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TÍTULO: Federalismo, 18a enmienda y construcción de la nación en Pakistán.

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RESUMEN: Este documento arroja luz sobre la importancia del federalismo en la construcción de la nación, analizando en qué medida la Enmienda 18 ha fortalecido a la federación de Pakistán, y de ahí, qué papel ha jugado el federalismo en la construcción de la nación. Para Pakistán, el sistema federal es la penitencia de tales demandas y problemas, mientras que la enmienda 18 ha dado un curso definitivo que conduce a la construcción de la nación al avanzar ciertas medidas, que de adoptarse, pueden obtener resultados alentadores; es difícil ignorar la importancia de las instituciones políticas. La gobernanza inclusiva y descentralizada permitiría a la federación de Pakistán desempeñar su papel en la construcción de la nación a través de intereses e identidades complacientes.

PALABRAS CLAVES: federalismo, relaciones centro-provincia, identidades, constitución, autonomía.

TITLE: Federalism, 18th amendment and nation building in Pakistan.

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ABSTRACT: This paper sheds light on the significance of federalism in nation building, analyzing to which extent the 18th Amendment has strengthened the federation of Pakistan, and thereafter, what role federalism has played in the nation building. For Pakistan, federal system is thus the penance of such demands and issues, while the 18th amendment has given a definite course leading to nation building by advancing certain measures those if adopted may fetch encouraging results. Importance of political institutions may hardly be ignored. Inclusive and decentralized governance would allow federation of Pakistan to play its role in nation building through accommodating interests and identities.

KEY WORDS: federalism, centre-province relations, identities, constitution, autonomy.

INTRODUCTION.

As defined in the Merriam-Webster dictionary, “Federalism means distribution of power in a federation between the central authority and the constituent units (as states) involving especially the allocation of significant lawmaking powers to those constituent units”.

Federalism is essential to carve out and manage ties between the centre and federating units. It may be termed a tool to harmonize the feelings of autonomy sans endangering integrity of the state. Centre is empowered with managing national affairs while provincial governments are to take care of local interests. As opined by Dicey “a political contrivance intended to reconcile national unity with the maintenance of state rights”.

Constitution provides guiding principles to reconcile these arrangements. Federalism originally is an outcome of centrifugal and centripetal tendencies. Economic interests and common dangers propel the federating units towards federalism. These very factors led the federations came into existence like Switzerland, US and Australia. Further, the geographical size of the state compels the state towards devolution and federation. Probably America is the first ever state to undergo such experience.

After Second World War, this system of government became popular and many other states too adopted it. Actually, federal system was taken as an alternate to Empire system as it permits the central control and agreed provincial autonomy, simultaneously. In the pivot is the constitution through which authority is exercised. A federation may, however, thrive and flourish under particular conditions. Among them, foremost is geographical contiguity that provides effective defense apparatus and better communication. This very factor paved the way for America to become a federation. Pakistan, however, faced severe problems due to non-contiguity of its eastern wing.

The desire of unity among federating units carries considerable significance. Economic gains and security concerns lead units to forge a federation, especially, in the event of existence of a strong neighbor posing imminent threat of intrusion. Again, existence of British Empire as a common foe propelled thirteen US states (initially) to join hands in the amalgam of a federation. At the same time however, federating units also maintain their autonomy. They yield their sovereignty partially and maintain control of their local affairs. It is imperative in a federation that equality is ensured among all federating units.

A successful federation cannot function if this factor does not prevail. It was in the absence of this very factor that culminated in the downfall of German Empire and dominance of Prussia. In the case of Pakistan too, the sense of inequality ended up in cessation of East Pakistan. Simultaneously, there must be profound regard for the constitution and maximum compliance of the verdicts of judiciary

and decisions of the Parliament. A federal system may hardly operate sans element of legitimacy and consent of the masses.

DEVELOPMENT.

Case study of Pakistan.

In the constitutional history of Pakistan, federalism has been a crucial issue. With a long distance of more than 1000 miles between its two wings, Pakistan appeared on the globe with diverse geography. Strained relationship between federation of Pakistan and its constituent units has been creating hurdles in the integration of Pakistan. Certain other factors having their roots in the colonial era also contributed on the issue of federalism.

Colonial Legacy.

Initially, Pakistan was comprised of Sindh, Punjab, Baluchistan, NWFP and Bengal. Each Province was maintained by the British authorities under a separate administrative setup. They made all out efforts to strengthen their rule and to hold control over local authorities. Paradoxically, these provinces of Pakistan lacked the experience of constitutional and federal model. This aspect adversely disturbed the democratic course and framing of the constitution immediately after independence (Sayeed, 1967: pp. 48-51).

Under the Sandeman treaty, the British rule acknowledged the authority of Pakhtun and Balochi tribal leaders, and this area never remained under constitutional system. The British used to control this region from the centre while the main objective of this province was to offer defense shelter against the incursion from the North. Despite a demand put forward by All India Muslim League in 1927, this province was not accorded status of a province. This legacy was quite evident in constitution making after independence.

The Western part of Punjab unlike rest of it had entirely a different arrangement. Land owning class was given complete protection and Punjab Alienation of Land Act was promulgated in 1990 in order to extend them incentive of free transfer of land in the rural areas. These land lord Muslims, Sikh population and the money lender Hindus always sided with the British government. The government backed Unionist Party would support the policies of the British in the rest of Punjab and never allowed the All India Muslim League and the Congress to strengthen their cause. Even after independence, these coercive trends kept dominant. In addition, due to predominance of Punjabi soldiers and officers in the British army, the position of this province emerged as more authoritative (Waseem, 2010: pp.126-127).

The area of NWFP, (now KP) was maintained through Political Agent. Later, the developed areas of the province including Peshawar, Mardan, Hazara, Kohat, Dera Ismail Khan and Bannu became the part of British administrative system. Hence, the federal and constitutional norms could not establish in them as well. Albeit, Sindh was detached from Bombay, but this area had not that vibrant in the developmental process as rest areas of Bombay were. Even after eleven years of getting provincial status, the land-owning class could not learn alphabetic of constitutional norms. On the other hand, East Bengal had an entirely different situation having faced many political and strategic episodes. This province had a diverse level of political training as compare to Punjab, NWFP and Baluchistan. In the post-independence era, this entirely diverse and intricate legacy had its insinuation on the constitution making process (Ahmed, 1990: p.20-25).

Constitutional Development.

As elaborated earlier, owing to diverse reasons and requirement of British rule, areas those came under Pakistan's management were not conversant with the constitutional norms. Multiple economic, geographic and demographic dissimilarities demanded special mechanism. Federalism was the most

appropriate option as identity and security were common objectives of all provinces.

Pakistan adopted Government of India Act 1935 with slight modifications to serve as first interim constitution. Although through the said Act the British Government had formed a federal system in India yet the tilt of power was entirely towards the centre to better serve the British purposes. The real authority vested with the centre while the units were allowed little share in governance. A hope prevailed that the Act of 1935 would be adopted for a short span of time but it took almost a decade to frame a constitution (Khan, 2001: pp.884-89).

The Government of India Act held field for almost a decade. Though a few modifications were brought in it yet this Act allowed the Governor General upper hand on the assembly and the provinces. Such powers of Governor General reshaped the character of this Act into quasi-federal. The circumstances; however, demanded a well-conceived scheme of federalism with clear cut powers of the centre so as to preserve its effectiveness and authority together with autonomy of the federating units.

During the freedom fight, the people of Pakistan had acquired ample political training and won Islam-based nationwide identity. They were keen to implement these two elements for coping with strategic and political issue confronted by newly created state, but the outcome was dissimilar to such anticipation. The process of constitution making was faced with such complex problems and issues which the political leadership was unable to apprehend and solve (Ahmed, 2009: pp.19-80; Choudhury, 2007: pp.49.60). These issues including representation in the centre and in units, powers and autonomy given to provinces, national language and the modus operandi of elections created impediments in the way of embedding the concept of federalism in the constitution.

Actually, the adoption and longer prevalence of the Act of 1935 provided for immense powers to the Governor General analogous to British vice-regal system and to a big extent blocked the way of plugging in the parliamentary system which can't co-exist within the vice-regal framework. The

vacuum caused by the inability of political elite was filled by oligarchy of military and bureaucracy, as a consequential factor. This very factor had a vital role in the upcoming process of constitutional development in Pakistan. The Federation of Pakistan meets the minimum threshold of federalism yet in practice, it functions more likely as a unitary system having least capability to address territorial and ethnic diversities.

There had been significant demographic and geographic disproportions between the two wings of Pakistan. The demand of East Pakistan elites for a bicameral legislature was innate as it could offer them upper hand over Western wing. Contrarily, the supremacy of East Pakistan veiled in the concept of parity between two wings was totally unacceptable to the elites of Punjab. On this very ground, both 1950 and 1952 reports of Basic Principle Committee (BPC) were declined. Amalgamation of four provinces of West Pakistan into One Unit was yet another problem.

Another issue pertaining to federal nature of the constitution was the quantum of sovereignty. Eastern Wing as well as Sindh and NWFP (now KP) were the proponents of greater self-government and intended to limit the centre to the extent of foreign currency, defense and economic affairs. On the other hand, Punjab severely opposed this demand and favored a strong centre with robust powers. In fact, Punjab was advancing the pattern of federalism introduced in 1947 provisional constitution.

Issue of language was an obstacle, apart as Bengali was demanded as national language being the mother tongue of majority of population in Eastern wing leaving rest of the provinces at stake. The best solution could be Urdu but the Eastern part didn't accept it and finally, both Urdu and Bengali were declared national languages.

Promulgated on 23rd March 1956, the constitution of 1956 endeavored to address the prevailing issues by introducing multiple changes. A lot of clauses had been derived from the 1947 provisional constitution. In the 1956 constitution, thirty subjects were allocated to the centre while ninety-four were sanctioned to the federating units. National Monetary Council and Finance Commission were

set up to advise the government regarding framing of financial policies, sanctioning of loans and management of dividable taxes. A Federal Court was established as a prerequisite of federation which was responsible for interpreting the constitution.

Albeit the 1956 constitution attempted to address all the challenges related to linguistic, demographic and fiscal issues yet the leaning of authority was vividly towards the centre as a consequential factor of the prevalent cultural and constitutional legacy.

The constitution of 1962 could not experience the operational phase as Pakistan transformed from vice-regal system to martial law which concentrated the powers in the hands of one man having no constitutional approach. In fact, Ayub Khan was a military bureaucrat who was inclined to strengthen and prolong his rule instead of introducing a parliamentary democracy. The 1962 constitution provided for a federal system as envisaged in article 1 which pronounced name of the state. In its preamble, relation between federal government and federating units was made abundantly clear. This constitution too favored a centre stronger than the federating units.

In order to carve out the quantum of power two lists were introduced; Central list having 49 items and Concurrent list. President's office was endowed with enormous powers. The meek unicameral legislature had no authority to contain the President's high handedness. Likewise, governors represented the President in the provinces. They were nominated under President's whims and they too were endowed with unchecked powers.

In the hands of indifferent leadership, the spirit of federalism and its efficacy was rather crushed. Resultantly the constitution culminated into a disaster with President resigning from office in the wake of uncontrollable turmoil. This extremely centralized rule that lasted for almost a decade ended in another martial law when powers were again accumulated in the hands of one individual. This dictatorial rule functioned till the unfortunate occurrence of East Pakistan tragedy in 1971. There are many viewpoints on the fall of Dhaka but in terms of federalism, it was lack of federal scheme of the

successor constitutions which culminated in the secession of East Pakistan.

Federalism provides a comprehensive mechanism to keep the territory integral under the auspices of one management. In Pakistan, the issue and nature of federalism has given birth to multiple perils in the survival and integration of the country. In the wake of stepping down of Ayub Khan, Yahya Khan assumed as Chief Martial Law Administrator. He promulgated some ordinances those fell heavy on the consolidation and integrity of Pakistan. He terminated the One Unit and revived the earlier status of West Pakistan. He also declared Baluchistan as an independent province. This decision; however, proved very problematic as after elections, none of the leading parties (PPP and Awami League) could clinch even one seat in opposing wings. This abundantly made clear the divergence of philosophy of leadership and of masses living in both wings. Mujeeb's six points categorically suggested setting up of a weak centre and powerful units. The role played by a strong centre bitterly offended the leadership of East Pakistan and they demanded severance from West Pakistan. Debacle of East Pakistan was inexorable result of center's mal management of issues of federating units.

Virtually, the constitution of 1973 was the outcome of many compromises as the injury caused by secession of East Pakistan was still simmering. This constitution provided for bicameral legislature; the first of its kind as the previous constitutions created unicameral legislature with federal system. The Prime Minister enjoyed enormous powers while President had a titular position representing the state. Two legislative lists were introduced; Federal list and Concurrent list. Ostensibly sufficient autonomy was awarded to the units. However, according to some analysts the constitution had a considerable tilt towards a strong centre as no mechanism was available there to contain violation by the federal government.

Provincial languages were also given appropriate recognition keeping in view the ethnic designs and representation. The events surfaced later, however proved this step a constitutional flaw that aggravated the already prevailing stressed ethnic situation.

The 1973, constitution introduced a parliamentary system. On the analogy of British model bicameral legislature was adopted with federal set up. Due to amendments incorporated by both civilian and military authorities, the model was distorted soon. Important bodies including the Council of Common Interests remained inactive for long. Despite having a federal system, the procedure of passing budget was exactly the one provided for in the 1935 Government of India Act. The centre would reserve with it 90% of revenue. Equal division of sources was provided for in the constitution but the relevant bodies like Council of Common Interests remained non-starter for a long span of time. Even now, hardly the National Finance Commission (NFC) is doing any better in the sphere of consolidating the federation. Therefore, it is essential to examine major amendments introduced in the constitution (Hanif & Khan, 2012, pp.23-26).

Eighth Amendment to the constitution is among the most important legislative instruments as it altered the nature of constitution. The Army took over Bhutto administration in 1979 and imposed martial law which continued till the time the 8th amendment was embedded in the constitution. The main objective of this amendment was to enable President to dissolve Assemblies and dismiss the Prime Minister at his discretion with like powers to the provincial governors. This amendment also empowered the President to appoint provincial governors and services' chiefs while Prime Minister had little role in this procedure.

President had also substantial say in the election of Prime Minister. He could ask an elected member of Assembly to run for premiership if he/she aver majority in the House. This marked a clear shift from the parliamentary to Quasi-Presidential regime. The federal character of the constitution was adversely affected due to concentration of powers in the centre and office of the President.

Through the 13th amendment the 8th amendment was reversed and the original parliamentary character of the constitution was revived in 1997 by the Nawaz Sharif administration. This amendment considerably slashed powers of the President who was now obliged to act as per Prime Minister's

advice which was compulsory. The tilt of power was towards the executive. This gave birth to identical issues surfaced during Bhutto's administration. After promulgation of 13th amendment, the federating units were under the huge pressure of the executive, which they earlier faced from the centre.

Nawaz Sharif administration was toppled in 1999 by the army which again enforced martial law and took reigns of the state by abrogating the constitution. Legal Framework Order (LFO) 2002 was promulgated which revived the 8th amendment in effect. In addition to powers to appoint Chairman Joint Chiefs of Staff Committee, Services Chiefs and the governors, the President regained the power to dissolve the National Assembly. Advice of Prime Minister was required but it was not binding for President to follow it. The eleven orders and ordinances promulgated by Pervez Musharraf also got legal protection through LFO.

The said eleven instruments were incorporated in the 6th Schedule to the Constitution and without prior concurrence of the President could not be amended. A special arrangement made to keep Nawaz Sharif and Benazir Bhutto away from regaining power was that none could hold Prime Minister's office for more than twice. The office of President thus emerged as all-time stronger. Through inserting these centralization clauses and accumulation of powers in the office of President, the federal character of the constitution was again decomposed (Shafqat and Wahlah, 2006).

17th amendment was introduced on 31st December 2003 during Pervez Musharraf stint for amending article 11 of the constitution of 1973. Amendment revitalized position of the President and enabled a sitting President to seek another tenure through a vote of confidence of the Assembly instead of holding election afresh. In the procedure of such election through Assembly Supreme Court was also involved. Such amendments tilting towards centralization continued to affect the constitution's federal character. Parliament faced big loss because it was made subservient to the executive. The ratio of debate in assemblies over vital legislation decreased to the lowest level. Such manifest

disregard of public representation gravely weakened the primary concept of federalism contained in the constitution (Kenedy, 2006: pp.1-11).

As earlier deliberated, the 8th and 17th amendments altered the parliamentary and federal character of the constitution and floated the balance of authority towards the President. These presidential powers transformed outlook of the constitution into quasi-federal. President in a parliamentary system holds a titular office while the actual powers rests with the office of Prime Minister; the real representative of the masses. The situation of the 1973 constitution was vice versa after incorporating the 8th and 17th amendments.

The 18th amendment resorted to purge the constitution of these unwanted insertions and to restore its original spirit. Following are the major changes brought forward by the said amendment (Waseem, 2010: p.18. Khan, 2001: pp.100-110):

- i. Revived the parliamentary and federal nature of the constitution.
- ii. Removed the amendments inserted by dictatorial regimes of General Zia-ul-Haq and General Pervez Musharraf.
- iii. Enhanced provincial autonomy through devolution of power. Removed Concurrent List and transfer of residuary powers to the provinces.
- iv. Widened the sphere of definition of “high treason”. Accordingly, suspension or keeping the constitution in abeyance or such attempt shall be considered “high treason”. Further, it has been elaborated that even the Supreme Court lacked authority to validate such act.
- v. While removing article 62 and 63, some codes of conduct have been enacted with regard to qualification and disqualification for the elections of national and provincial legislatures.
- vi. Strengthened the office of Election Commission by enhancing his tenure from three to five years. Inclusion of both treasury and opposition members in the process of appointment of Chief Election Commission (CEC) has improved its credibility.

- vii. Fixed the numbers of ministers including ministers of state to 11% of the total number of MPs.
In case of a provincial assembly, it can't exceed 15 or 11% of the total members.
- viii. Established a new High Court in Islamabad which would be manned with judges from all provinces and the Islamabad territory.
- ix. As per Article 140-A, election to local bodies would be held under the surveillance of Election Commission of Pakistan.
- x. Increased the scope of Council of Common Interests. With the primary objective to protect interest of both sides, the Council comprised representatives both from centre and the units. It enjoyed an advisory role in the review and suggestion of economic condition, distribution of national revenues and formulation of policies and plans. National Finance Commission (NFC) would act as a protector of units' share in national revenue. This share cannot be lesser than given to a unit in the previous NFC award.
- xi. Presidential power to conduct referendum and to dissolve assemblies has been done away with. Powers of President have been transferred to the elected House of the people of Pakistan thereby giving supremacy to the parliament.
- xii. Unlike the previous scheme, the power to legislate on Concurrent List has exclusively been transferred to provincial assemblies.
- xiii. The Caretaker Prime Minister to be appointed with the consultation of both leader of opposition and the Prime Minister. Family of Caretaker Prime Minister won't run for election.

Achievements and issues of nation building post 18th Amendment.

The 18th amendment introduced constructive measures and a definite mechanism towards constitutional development and nation building in Pakistan. Simultaneously, several challenges have overtime emerged in the way of its smooth functioning. As far as positive impacts, the foremost has

been observed in the sphere of centre-province relations. 18th amendment has strengthened the federating units a lot.

By amending Article 142, the concurrent list was deleted, and its subjects were shifted to the provinces. President's power to appoint provincial governors was retained, but the governor-to-be must be a resident of respective province and enlisted in its voters' list. Before constructing hydro-power stations, the federal government is required to consult the provincial government concerned extending a big favor for water resources of provinces. To address differences between centre and federating units, CCI was made effective. The NFC has been under obligation not to allocate any province share less than the previous award. Emergency can't be imposed in a province sans prior consent of respective provincial assembly.

Likewise, this amendment has strengthened the political system. Deletion of Article 58(2)(b) has revived the democratic spirit. Sword of Damocles has been removed from the Assembly which enabled it to concentrate with utmost capacity on real issues and to complete its constitutional tenure. The working days for the Senate and the Provincial Assemblies have been increased from 70 to 100. Local bodies' elections have been put under the domain of Election Commission to increase their credence. Proclamation of emergency in the country or in a province has been made conditional to the consent of National Assembly and the concerned Provincial Assembly respectively. Presidential power is subject to the consent of peoples' representatives both at provincial and national realms.

Under this amendment Parliament has also acquired adequate powers. Earlier, the Parliament could not legislate on the laws contained in the 6th and 7th schedules but through the 18th amendment, this restriction has been done away with and these laws can be amended even without President's permission. As provided in Article 59 non-Muslims have also been given representation in the Senate by increasing its seats from 100 to 104. A significant space has been awarded to the judiciary. A successful federation can't be created sans an effective and strong judiciary (Sattar, 2012: pp.74-78).

At the same time, the 18th amendment has also created some issues. The institutions that have been empowered in the wake of its incorporation are confronted with certain challenges. Federating units have been empowered to legislate over the subjects of Concurrent list. Previously, provincial powers were devolved to local bodies but now the devolution from centre to federating units has been introduced. For exercising these powers in a befitting manner, provinces are ought to create infrastructure. Almost 20 ministries and 100 autonomous bodies has become under provincial domain in the wake of transfer of powers.

In order to properly discharge this uphill task within the framework of 18th amendment, provinces need concerted efforts, finances and thousands of employees to man the devolved institutions. A well trained and responsible leadership is needed to carry on the arduous task of safeguarding the consolidation of the state (Report of the sub-Committee on Provincial Autonomy: March 2007, PILDAT, Report of the Parliamentary Committee on Balochistan: November 2007).

In the past, the tense relations between centre and units have created instability and uncertainty. Many a times federalism and even the integration of Pakistan has been put on stake due to this conundrum. To cope with such situation sufficient efforts have been made in the 18th amendment by awarding adequate autonomy to the provinces. Only an acquainted, well organized, responsible and mature leadership can safeguard the amount of provincial autonomy guaranteed by this piece of legislation. Well-conceived economic policies can bring about economic equilibrium throughout the state as the Concurrent list is now the legislative authority of the provinces. NFC award should be structured in the light of economic conditions of the state and the provinces to ensure real implementation of this amendment. Likewise, there is a need to restructure the Federal and Public Service Commissions.

It is abundantly clear, that the 18th Amendment has strengthened the federation of Pakistan and has played role in the nation building. With several demographic, geographic and economic dissimilarities, the process of nation building required special arrangements. As all the units have

common objectives including identity, economy and security, in the case of Pakistan, federal system is thus the penance of such demands and issues, while the 18th amendment has given a definite course leading to nation building by advancing measures those if adopted in true spirit may fetch encouraging results.

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