an act of (Majlis-e-Shoora) Parliament.’

Analysis: Pakistan has ratified/signed many international instruments like: the International Covenant on Economic, Social and Cultural Rights (ICESR) and the International Covenant on Civil and Political Rights (ICCPR) as well as Convention Against Torture (CAT) in April 2008 and is already a party to the International Convention on the Elimination of Racial Discrimination (CERD), International Convention on the Elimination of all forms of Discrimination against Women (CEDAW), Convention on the Rights of the Child (CRC), and to the core ILO Conventions. All these obligations do not figure prominently in the reformed Fundamental Rights chapter.

Similarly there was a controversy about Article 17 that is about the Right to Association but had accumulated numerous conditionalities only for political parties whereas the parameters for all other associations are located in corresponding laws. Only German Basic law elaborate full-fledged criterion for political parties in an article fully devoted to define and describe them.

Supremacy of the Parliament: Approval of landmark 18th amendment restores the spirit of Parliamentary system in the country. It transfers key presidential powers to the Parliament and establishes its supremacy. Other major changes include:

- The Prime Minister along with the Cabinet will be collectively responsible to both Houses of the Parliament [The National Assembly and the Senate]. Earlier such responsibility was only before the National assembly. The Prime Minister will be the Chief Executive. The size of the federal and provincial cabinets not to exceed eleven percent of the total membership of the Parliament. (after next election).

- The National assembly must meet on the twenty first day following the day on which a general election to the Assembly is held, unless sooner summoned by the President. Concept of run-off election for the Prime Minister. Lifting restriction on the number of terms for the office of the Prime Minister.

- Annual report on implementation of Principles of Policy will also be laid before the Senate along with the National Assembly. *Only the Senate has a committee on less developed areas.*

- The President cannot promulgate an ordinance while the Senate is in session. The President can issue an Ordinance only once. One-time extension can be given by a resolution of the National Assembly or the Senate.

- The number of the working days for the Senate has been increased from 90 to 100

and the number of days to make recommendations on the money bill has been increased from 7 to 14. Four seats (one from each province) for religious minorities have been added in the Senate, raising its strength to 104 from 100.

- Acknowledging Local Government as the third tier (Article 140-A) and holding its elections through the Election Commission of Pakistan.

- The discretionary Presidential power to dissolve the National Assembly and to refer a question to a Referendum has been removed. Now the power to hold a referendum lies with a joint sitting of the Parliament. The President retains the right to be informed on all matters of internal and foreign policy and on legislative proposals. Time limit has been fixed for the President to act on the advice of the Prime Minister. Abolition of schedule sixth and seventh schedule also brings in a sense of equality and empowers the Parliament to amend all laws on the statute book.

- Governor to be appointed on the advice of the Prime Minister and the Governor to be a registered voter and resident of the province concerned.

- Elections within 90-days. Little progress on article 62 and 63 relating to the qualifications and disqualifications for election to the Parliament. Still these articles remain abstract.

Election Commission of Pakistan: Term of the Chief Election Commissioner to be appointed in consultation between the Prime Minister and the Leader of the Opposition in the National Assembly, and after the approval of a Parliamentary Committee (12 members, half from the treasury and half from the opposition) has been increased from three to five years. The Election Commission will be a permanent body.

Balance of Powers between the Centre and the Provinces: The 18th amendment takes important steps toward devolution of authority and enhancing provincial autonomy. It scraps the Concurrent Legislative List of subjects and empowers the provinces. In addition to all subjects in the Concurrent List, except boiler (shifted to Federal List-I) and electricity (shifted to Federal List-II), three subjects from the Federal list including state lotteries, duties in respect of succession of property, and estate duty on property will go to the provinces by June 30, 2011.

The amendment empowers the provinces to levy sales tax on services. Provinces have been given powers to seek national and international loans, exercise joint control with the federal government over 18 subjects including some key subjects like sea ports, all regulatory authorities, national planning and national economic coordination, supervision and management of public debt, census and natural resources.

The amendment has expanded the role of Council of Common Interests (CCI). The CCI will become a powerful constitutional body comprised of representatives of centre and provincial government to decide key matters especially enlisted in Federal list-II. The Council will become an effective dispute resolution, economic planning and development forum with a sense of joint responsibility. It has been mandated to meet once a quarter. The National Economic Council (NEC) has been reformed with an advisory role to review overall economic condition of the country and to advise the Federal and Provincial government to formulate plans in this regard. Another significant step forward is the consent

of the concerned Provincial Assembly for the imposition of emergency rule in any province.

National Finance Commission Award: Another important step is the distribution of national revenues that is protected under this amendment and provinces' share cannot be reduced beyond that given in the previous National Finance Commission award.

Judicial Appointments: An independent Judicial Commission will propose nominees and a special parliamentary committee comprised of government and the opposition will confirm them.

Ostensibly this was most controversial part of the amendment and experienced many road blocks and litigation spanned over months. But today, it stands as one of the first operational aspect of the 18th Amendment.

Conclusion:

The architects of the 18th Amendment have tried to rewrite the social contract between the citizens and the state under the umbrella of democracy. The ignored ideological gray areas apart the overall contents of the 18th Amendment have tried to harmonize the institutional balance and redefine institutional boundaries within democratic ambit. The PCCR was also cognizant of difficulties on the way to translate the Amendment into reality. Therefore they inserted a new articles (267-A) in the Constitution that says, "If any difficulty arises in giving effect to the provisions of the Constitution (Eighteenth Amendment) Act, 2010, hereinafter in this Article referred as the Act, or for bringing the provisions of the Act into effective operation, the matter shall be laid before both Houses in a joint sitting which may by a resolution direct that the provisions of the Act shall, during such period as may be specified in the resolution, have effect, subject to such adaptations, whether by way of modification, addition or omission, as may be deemed necessary or expedient. Provided that this power shall be available for a period of one year from the commencement of the Act."

This window of opportunity is available till April 18, 2011. Already a prolonged litigation in the Apex court has resulted in loss of seven months. The Implementation Commission constituted to transfer devolved ministries to the provinces is functional to meet the June 30, 2011 deadline. The political and civil society must come forward to discuss and debate the possibilities and contribute their bit to expedite the implementation of the 18th Amendment.

Mapping discourse on Constitutional Reforms-2010

Broad National Consensus:					
<ul style="list-style-type: none"> • Federal Parliamentary Character • Not to touch the Islamic provisions • Cleansing aberrations inserted by military regimes (Gen. Zia, Gen. Musharraf) 					
Matrix	Broad stands across the political spectrum				
Issues	New Social Contract in the light of 1940 resolution i.e. new constitution Provincial control over natural resources	Maximum Provincial Autonomy Respect Diversity <i>(Acknowledging identity e.g. Khyber Pakhtunkhwa, languages)</i> Informal support for Charter of Democracy	Expand the scope of fundamental rights. Enforceable Principles of Policy Secular character of the Constitution Independence of judiciary	Restoration of original Constitution of 1973 Supremacy of the Parliament <i>(Balance of power)</i> Broad consensus on Charter of Democracy	More Islamization
Parties	<i>No parliamentary representation</i>	<i>ANP, NP, PKMAP, BNP-A, JWP</i>	<i>NGOs, Bar Associations etc</i>	<i>PPP, PML-N, MQM, PML-Q, PPP-S, NPP</i>	<i>JUI-F, JI</i>
Strategy	Proposals to the Committee & Media	Members of Committee	Proposals to the Committee/ Media, & interaction with political parties	Members of Committee	Members of Committee
Ideological orientation	Nationalists	Left	Constitutional petitions Civil Society <i>(Left-Centre-Right)</i>	Centre	Right/ religious

*Annex - II***Pakistani Federalism: Existing issues and response matrix****Balochistan:**

- Operation and missing people
- Baloch-Pukhtoon disequilibrium
- Under-development example: Dera Bugti despite producing sui gas for entire country ranks lowest in Human Development Index prepared by National Human Development Report prepared by UNDP. Federally imposed development Gawader

Political voice:

- Ultra-nationalist parties express their mistrust
- NP and mild nationalist voices participated in Constitution Reform process

Sindh:

- Reservations on Kalabagh Dam, Greater Thar Canal,
- Concerns over water distribution especially with Punjab

Political voices:

- MQM expanding for a national role
- Nationalists reminding the original text of 1940's Lahore (Pakistan) Resolution for provincial autonomy. Rejected 18th amendment as an inadequate measure (too little too late)

Khyber-Pukhtoonkhwa

- Quest for separate identity in Hazara and Dera regions
- Security paradigm tempering with Puktoon identity
- Political voices:
- Mass movements in Hazara region

FATA/Gilgit-Baltistan/Islamabad:

- Absence of political rights in FATA (no-political parties, no local government, FCR), Gilgit-Baltistan (despite reforms vague constitutional status), Islamabad (no local government, bureaucratic governance)

Political voices:

- Very weak

Punjab:

- Seraiki's for a separate province, socio-economic rights
- Political voices:

- Separate Seraiki province

Other issues:

- Foreign policy articulated by security paradigm fails to address the concerns of provinces on periphery.
- Politically imbalanced federation (Number of seats of Punjab out weights all other federation units). No significant role of the Senate in the election of the Prime Minister and passage of money bill.
- Capacity and capital to realize provincial autonomy (after abolition of Concurrent list). Weak provincial and local civil service
- Identity question (None of the province is monolith): Punjab: Seraiki-Punjabi-Pothohari, Khyber-Pukhtoonkhwa: Pukhtoon-Hazara, Derawal, Balochistan: Pukhtoon-Baloch, Settlers, Sindh: Sindhi-Mohajir, Settlers
- Answer is salad bowl/rainbow identity reflecting ethnic pluralism of Pakistan
- Federal forces like Frontier Constabulary, Scouts, Rangers, Coast Guards
- Devolution: Lack of consensus on the type of local government system (party-based, non-party based), Police Order (Federal imposition)

Positive incremental developments:

- 18th Constitutional Amendment
- 7th National Finance Commission 2009
- Aghaz-e-Haqooq-i-Balochistan Package (Beginning of the Rights of Balochistan)
- Reforms in Gilgit-Baltistan
- Local government system back to provinces

Deficits:

- Missing culture of federalism (It is federalism that holds together the units)
- Missing culture of constitutionalism
- Weak political institutions (Extra political interference)
- Malaise of Corruption
- Lack of civic education (no mention of federalism, democracy, parties etc in textbooks)

Recommendations for the Government by the PCCR

1. Provide equal opportunities for recruitment in Armed Forces.
2. Election Tribunal to complete trial (Representation of People Act) within 90-day.
3. Introduce reforms in Federally Administered Tribal Areas (change Frontier Crime Regulation, allow political parties to work there).
4. Make appropriate laws to ensure, “security of person) *Article 9*.
5. Islamabad High Court shall have judges from all the provinces and the federal capital.
6. Islamabad High Court be conferred original civil jurisdiction in cases of the value of Rupees five million or above.
7. Federal Finance Secretary shall not be appointed as the Auditor General of Pakistan.
8. Implementation Commission shall be constituted to facilitate process of devolution after the abolition of the Concurrent List.
9. Expeditiously provide infrastructure for the utilization of water in the provinces, where it does not exist.
10. After abolition of Concurrent list the distribution of work between the Federal Public Service Commission and Provincial Public Service Commissions to ensure provincial autonomy.
11. Steps/policies for harmony and stability between the Baloch, Pakhtun and all the communities in Baluchistan.

Summary of the notes of reiteration

Sr. #	Leader/Party	Context
1	Senator S. M. Zafar (PML-Q)	The Concurrent list shall not be abolished (it will be too early to take a quantum jump). Adopt evolutionary approach to devolve some subjects to the provinces.
2	Senator Wasim Sajjad-PML-Q	The new name for NWFP shall be, "Sarhad"
3	Senator S. M. Zafar (PML-Q)	The procedure for creation of a new province (article 239) is cumbersome. It should be made simpler.
4	Senator Haji Adeel and Senator Afrasiab Khattak (ANP)	<ul style="list-style-type: none"> • Article 246 and 247 about FATA (Federally Administered Tribal Areas) shall be omitted and these areas be mainstreamed. • As lingua franca Urdu is the National language and arrangements shall be made for it being used for official and other purposes while similar measures will simultaneously be taken for other National languages spoken in the country within 15 year. (Article 251) • Money bill, foreign assistance, raising of debt, and monetary expansion shall be subject to mandatory approval of the Senate. (Article 73) • Endorsement of PKMAP proposal about protection of rights of Pakhtun's in Baluchistan. • Article 2 A (that makes the Objectives Resolution an operative part of the Constitution) shall be deleted. • The age for National Assembly membership be increased to 30 and for the Senate to 40. • President of Pakistan shall be elected on rotational basis from all federating units and the condition of being Muslim shall be removed.
5	Justice (R) Abdul Razak Thahim (PML-F)	Article 182 (<i>appointment of ad hoc Judges</i>) be deleted.
6	Dr. Farooq Sattar, Haider Abbas Rizvi (MQM)	<ul style="list-style-type: none"> • Article 27 (quota system for jobs) be deleted. • Major Ports be devolved to the lowest level of the government. • Overseas Pakistanis be given political rights and representation

Sr. #	Leader/Party	Context
7	Prof. Khurshid Ahmad (JIP)	<ul style="list-style-type: none"> • Article 25-A (right to education) be time bound (10-year). • Deletion of article 45 (President's power to grant pardon) or at least in cases under Hudood or Qisas • Senate is elected indirectly parties can award tickets to minorities, therefore no need to reserve seats for them. • Legislation through ordinance shall be prohibited. • Attorney General shall not be included in Judicial Commission • Constitutional guarantee in case of civil servants (article 240) • Tenure of the Chairman and members of Public service Commission, Chief election commissioner, and Chiefs of the Armed Services should not be renewable. Their tenure could be made 4-year. • There shall be some mechanism for coordinating uniform education at federal level. • The objective of article 251 (National Language) be achieved within next five years. • The Senate shall be directly elected (proportional representation). It shall have role in the election of the Prime Minister and adoption of Money Bill. • Appointments to public corporations, federal authorities and non-career diplomats be ratified by a Parliamentary Committee • International Treaties, agreements and Conventions be ratified by the Parliament. • Advisors to the Prime Minister shall also take a proper oath.
8	Senator Shahid Bugti-JWP, Senator Israrullah Zehri-BNP-A, Senator Dr. Abdul Malik –NP	<ul style="list-style-type: none"> • Balochi, Sindhi, Pushto, Punjabi and Saraki shall be the national languages • National Economic Council shall have equal members from the Federal and the provinces. • Money Bill powers for the Senate.
9	Senator Wasim Sajjad-PML-Q	<ul style="list-style-type: none"> • The right of a person to contest from several seats be curtailed.
10	Pashtoonkhwa Milli Awami Party	<ul style="list-style-type: none"> • The Senate shall have role in Money Bill, role in election or vote of no confidence against the Prime Minister. Money Bill can originate in either House of the Parliament • Pashto, Balochi, sindhi, Punjabi, Saraiki be made national languages. • Call for Pashtoonkhwa Southern and Sraikistan as new provinces.

Sr. #	Leader/Party	Context
		<ul style="list-style-type: none"> • FATA shall be named Pashtoonkhwa (Central) and shall have the existing status. It shall be merged into respective contiguous unit. • Islamabad Capital Territory be named, Federal Capital • Appointments of Ambassadors shall be subject to the approval of the Senate
11	Ahsan Iqbal, PML-N	<ul style="list-style-type: none"> • Curriculum and syllabus should be the joint responsibility of the Federal and Provincial governments.
12	Senator Muhammad Ishaq Dar, PML-N	<ul style="list-style-type: none"> • An additional nomination by the Chief Justice for the Judicial Commission. • The Federal Law Minister or the Attorney General be dropped from the Judicial Commission and President, Supreme Court Bar Association be made a member.
13	Aftab Ahmad Khan Sherpao, PPP-S	<ul style="list-style-type: none"> • The new name for NWFP shall be “Pukhtunkhawa” according to the resolution of the provincial assembly. • Electricity shall not be transferred to Federal List-II from the Concurrent list
14	Senator Mir Israrullah Zehri, BNP-A	The Center shall keep only for subjects i.e. defence, currency, communication and foreign affairs.
15	Senator Rehmatullah Kakar, JUI-F	<ul style="list-style-type: none"> • Islamic legislation according to the spirit of the 1973 Constitution • More provincial autonomy. The Center shall keep only for subjects i.e. defence, currency, communication and foreign affairs. • The new name for NWFP shall be “Pukhtunkhawa” according to the resolution of the provincial assembly. • The appointment of judges shall be in accordance with the suggestions of the Charter of Democracy. • Reserved seats in the Parliament shall be according to the number we had before October 12, 1999.

Federalism: NFC award, financial autonomy and economic matters in the eighteenth amendment

By Dr Pervez Tahir and Dr Nadia Saleem¹

I. Introduction

Fiscal federalism and the issues of provincial autonomy are intimately related. Pakistan's painful experience in this respect makes the Seventh NFC Award (SNA) and the Constitution [Eighteenth Amendment] Act (CEAA) events of great historic significance.

The struggle for the rights of Muslims in British India took a concrete shape in the adoption of the Lahore Resolution in 1940, which demanded " 'Independent states' in which the constituent units shall be autonomous and sovereign." In accepting the Cabinet Mission Plan in 1946, the All India Muslim League re-affirmed the idea of autonomous states. However, the rejection of this Plan by the Congress party made the establishment of the state of Pakistan inevitable. The teething troubles of the newborn state in 1947 overshadowed the federal idea, particularly in its fiscal and financial dimensions. In order to assist the Centre in the process of its establishment, the Provinces had to cede some subjects and powers of taxation.

From this point on, unfortunately, the Centre never looked back. An ideological cover was provided to a strong Centre by the Objectives Resolution of 1949. This Resolution also eventually became the basis of defining national security interests, which by its very nature required centralized control over resources. The Centre progressively expanded its jurisdiction and fiscal powers. The tendency towards centralization was epitomized by the creation of the province of West Pakistan in 1955 by subsuming into it the four Western Provinces and princely states. Following this development, the pre-existing strain on Centre-Province relations was worsened by the adoption of the parity formula in the distribution of resources between the provinces. The military take over in 1958 turned the country effectively into a unitary federation. In the late sixties, the cries of reverting to the Lahore Resolution were heard again. Failure to pay heed led to the break up of the state in 1971.

The 1973 Constitution for what was left of the state, consisting now of the four Western Provinces restored in 1970, increased the quantum of provincial autonomy by recognizing provincial jurisdiction over all subjects not included in the Federal and Concurrent Lists. Further, Part II of the Federal List was placed under the Council of Common Interests, an institution of the Federation and not just the Federal Government. Further still, an understanding was allegedly reached to abolish the Concurrent List within a decade. Finally, National Finance Commissions (NFCs) were to be set up every five years for the

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apportionment of resources. Population replaced parity as the criteria for distribution among the Provinces, i.e. the so-called horizontal distribution. The vertical distribution between the Federal Government and the Provinces and the size of divisible pool of the taxes was a matter for the NFCs to decide. Special provisions were also made for electricity, oil and gas to placate smaller Provinces.

These arrangements did not satisfy fully the aspirations of the Provinces, but the national consensus embodied in these arrangements was undermined by slow or even lack of implementation and the centralizing impact of the military takeovers. Very few meetings of the CCI were held. No moves were made to abolish the Concurrent List. Only 3 NFC awards were implemented between 1973 and 2010. The smaller Provinces, Balochistan and Khyber Pakhtunkhwa, felt that the provisions regarding natural resources were unfair. These Provinces, together with Sindh, also considered the population-based criteria of horizontal distribution to be unjust in a situation where the population of one province, i.e. Punjab, exceeded the population of all the other three provinces put together.

Finally, the revenue-expenditure imbalance between the Federal Government and the Provinces turned from bad to worse. In 1990-91, for instance, the Provinces made 22.87 per cent of the total expenditure, but collected only 4.12 per cent of the total revenue and 4.11 per cent of the tax revenue. In 2000-01, Provincial share in total expenditure rose to 24.76 per cent, in total revenue to 7.16 per cent and in tax revenue to 4.36 per cent. While expenditure share rose further to 28.35 per cent in 2008-09, the Provincial revenue collection declined to 7.01 per cent and tax collection to 3.83 per cent. Federal transfers under the NFCs have thus been the main source of meeting the gap between the Provincial expenditures and revenues. With all of the major taxes in the Federal Legislative List, leaving a narrow revenue base with the provinces. This could not have been otherwise. As a matter of fact, the Provinces have had little incentive to mobilize their own resources.

In this background, the SNA and the CEAA are developments of great economic, financial and social significance. While the SNA seeks to transfer larger resources to the Provinces, the CEAA adds more expenditure responsibilities to the Provincial domain, besides improving the institutional arrangements for Federal-Provincial relations. The objective is to ensure greater provincial autonomy and to move towards a fiscally viable federation. This paper outlines the various provisions of SNA and CEAA and discusses the likely economic, financial and fiscal impact.

II. The Seventh NFC Award (SNA), 2009

The Seventh NFC was constituted on July 24, 2009 in pursuance of Article 160 (1) of the Constitution. Its report was finalized and signed on December 31, 2009. The Award was given effect through President's Order No.5 of 2010, called the Distribution of Revenues and Grant-in-Aid Order, 2010, issued in pursuance of clauses (4) and (7) of Article 160 of the Constitution. The SNA has been operationalized with effect from July 1, 2010, i.e. Fiscal Year 2010-11 for a period of 5 years.

Reduced Collection Cost

As in the past, the SNA provides for the distribution between the Federal Government and the federating units, the Provinces, the net proceeds of the taxes included in the Divisible

Pool. Net proceeds are arrived at after deducting the cost of collection of the Federal Board of Revenue, as certified by the Auditor General of Pakistan. Under the SNA, the first important departure from past is that this cost has been brought down from the fixed 5 per cent to the actual cost certified by the Auditor General. This actual cost is not perceived to be more than 1 per cent of the gross tax collection. In 2008-09, for instance, the total expenditure of the Revenue Division, Federal Board of Revenue and its line departments was 0.74 per cent of the gross tax collected. This very change enhances the proceeds of Divisible Pool of taxes by 4 percentage points.

Changing composition of the Divisible Pool

The Divisible Pool includes these taxes levied and collected by the Federal Government:

- (a) Taxes on income including corporate tax but excluding taxes on income consisting of remuneration paid out of the Federal Consolidated Fund
- (b) Wealth tax
- (c) Capital value tax
- (d) Taxes on sales and purchases of goods imported, exported, produced, manufactured or consumed
- (e) Export duties on cotton
- (f) Customs duties
- (g) Federal excise duties excluding the excise duty on gas charged at wellhead
- (h) Any other tax which may be levied by the Federal Government

Under the SNA, the second important departure from the past relates to the composition of the Divisible Pool. Item (d) in the past merely referred to “Taxes on sales and purchases”. In recognition of the Constitutional right of the Provinces to tax services, it has now been made clear that the Federal Government can only levy and collect sales tax on “goods imported, exported, produced, manufactured or consumed.” Consequently, item “e” in the previous NFC – “Sales tax on services (CE mode)” has now been eliminated. CE here stands for Central Excise. Under the SNA, what was called GST on services (Provincial) was also transferred to Provinces after deducting 2 per cent collection charges. Article 8 of SNA now states:

“NFC recognizes that sales tax on services is a Provincial subject under the Constitution of the Islamic Republic of Pakistan, and may be collected by respective Provinces, if they so desire.” It may be noted that effectively all taxes levied and collected by the Federal Government at present and in future form part of the Divisible Pool. Item (b) related to wealth tax has been included, but the tax was abolished by the Musharraf regime.

Vertical Distribution

The third important departure from the past is the substantial change in the vertical distribution of the net proceeds of the Divisible Pool in favour of the Provinces. From 45 per cent in 2009-10, the share assigned to the provinces has been raised to 56 per cent in the current Fiscal Year, 2010-11. It will rise further to 57.5 from the Fiscal Year 2011-12 onwards. Correspondingly, the share of the Federal Government has declined from 55 per

cent in 2009-10 to 44 per cent in 2010-11. It would decline further to 42.5 per cent from 2011-12 onwards.

Multiple Criteria

The fourth important departure under SNA is in regard to horizontal distribution among the Provinces. It has shifted from the single-factoral criteria of population to multiple indicators. These now include population, poverty or backwardness, revenue collection or generation and inverse population density. The relative weights assigned to these indicators are as follows:

Provincial Share: Relative Weights of Multiple Indicators	
Indicators	Weight (%)
(a) Population	82.00
(b) Poverty or backwardness	10.30
(c) Revenue collection or generation	5.00
(d) Inverse population density	2.70

As a result of the application of the multiple indicators, the provincial shares have changed. As can be seen in the table below, which compares the SNA with the previous NFC Award, all provinces except Punjab have gained. Balochistan, the least developed province, has gained the most. Its share improves by as much as 3.98 percentage points. Punjab has lost out by as much as 5.62 percentage points.

Relative Shares of Provinces under SNA and 6th NFC			
Province	SNA	Sixth NFC	Difference (%)
Balochistan	9.09	5.11	+3.98
Khyber Pakhtunkhwa	14.62	13.82	+0.80
Sindh	24.55	23.71	+0.84
Punjab	51.74	57.36	-5.62
Total:	100	100	

Special Provisions

The fifth important departure from the past consists of a number of special provisions in favour of smaller Provinces. A special feature of the SNA is that one per cent of the net proceeds of Divisible Pool before its vertical distribution has been earmarked for Khyber Pakhtunkhwa towards meeting the cost of the war on terror. In the case of Balochistan, the budget for 2010-11 projects its share in the Divisible Pool under the SNA at Rs 83 billion. The corresponding figure in the previous year was Rs 29.4 billion. Not only this amount has risen sharply by 182 per cent, the Federal Government has guaranteed that throughout the five years of the SNA, Balochistan would receive its projected share even if the projections

go wrong. In other words, any difference would be made up by the Federal Government from its share. This is important for Balochistan because actual releases deviate routinely from the projected share.

National Finance Commissions are not just about the formula-based Divisible Pool of taxes. Another important feature is the mechanism of straight transfers outside of the Divisible Pool. These relate to royalties on crude oil and natural gas, development surcharge and excise duty on natural gas. In the case of smaller provinces, these transfers constituted substantial additionality to the share in the Divisible Pool.

Under the previous NFC, royalty on crude oil and development surcharge on natural gas, after deducting 2 per cent collection charges, were transferred to the provinces on the basis of well head production. According to SNA, each province's share in the net proceeds of the total royalties on crude oil will be an amount which bears to the total net proceeds the same proportion as the production of crude oil in the Province in that year bears to the total production of crude oil.

After deducting 2 per cent collection charges, the previous NFC transferred royalty and excise duty on natural gas to the provinces in accordance with Article 161(1) of the Constitution. This does not change under SNA, except that it recommends legislation to increase excise duty to Rs.10 per MMBTU. But the share of a Province in the net proceeds of development surcharge on natural gas would be determined by an average rate per MMBTU of the respective province, to be derived by a notional clubbing of the royalty and development surcharge. A special provision for Balochistan has been made to rework on the basis of this new formula its share in development surcharge with effect from July 1, 2002. The resulting amount, subject to a maximum of Rs 10 billion, will be paid as Federal grants in five years in equal installments.

Grants-in-Aid

In addition to the shares in the Divisible Pool of taxes and straight transfers, the Federal Government has been providing grants-in-aid to the Provinces. Under the previous NFC, as amended under the Distribution of Revenue and Grants-in-Aid Order 2006, grants of Rs 27.75 billion were provided each year, increasing annually in line with the growth of net proceeds of Divisible Pool. The distribution formula favoured the less developed Provinces. Thus Punjab was allocated the lowest share of 11 per cent, Sindh 21 per cent and Balochistan 33 per cent. The highest share of 35 per cent was allowed to Khyber Pakhtunkhwa. This arrangement has been discontinued in SNA. While the Federal Government has committed to assist the Provinces through specific grants in times of unforeseen calamities, and allowed annual grants to Sindh amounting to 0.66 per cent of its share in the net proceeds of the Divisible Pool, the system of regular grants-in-aid has been done away with.

The basis of the special grant to Sindh needs to be explained. Octroi and zilla tax collected by local governments had been abolished because these constituted unnecessary barriers to trade. In lieu thereof, 1/6th of the net proceeds of sales tax in the Provincial share of the Divisible Pool was allowed as compensation. The Provinces were also bound to transfer the entire amount to the district governments. Distribution between the Provinces was broadly in proportion to their respective collections of octroi and zilla tax. Accordingly,

Punjab received 50 per cent, Sindh 34.85 per cent, Khyber Pakhtunkhwa 9.93 per cent and Balochistan 5.22 per cent. Population-based allocations to the Provinces in the Provincial share of the Divisible Pool were determined after the deduction of 1/6th of the net proceeds of sales tax. Under the SNA, this arrangement has been discontinued. While other Provinces were not any worse off as a result, Sindh suffered an absolute decline. The grant of 0.66 per cent to Sindh compensates for this decline.

The Financial Outcome

What is the final outcome? Annex Tables 1-3 show the transfers to the Provincial Governments from the Divisible Pool of taxes and as straight transfers from the Federal Government during the years 2009-2011. These are Budget as well as Revised estimates. A summary position is presented in the table below.

6th NFC (2009-10) and 7th NFC (2010-11): A Comparative Analysis

(Rs in Billion)

Divisible Pool	Balochistan	KP	Sindh	Punjab	Total Provincial	Federal	Total
6 th NFC	29.4	76.0	145.5	323.1	574.0	807.6	1381.6
7 th NA	83.0	138.7	207.3	436.8	865.8	802.9	1668.7
Straight Transfers							
6 th NFC	11.7	7.3	53.7	8.5	81.2	- 81.5	81.2
7 th NA	16.4	21.7	72.4	57.4	167.0	- 167.0	167.0
Total							
6 th NFC	41.1	83.3	199.2	331.6	655.2	726.1	1381.3
7 th NA	99.4	160.4	279.7	494.2	1032.8	635.9	1668.1
<i>Source: Annex tables</i>							

It will be seen that the total transfer of resources to the Provinces under SNA is estimated at Rs 1032.8 billion compared to Rs 655.2 billion in the last year of the 6th NFC, an increase of 57.6 per cent. While all Province have gained, the highest increase is in the case of Balochistan, i.e. 141 per cent. The Federal Government will experience a decline of 12.4 per cent.

III. The Constitution (Eighteenth Amendment) Act, 2010 (CEAA)

The Constitution (Eighteenth Amendment) Act, 2010 (CEAA) was passed by the National Assembly on April 8, 2010. In its original form and up to the seventeenth amendment, the 1973 Constitution contained a number of economically relevant features. The most important among these formed part of Part V relating to Relations between Federation and Provinces and Part VI relating to Finance, Property, Contracts and Suits. Under the CEAA, significant changes have been made in both Parts. As a result, the Fourth Schedule comprising Legislative Lists has undergone major changes. Federal Legislative List, Part I,

over which the Federal Government has exclusive jurisdiction, had 59 entries; it now has 53 entries, with 4 revisions of 4 sub-entries. Federal Legislative List, Part II, also lies in the Federal jurisdiction but matters pertaining to it are regulated by the Council of Common Interests (CCI) which has full representation of the Provinces. From 8 entries, the Federal Legislative List, Part II, has now gone up to 18 entries. Concurrent List, over which both the Federal and Provincial Governments exercised jurisdiction, had 47 entries; it has now been abolished. Except for entry 29 (boilers) moved to the Federal List Part I and entries 34 (electricity) 43 (legal, medical and other professions) moved to Federal List, Part II, all other subjects now fall in the jurisdiction of the Provinces. According to Article 142 (c), the provinces have exclusive jurisdiction “with respect to all matters pertaining to such areas in the Federation as are not enumerated in the Federal Legislative List.”

There are thus two important effects of the CEAA. First, the abolition of the Concurrent Legislative List had been a long-standing demand based on understandings believed to be given at the time of constitution making in 1973 to terminate it within ten years of the Constitution coming into effect. Despite the fact that there is neither any documentary evidence nor confirmation by any participant of the constitution making process in 1973, the List has been deleted from the Fourth Schedule to respect the implicit national consensus on doing so. By abolishing the Concurrent List and deleting certain items from the Federal Legislative List, Part I, the CEAA has substantially increased the quantum of provincial autonomy. Second, the role of the provinces in the decision-making of the Federation has been substantially enhanced by the enlargement of the Federal Legislative List, Part II, and the strengthening of the institutional mechanisms for the conduct of the business thereof. These two effects are now discussed in turn.

A. Provincial Autonomy

Provinces now have more subjects to deal with than was the case before the CEAA.

In the first place, they have been given full and effective control of the social sectors, especially education, health, population, labour, social welfare, Zakat, Auqaf, environment, tourism, print media and cinematograph films, culture and archeology.

Social Sectors

Education: Education was mainly a provincial subject, but with an overbearing Federal presence in higher education, curriculum, syllabus, planning, policy, centres of excellence, Islamic education and standards of education. After the CEAA, the Federal Government can set up Federal agencies or institutes for research, professional or technical training or promotion of special studies (Entry 16 of the Federal Legislative List, Part I). It is also concerned with “Education as respects Pakistani students in foreign countries and foreign students in Pakistan” (Entry 17 of the Federal Legislative List, Part I). But the subject of “Standards in institutions for higher education and research, scientific and technical institutions” has been placed under the Federal List, Part II (Entry 12).

Other than standards of higher education and international student exchange, the Provinces are responsible for the education sector. It obviates the need for Ministry of Education and the Higher Education Commission at the Federal Level. The student exchange

function can be performed by the Economic Affairs Division and the standards of higher education and science can be set up by a leaner Education and Science Commission responsible to the CCI. Provinces are now free to have their own education policies to meaningfully reflect the socio-cultural diversities of the country.

Elementary education is already a Provincial subject. But the insertion of the new Article 25A - Right to Education under CEAA makes it free and compulsory. The said Article states: "The State shall provide free and compulsory education to all children of the age of five to sixteen years in such manner as may be determined by law." The Constitution requires this law to be enacted by the Provincial Assemblies within a maximum period of two and a half years.

Health: Like education, health has largely been a Provincial subject. Overtime, however, the Federal Government had assumed a much bigger role than the Constitution envisaged. Except for port quarantine, the Federal Legislative List, Part I, contained nothing related to health. The position remains unchanged post-CEAA. With the abolition of the Concurrent List, three key changes have occurred. First, the subjects of drugs and medicines, poisonous and dangerous drugs move to the Provinces. Secondly, the Provinces are now responsible for "prevention of the extension from one Province to another of infectious or contagious diseases or pests affecting men, animals or plants." Thirdly, the subject of "Mental illness and mental retardation, including places for the reception or treatment of the mentally ill and mentally retarded" now falls in the Provincial domain. Finally, the regulation of medical professionals has been moved to the Federal List, Part II.

Effective implementation of CEAA would mean that the Federal Ministry of Health would cease to be a regulator of drugs and medicines. It would no more be responsible for vertical programmes. There would be no need for a federal health policy. As a matter of fact, this Ministry would have no reason to exist.

Population Welfare: Although the Provinces have their own separate Population Welfare Departments, the Federal Government has been fully funding the development budgets of the Provinces. Federal Ministry of Population Welfare administers this development programme. As a result of the CEAA, the subject stands fully devolved. With the subject of health going to the Provinces in its entirety, the devolution of the population programme is only natural. With a view to ensuring effective delivery, the expert opinion for a long time has suggested the merger of the two Ministries at the Federal level, without any success. Better sense would perhaps prevail at the Provincial level.

Labour and Manpower: All matters related to labour have been entrusted to the Provinces. In addition to the functions already performed by the Provincial Departments of Labour, the CEAA has given the following subjects to the Provinces:

- Welfare of labour; conditions of labour, provident funds; employers' liability and workmen's compensation, health insurance including invalidity pensions, old age pensions
- Trade unions; industrial and labour disputes
- The setting up and carrying on of labour exchanges, employment information bureaus and training establishments
- Regulation of labour and safety in mines, factories and in oilfields
- Unemployment insurance

In view of this comprehensive devolution, the Federal Ministry of Labour and Manpower becomes completely redundant. Provinces are empowered to have their own labour policies, with different minimum wage levels. Organizations like the Employees Oldage Benefits Institution (EOBI) and the Workers Welfare Fund (WWF) will have to be provincialised. Same will be the case with various skills and vocational training schemes and institutions.

Environment and Special Initiatives: Environmental pollution and ecology was on the Concurrent List. After the CEAA, environment is the sole responsibility of the provinces. The provinces will have to implement policies related to forests, environmental degradation, sanitation and drinking water. Clean Drinking Water for All, an initiative originally based in Ministry of Environment, was moved to a specially created Ministry of Special Initiatives to speed up implementation. This Ministry will devolve along with Ministry of Environment. Energy conservation, presently part of the Ministry of Environment, will have to move to Ministry of Petroleum and Natural Resources.

Social Welfare, Zakat: Ministry of Social Welfare and Special Education deals with social transfers to the disadvantaged sections of the society. Ministry of Zakat and Ushr oversees the discharge of the religious obligation to help the poor and the indigent. These will be devolved. Benazir Income Support Programme is a scheme of social assistance falling conceptually under the purview of Social Welfare. This will have to devolve, too.

Culture, Tourism and others: The care and protection of ancient and historical monuments and archeological sites and remains is presently the subject of Ministry of Culture, which stands devolved. Production and censorship and exhibition of cinematograph films also belong here. The Provinces already deal with newspapers, books and printing presses. The implication here is for Federal Ministry of Information to leave it entirely to the Provinces. The CEAA makes cinematograph films and print media the exclusive domain of the Provinces. Auqaf, presently administered by the Ministry of Religious Affairs, is devolved. With the subject of Islamic Education devolved to the Provinces, the justification for this Ministry at the Federal level is doubtful. Council of Islamic Ideology is a Constitutional body and should exist independent of this Ministry. Haj can also be better organized by an autonomous body.

Economic Sectors

There were a number of entries on the Concurrent List relating to transactions that form part of the business environment for the smooth functioning of the economic sectors, especially private investment. These included the following:

- Wills, intestacy and succession, save as regards agricultural land
- Bankruptcy and insolvency, administrators-general and official trustees
- Arbitration
- Contracts, including partnership, agency, contracts of carriage, and other special forms of contracts relating to agricultural land
- Trusts and trustees
- Transfer of property other than agricultural land, registration of deeds and documents
- Actionable wrongs

As is obvious, the CEAA makes the Provinces the pivot of legislation relating to the above areas to ensure sanctity of contracts and clarity of property rights. (Regulation of legal professions, previously on the Concurrent List, has been moved to the Federal Legislative List, Part II). In addition, the Provinces have also been allowed exclusive jurisdiction on shipping and navigation on inland waterways as regards mechanically propelled vessels, and the rule of the road on such waterways; carriage of passengers and goods on inland waterways. The same is now the case for mechanically propelled vehicles.

Pre-CEAA Appropriation of the Provincial Subjects

The subjects mentioned in the previous two sections have fallen in the Provincial domain following the termination of the Concurrent Legislative List by the CEAA. It need not be forgotten that over a period of time and under one pretext or the other, the Federal Government has appropriated many other subjects not mentioned in the Federal Legislative List. These include food and agriculture, livestock and dairy development, industries, local government and rural development, sports, textile, women development, youth, parts of petroleum and natural resources.

Resources

The addition of the large number of subjects in social and economic sectors to the provincial responsibilities, enumerated in the earlier two sections, increases the quantum of autonomy. Whether the provinces have a corresponding increase in resources to spend on these matters, is another subject. The subject needs to be examined at three levels. First, the addition to the provincial resources contained within the CEAA. Second, the additionality in resources provided by the SNA, discussed in the Part II above. Thirdly, the permission to the Provinces to incur and domestic debt and international debt under the CEAA.

The CEAA Revenue Sources: The abolished Concurrent List, in devolving subjects to the provinces, also devolved the power to levy fees in respect of any of these subjects. Further, a number of revenue sources/taxes included in the Federal Legislative List Part I, have been deleted by the CEAA. This means that the Provinces now have the power to exploit their revenue potential. These include:

- State lotteries
- Duties in respect of succession to property
- Estate duty in respect of property
- Taxes on capital value of immovable property

State lotteries are an important source of financing specific public services in other countries. It remains unexploited in Pakistan for religious reasons as well as the lack of transparency witnessed in some cases in the past. The other three taxes, with their incidence largely on the well-to-do, had become dormant at the Federal level. Like the wealth tax, Federal Government had not been using them as revenue sources. The CEAA has provided the Provinces an opportunity to exploit their potential. However, the budgets announced by the Provinces for July-June 2010-11 took no steps in this direction.

Reformed GST: Due to the burning nature of the topic, the General Sales Tax (GST)

on services merits a separate discussion. Historically, the sales tax belonged to the Provinces. In 1948, the Provinces let the newly established, under-funded Government of Pakistan to declare it to be a Federal subject. In 1951, the subject was permanently transferred to the Government of Pakistan. The same position was repeated in the original 1973 Constitution, and the entry 49 of the Federal Legislative List, Part I, stated thus: "Taxes on sales and purchases." This tax was commonly understood to be charged on goods. However, the wording in the entry 49 did not make it clear. In 1976, the Fifth Amendment to the Constitution made it clear by changing the wording to "Taxes on the sales and purchases of goods imported, exported, produced, manufactured or consumed." In spite of this, the Federal Government started to levy it on services, in various ways including the excise mode. The Provinces began to take issues with this towards the close of 1980s when the Federal Government accepted the levy of a value added tax (VAT) under the Structural Adjustment Programme with the International Financial Institutions. By now the services had started to become big revenue spinners. A new Sales Tax Act was passed in 1990 with a view to eventually moving into the VAT mode fully. While this movement was slow and not very steady, the entry into another IMF programme in 2008 resulted in a commitment to impose a full VAT mode, called the General Sales Tax. Those who signed the agreement failed to foresee that the Provinces might assert their authority to levy and collect GST on services themselves. Having different jurisdictions for goods and services is against the very spirit of a VAT. The SNA provided a legitimate platform to the Provinces to reclaim their jurisdiction over the sales tax on services. As already noted, the SNA explicitly recognized that the sales tax is a Provincial subject and there was no bar on them if they wanted to collect it themselves. The Government of Sindh declared its intention to do so. Hence the talk of a Reformed GST to get around this difficulty and satisfy the IMF at the same time. To add to the vows of the Federal Government and its team negotiating with the IMF, the CEAA made the right of the Provinces crystal-clear by adding, at the end of entry 49 of the Federal Legislative List, Part I the following words: "except sales tax on services."

National Finance Commission (NFC): Two new clauses added in Article 160 relating to the NFC make the Provincial share in the vertical distribution irreversible and the implementation of the NFC awards subject to regular monitoring. These are: "(3A) The share of Provinces in each Award of National Finance Commission shall not be less than the share given to the Provinces in the previous Award. (3B) The Federal Finance Minister and the Provincial Finance Ministers shall monitor the implementation of the Award biannually and lay their reports before both houses of Parliament and Provincial Assemblies."

Natural Resources: The ownership of natural resources and the related revenues have been a bone of contention between the Federal Government and the smaller Provinces. The CEAA has made a number of amends in this regard.

Before CEAA, the Federal excise on natural gas was paid to the province of origin but not on oil. Article 161 (1) has been amended. It now has these two sub-clauses: "(a) the net proceeds of Federal duty of excise on natural gas levied at well-head and collected by the Federal Government, and of the royalty collected by the Federal Government, shall not form part of the Federal Consolidated Fund and shall be paid to the Province in which the well-head of natural gas is situated; (b) the net proceeds of Federal duty of excise on oil

levied at well-head and collected by the Federal Government, shall not form part of the Federal Consolidated Fund and shall be paid to the Province in which the well-head of oil is situated.

Article 172 has been amended to allow the Provinces 50 per cent of the ownership of mineral oil and natural gas within the Province or the territorial waters without prejudice to the existing commitments and exclusive right to other natural resources within the territorial waters. The later, among other things, means that fish stock in territorial waters belongs to the Provinces. Accordingly, the clause (2) of the Article 172 has been amended and a new clause (3) added. These now read as follows: “(2) All lands, minerals and other things of value within the continental shelf or underlying the ocean beyond the territorial waters of Pakistan shall vest in the Federal Government. (3) 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.”

Water and power is another area impacted upon by the CEAA. Article 155 previously protected interests in water affected prejudicially by the supply from a natural source. It now covers “reservoirs” as well. Article 157 (1) permits Federal Government to construct power stations anywhere in Pakistan. The CEAA has introduced an obligation to consult the host Province by inserting this proviso: “Provided that the Federal Government, prior to taking a decision to construct or cause to be constructed, hydro-electric power stations in any Province, shall consult the Provincial Government concerned.” A new clause (3) has been added for dispute resolution, which states: “In case of any dispute between the Federal Government and a Provincial Government in respect of any matter under this Article, any of the said Governments may move the Council of Common Interests for resolution of the dispute.”

Provincial Debt

A radical change introduced by CEAA is the freedom, within limits, allowed to the Provinces to raise domestic as well as foreign loans and issue guarantees. Article 167 related to borrowing by Provincial Governments now has a new clause to this effect, which states: “(4) A Province may raise domestic or international loan, or give guarantees on the security of Provincial Consolidated Fund within such limits as may be specified by the National Economic Council.”

The argument for denying this freedom in the past was to ensure the smooth conduct of monetary, financial and debt management policies. All banks set up by the Provinces in the past have had problems. Mehan Bank was closed down, Bank of Punjab failed to follow prudential rules and Khyber Bank operations leave much to be desired.

B. Institutional Framework for a Participatory Federation

A novel feature of the CEAA is the institutional framework provided for an expanded and effective participation of the Provinces in the decision making of the Federation. Federal Legislative List, Part II, comprises of subjects requiring Federal- Provincial interaction. The much ignored CCI provided in the original 1973 Constitution has been made a pivot of the reform in this sensitive area. The Parliamentary Committee on Constitutional Reform

(PCCR) “built on the basic idea of the 1973 Constitution, in terms of Article 153, i.e. the Council of Common Interests, in order to promote joint supervision of Federal resources and dispute management while providing a collective leadership to further strengthen the Federation” (Para 21).

Before CEAA, Federal Legislative List, Part II, consisted of 8 entries, the most important being railways, mineral oil and natural gas, public sector enterprises set up by declaring Federal control by Federal law in public interest and the CCI. Article 155 also authorized the CCI to deal with complaints regarding interference with water supplies. Now it includes electricity and legal, medical and other professions from the defunct Concurrent List. National planning and national economic coordination including planning and coordination of scientific and technological research, major ports and census have been added from the Federal Legislative List, Part I. New entries include all regulatory authorities established under a Federal law, supervision and management of public debt and inter-provincial coordination matters.

Council of Common Interests (CCI)

Not only the scope of the Federal Legislative List, Part II, becomes larger, the CCI has also emerged as the most important forum in the new institutional framework. Its function, under Article 154 (1) remains unchanged: “The Council shall formulate and regulate policies in relation to Part II of the Federal Legislative List and shall exercise supervision and control over related institutions.” Provisions that it could make its own rules of procedure and majority rule for decisions already existed. It was also provided that a dissatisfaction with the decision of the CCI could be taken to a joint sitting of the Parliament and the Parliament in joint sitting could also issue directions to CCI. Under the CEAA, its composition has been strengthened. It consists of the Prime Minister as Chair, the Chief Ministers of Provinces and three members from the Federal Government to be nominated by the Prime Minister. Before CEAA, any cabinet member could be the chair. The constitution of the CCI now cannot be delayed; it has to be constituted within thirty days of the Prime Minister taking oath of office. A meeting is mandated at least once in ninety days. It shall have its own secretariat. The Parliament shall have to be informed about the activities of the CCI by submitting an Annual Report to both houses.

National Economic Council (NEC)

By moving the NEC from Federal Legislative List, Part I to Part II, the function of national planning is the joint responsibility of the Federal Government and the Provinces. Broadly, Article 156 (2) keeps its function unchanged except the italicized part: “The National Economic Council shall review the overall economic condition of the country and shall, for advising the Federal and Provincial Governments, formulate plans in respect of financial, commercial, social and economic policies; and in formulating such plans it shall, *amongst other factors, ensure balanced development and regional equity* and shall also be guided by the Principles of Policy set out in Chapter 2 of Part II.” There are, however, important changes made under CEAA on the pattern of CCI. Article 156 (1) specifies its composition. It is to be chaired by the Prime Minister, and the membership consists of the Chief Ministers and one member from each Province to be nominated by the Chief Ministers, and four

other members nominated by the Prime Minister. The meetings of the NEC can be summoned by the chairman or on a requisition made by one-half of the membership. But meeting at least twice a year is mandatory.

An Annual Report has to be submitted to each House of the Parliament. The spirit of this new role of the NEC requires Planning Commission as its secretariat, with its members nominated by the Provinces.

IV. Summing Up

The SNA and CEAA are developments of great economic, financial and fiscal significance. The SNA has reversed the vertical distribution of resources and made a departure from the population-based criteria of horizontal distribution to multiple criteria. Not only the pie for distribution among the Provinces is larger, the distribution among the Provinces is also fairer. Balochistan, the least developed province, has gained the most, followed by Khyber Pakhtunkhwa. A number of special provisions also favour smaller Provinces, besides further concessions on natural resources.

As result of the CEAA, the Provinces now have more subjects to deal with than before. They now fully control the social sector. Their role in the economic sector is also enhanced. Along with these additional responsibilities to spend, the CEAA gives ownership of some sources of revenue to the Provinces.

However, the sequencing of SNA and CEAA has made the linkage between the two problematic. The SNA allowed greater resources to the Provinces before the CEAA extended their autonomy in regard to subjects. Again, despite some additions to the revenue sources owned by the Provinces, all of the major taxes continue to be levied and collected by the Federal Government. The SNA report calls for achieving a tax/GDP ratio of 15 per cent by 2014-15, the last year of the SNA. It also hoped that Provinces would take necessary administrative and legislative steps to tax agriculture and real estate. Provincial Governments were expected to develop and enforce mechanisms for maintaining fiscal discipline. All post-SNA budgets of the Provinces show deficits and the Federal Government's fiscal deficit and failure to reform is threatening the Programme with the IMF. Article 270AA requires that the process of devolution of matters mentioned in the Concurrent List to the Provinces must be completed by June 30, 2011. It seems that the Federal Government lacks the will and the Provincial Governments the capacity to meet the deadline, unless the Implementation Commission knows more. It prefers to work in strict secrecy, Article 19A on Right to Information notwithstanding.

TABLE 1

PROVINCIAL SHARE IN REVENUE RECEIPTS 2009-2010 (BUDGET)

<i>(Rs. in Million)</i>					
	Punjab	Sindh	Khyber Pakhtunkhwa	Balochistan	Total
Taxes on Income	130107.229	53780.377	31347.314	11590.794	226825.714
Capital Value Tax	1767.503	730.605	425.852	157.461	3081.421
Sales Tax (excluding 1/6 th)	627594.617	25941.955	15120.954	5591.033	109413.559
1/6 th of Sales Tax	3958.758	27590.577	7861.533	4132.649	79169.517
Federal Excise (Net of Gas)	32076.443	13258.934	7728.320	2857.577	55921.274
Customs Duties	40286.698	16652.678	9706.454	3589.000	70234.830
GST (CE Mode)	14440.162	5968.902	3479.132	1286.423	25174.619
Total: Divisible Taxes (A)	321022.410	143924.028	75669.559	29204.937	569820.934
Royalty on Crude Oil	1429.013	3915.178	2469.512	0.000	7813.703
Royalty on Natural Gas	1214.014	18129.114	2729.095	4443.718	26515.941
Gas Development Surcharge	1631.207	19914.811	2159.296	5632.946	29338.260
Excise Duty on Natural Gas	350.840	4545.240	191.100	1371.020	6458.200
G.S.T (Provincial)	8759.079	3620.602	2110.364	780.315	15270.360
Total: Straight Transfers (B)	13384.153	50124.945	9659.367	12227.999	85396.464
Total (A+B)	334406.563	194048.973	85328.926	41432.936	655217.398

TABLE 2

PROVINCIAL SHARE IN REVENUE RECEIPTS 2009-2010 (REVISED)

<i>(Rs. in Million)</i>					
	Punjab	Sindh	Khyber Pakhtunkhwa	Balochistan	Total
Taxes on Income	126266.109	52192.633	30421.855	11248.602	220129.199
Capital Value Tax	1078.942	445.958	259.954	96.119	1881.000
Sales Tax (excluding 1/6 th)	66101.720	27323.427	15926.182	5888.769	115240.098
1/6 th of Sales Tax	42296.533	29480.684	8400.092	4415.758	84593.067
Federal Excise (Net of Gas)	31392.541	12976.241	7563.545	2796.651	54728.978
Customs Duties	39534.627	16341.806	9525.254	3522.000	68923.687
GST (CE Mode)	16386.671	6773.500	3948.113	1459.831	28568.115
Total: Divisible Taxes (A)	323057.143	145534.276	76044.995	29427.730	574064.144
Royalty on Crude Oil	2315.400	7859.073	3782.926	3.841	13961.240
Royalty on Natural Gas	1000.726	18926.982	1893.690	3875.640	25697.038
Gas Development Surcharge	1469.772	21164.714	587.909	6173.042	29395.437
Excise Duty on Natural Gas	356.477	4397.096	182.536	1315.311	6251.420
G.S.T (Provincial)	3388.508	1400.654	816.408	301.870	5907.440
Total: Straight Transfers (B)	8530.883	53748.519	7263.469	11669.704	81212.575
Total (A+B)	331588.026	199282.765	83308.464	41097.434	655276.719

TABLE 3

PROVINCIAL SHARE IN REVENUE RECEIPTS 2010-2011 (BUDGET)

<i>(Rs. in Million)</i>					
	Punjab	Sindh	Khyber Pakhtunkhwa	Balochistan	Total
Taxes on Income	177942.395	84431.500	56483.992	33809.319	352667.206
Capital Value Tax	1334.697	633.297	423.671	253.594	2645.259
Sales Tax (excluding 1/6 th)	165813.957	78676.704	52634.080	31504.898	328629.639
1/6 th of Sales Tax	0.000	0.000	0.000	0.000	0.000
Federal Excise (Net of Gas	41548.835	19714.416	13188.785	7894.340	82346.376
Customs Duties	50198.808	23818.723	15934.533	9537.848	99489.912
GST (CE Mode)	0.000	0.000	0.000	0.000	0.000
Total: Divisible Taxes (A)	436838.692	207274.640	138665.061	82999.999	865778.392
Royalty on Crude Oil	2792.131	7756.061	4482.472	7.164	15037.828
Royalty on Natural Gas	1885.636	20077.703	3300.428	4175.455	29439.222
Gas Development Surcharge	1178.089	18350.784	1377.047	6154.820	27060.740
Excise Duty on Natural Gas	407.387	5025.055	208.604	1503.154	7144.200
G.S.T (Provincial)	51155.334	21145.275	12325.082	4557.248	89182.939
Total: Straight Transfers (B)	57418.577	72354.878	21693.633	16397.841	167864.929
TOTAL (A+B)	494257.269	279629.518	160358.694	99397.840	1033643.321
<i>Source: Government of Pakistan, Finance Division, Explanatory Memorandum on Federal Receipts 2010-2011.</i>					