

## **The 18<sup>th</sup> Amendment: Historical Developments and Debates in Pakistan**

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### **Summary**

*The aftermath of former President Pervez Musharraf's political demise posed fundamental questions for legislators concerning the foundational values and the constitutional shape of the Pakistani state. The drafters of the 18<sup>th</sup> Amendment prioritised reforms which would improve transparency in the political system, minimise individual discretion, strengthen parliament and provincial assemblies, increase provincial autonomy, ensure the independence of the judiciary, expand fundamental rights and promote good governance. The 18<sup>th</sup> Amendment altered about a third of Pakistan's Constitution. The reforms were not only legally important, but also symbolically significant. However, the drastic constitutional overhaul continues to prove controversial. The most enduring contention concerning the Amendment has been on the issue of devolution.*

When former President Pervez Musharraf fled Pakistan in November 2008, he left the country's constitutional framework in a state of disarray. He was the country's fourth military ruler, and his quest for absolute power resulted in a drastic rewriting of Pakistan's 1973 Constitution. Musharraf concentrated power with the executive branch of government, weakened the Parliament and subdued the judiciary.<sup>1</sup> He passed the Legal Framework Order of 2002 and the 17<sup>th</sup> Amendment in 2003 which sought to legitimise his previous legal manoeuvres, amass control of state institutions, emasculate provincial assemblies and facilitate his dominance in domestic politics.<sup>2</sup> Musharraf reintroduced Article 58 2(b) of the Constitution which endowed the president with the power to dissolve the National Assembly at his discretion.<sup>3</sup> His local government reforms promised devolution but instead were designed to deliver centralisation.<sup>4</sup>

His rule witnessed the height of the United States-led war on terror and the subsequent erosion of civil liberties and political freedoms in Pakistan. His regime was tied to the disappearance of dissidents and political opponents, human rights violations and the violent suppression of the Baloch nationalist movement.<sup>5</sup> Musharraf left behind a fractured and

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<sup>1</sup> Sadaf Aziz, *The Constitution of Pakistan* (Oregon: Hart Publishing, 2018), pp.100-109.

<sup>2</sup> Hamid Khan, *Constitutional and Political History of Pakistan* (Oxford: Oxford University Press, 2009), pp. 485-89.

<sup>3</sup> General Zia ul Haq introduced this provision through the 8<sup>th</sup> Amendment to the Constitution of 1985. Nawaz Sharif later passed the 13<sup>th</sup> Amendment in 1997 which repealed Article 58 2(b).

<sup>4</sup> Ibid, pp. 484-485.

<sup>5</sup> Frederic Grare, "Balochistan: The State Versus the Nation", Carnegie Endowment for International Peace (April 2013), pp. 8 and 11, <https://carnegieendowment.org/files/balochistan.pdf>. Accessed 16 August 2020; Adeel Khan, "Renewed ethnonationalist insurgency in Balochistan, Pakistan: the militarized state and continuing economic deprivation", *Asian Survey*, Vol. 49, no. 6 (2009), pp. 1080-1081, <https://www.jstor.org/stable/10.1525/as.2009.49.6.1071>. Accessed 17 August 2020; and Adeel Khan,

divided Pakistan. The aftermath of his political demise posed fundamental questions for legislators concerning the foundational values and the constitutional shape of the state. In a joint sitting of Parliament on the 20 September 2008, President Asif Ali Zardari issued a call for the creation of an all parties committee to revisit the 17<sup>th</sup> Amendment and Article 58 2(b).<sup>6</sup>

## Drafting the 18<sup>th</sup> Amendment

A 27-member Parliamentary Committee on Constitutional Reforms was set up with the task of effacing the imprint of authoritarianism from the text of the Constitution and returning the state to a sound, stable and consensual legal footing. The Committee prioritised reforms which would improve transparency in the political system, minimise individual discretion, strengthen parliament and provincial assemblies, increase provincial autonomy, ensure the independence of the judiciary, strengthen fundamental rights and promote good governance.<sup>7</sup> It sought suggestions and proposals for constitutional reform from its own constituent members, the public at large and also referred to Private Member's Bills pertaining to constitutional amendments introduced in the Senate of Pakistan.<sup>8</sup>

The Committee also decided that all proceedings would be in-camera and that no press release of its functioning would be issued unless authorised by the Committee.<sup>9</sup> The objective of this process was to provide its members with an open, free and frank atmosphere to discuss constitutional matters and make decisions based on expertise rather than party consideration.<sup>10</sup> The Committee met 77 times,<sup>11</sup> revisited all 280 Articles of the Constitution and its deliberations culminated in *The Constitution (Eighteenth Amendment) Act, 2010* which received the presidential assent on the 19 April 2010. In all, 102 Articles of the Constitution were amended, inserted, added, substituted or deleted making it an unprecedented overhaul of the Constitution.<sup>12</sup> It was a landmark achievement in Pakistan not simply for its sweeping constitutional reforms, but also for the cooperation it had garnered across the political spectrum to move Pakistan towards a federal, parliamentary system of government.

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"Pakistan in 2006: Safe center, dangerous peripheries", *Asian Survey*, Vol. 47, no. 1 (2007), p. 126, <https://www.jstor.org/stable/10.1525/as.2007.47.1.125>. Accessed 18 August 2020.

<sup>6</sup> Address of President of Pakistan Asif Ali Zardari to the Parliament on 20 September 2008, <https://www.satp.org/satporgtp/countries/pakistan/document/papers/speechpresident.htm>. Accessed 11 August 2020.

<sup>7</sup> Point 18 of Parliamentary Committee on Constitutional Reforms, Report on the Constitutional 18<sup>th</sup> Amendment Bill 2010, (31 March 2010), [http://www.na.gov.pk/uploads/documents/report\\_constitutional\\_18th\\_amend\\_bill2010\\_020410.pdf](http://www.na.gov.pk/uploads/documents/report_constitutional_18th_amend_bill2010_020410.pdf). Accessed 12 August 2020.

<sup>8</sup> Points 13, 14 and 15 of Report on the Constitutional 18<sup>th</sup> Amendment Bill 2010.

<sup>9</sup> Point 26, *Ibid*.

<sup>10</sup> *Ibid*.

<sup>11</sup> Ahmad Hassan, "Parties strike accord on 18th Amendment", *Dawn* (1 April 2010), <https://www.dawn.com/news/528244/parties-strike-accord-on-18th-amendment>. Accessed on 8 August 2020.

<sup>12</sup> Zulqarnain Ali Raja, "The Redundant Laws: 18th Amendment Aftershocks", *Courting The Law* (26 August 2016), <https://courtingthelaw.com/2016/08/26/commentary/the-redundant-laws-18th-amendment-aftershocks/>. Accessed on 4 August 2020).

## Reforming the Constitution, Devolution and Federalism in Pakistan

The broad breadth of the reforms and the cooperative and inclusive nature of the deliberative process meant that the 18<sup>th</sup> Amendment was not only legally important, but also symbolically significant. The Amendment declared that the Legal Framework Order had no legal effect and repealed the 17<sup>th</sup> Amendment. It restructured the separation of powers placing limits on presidential powers, expanding the role of Parliament and the Prime Minister, and altering the process of judicial appointments in the Supreme Court. It returned Pakistan to a parliamentary system of government. The 18<sup>th</sup> Amendment also sought to deter future violations of the constitutional order proclaiming that subversion or abrogation of the constitution would be guilty of high treason. It stipulated that an act of high treason cannot be validated by any court including the Supreme Court or a High Court. These provisions, together with the removal of past amendments added by the military rulers, sought to establish some – at least legal – boundaries in civil-military relations. The 18<sup>th</sup> Amendment moved to increase the number of fundamental rights in the Constitution by inserting the right to a fair trial (Article 10A), right to information (Article 19A) and right to education (Article 25A).

Perhaps, most significantly, the 18<sup>th</sup> Amendment transformed centre-province relations. The division of power between the state and its units has been amongst the most contentious and recurring issues in Pakistan since its creation in August 1947. While promises of provincial autonomy were a cornerstone of the demand for Pakistan,<sup>13</sup> the founding leadership of the new state remained suspicious of provincial loyalties in the aftermath of independence.<sup>14</sup> The earliest constitutional debates struggled to reconcile provincial aspirations with the central government's desire for control and domination. And various arithmetical formulations were put forth to undercut the numerical majority of East Pakistan and its ability to control the centre.<sup>15</sup> In a post-Bangladesh Pakistan, the political domination of Punjab has been a cause of concern for Pakistan's less populous provinces.

In his national address on the 29 March 1973, Zulfikar Ali Bhutto, the chairman of the Pakistan Peoples Party, proclaimed that provincial autonomy was “the problem from the beginning, since the days when the British came into the subcontinent ... even the concept of Pakistan is based on autonomy ... our tragic division between East and West Pakistan was over autonomy”.<sup>16</sup> The third and current Constitution was passed in the National Assembly on the 10 April 1973, received presidential assent two days later on the 12<sup>th</sup> and was inaugurated on 14 August the same year. It envisaged a parliamentary form of government

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<sup>13</sup> The Lahore Resolution of 1940 declared that a workable constitutional plan for Indian Muslims would require constituent units where Muslims were a majority to be independent, autonomous and sovereign.

<sup>14</sup> See Adeel Khan, *Politics of Identity: Ethnic Nationalism and the State in Pakistan* (New Delhi: Sage Publications, 2005), pp. 62-63.

<sup>15</sup> The first constitutional draft of 1950 for instance showcased an arrangement in which an equal number of seats were given to each province in the Upper House making East Pakistan's majority equal to a fifth of the population. Article 44(1) of the 1956 Constitution declared that the composition of the National Assembly would be divided equally between East and West Pakistan.

<sup>16</sup> Craig Baxter, “Constitution making: The development of federalism in Pakistan”, *Asian Survey*, Vol. 14, no.12 (1974), pp. 1074-1075, <https://www.jstor.org/stable/2643201>. Accessed 5 August 2020.

but vested enormous powers in the office of the Prime Minister.<sup>17</sup> The new Constitution provisioned for a bicameral central legislature comprising a National Assembly (Lower House) and a Senate (Upper House). The 1973 Constitution allocated seats from each province in the Lower House, including special reserved seats for women on the basis of population. This implied that the most populous province of Punjab dominated the Lower House. In allocating equal proportions of seats in the Upper House to each province the Senate was designed to act as a counter majoritarian instrument. But the sweeping powers of the Prime Minister and the Punjabi domination of the Lower House set forth imbalances in the constitutional setup.<sup>18</sup>

Although the 1973 Constitution reaffirmed the federal nature of the republic, the formula it laid down failed to prevent violent conflict and political contestation. The new Constitution stipulated three legislative lists (federal, provincial and concurrent) but the directives placed on provincial governance implied that the federal system was geared towards centralisation.<sup>19</sup> All federating units with the exception of Punjab considered the constitutional arrangement a failure.<sup>20</sup> Bhutto himself showed little patience for provincial resistance and recalcitrance when he dismissed the government of Baluchistan using his discretionary prime ministerial powers.<sup>21</sup> In protest, the government of the North West Frontier Province resigned.<sup>22</sup> The centralising tendencies of Pakistan's military rulers also ensured further that the promise of devolution in 1973 would remain unfulfilled.<sup>23</sup> The 18<sup>th</sup> Amendment abolished the concurrent list of the 1973 Constitution expanding the administrative and legislative responsibilities of the provinces in Pakistan. The Amendment devolved laws which govern marriage, contracts, the management of infectious and contagious diseases, labour, educational curriculums, environmental pollution, trade unions and forty other diverse areas to the provinces.<sup>24</sup> It also altered the distribution of resources in order for the provinces to meet the financial burden of these new transferred responsibilities and reconfigured the inter-provincial revenue distribution formula which now takes into account the levels of poverty (or backwardness) and inverse population density of a province.<sup>25</sup> It also renamed the North West Frontier Province as Khyber

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<sup>17</sup> Philip Oldenburg, *India, Pakistan, and Democracy: Solving the Puzzle of Divergent Paths* (Abingdon/New York: Routledge, 2010), p. 134.

<sup>18</sup> Article 59 of the 1973 Constitution.

<sup>19</sup> Article 148 required the executive authority of every province to secure compliance with federal laws and maintained that it was the duty of the Federation to ensure that provincial governments act in accordance with the Constitution. Article 149 allows the federal government to provide directions to a province as to the carrying into execution therein of any federal law which relates to matters specified the concurrent legislative list. See also Hamid Khan, *Constitutional and Political History of Pakistan* (Oxford: Oxford University Press, 2009), p. 280.

<sup>20</sup> Sadaf Aziz, *The Constitution of Pakistan: A Contextual Analysis* (Oregon: Hart Publishing, 2018), p. 152.

<sup>21</sup> Shaikh Aziz, "A leaf from history: Reclaiming Balochistan, peacefully", *Dawn*, 5 October 2014, <https://www.dawn.com/news/1135570>. Accessed 9 August 2020.

<sup>22</sup> Safdar Mahmood, *Pakistan: Political Roots and Development, 1947-1999* (Karachi: Oxford University Press, 2002), p. 90.

<sup>23</sup> Sadaf Aziz, *The Constitution of Pakistan: A Contextual Analysis* (Oregon: Hart Publishing, 2018), p. 152.

<sup>24</sup> Colin Cookman, "The 18th Amendment and Pakistan's Political Transitions", Center for American Progress (19 April 2010), <https://www.americanprogress.org/issues/security/news/2010/04/19/7587/the-18th-amendment-and-pakistans-political-transitions/>. Accessed 4 August 2020.

<sup>25</sup> Shahid Hamid, "Impact of the 18th Constitutional Amendment on Federation-Provinces Relations", Pakistan Institute of Legislative Development and Transparency, Briefing Paper 39, (July 2010), p. 14,

Pakhtunkhwa. While the Amendment made significant steps towards expanding the powers of the provinces, it did not render provincial governments the sole governing authority within their territory. The 18<sup>th</sup> Amendment inserted Article 140A which mandated that each province, by law, must establish a local government system and devolve political, administrative and financial responsibility and authority to the elected representatives of local governments.

## Debates and Controversies

The 18<sup>th</sup> Amendment altered about a third of Pakistan's Constitution. And while it may have found parliamentary support at the time of its drafting, it is not difficult to expect that such a drastic overhaul would prove controversial. Indeed, few state or political institutions remain undisturbed from its influence and the reforms the amendment laid down have often been challenged. In removing Article 58 2(b) and reforming electoral institutions for instance, the 18<sup>th</sup> Amendment tried even to limit the political manipulation of Pakistan's most powerful state institution – the armed forces.<sup>26</sup>

The most enduring contention concerning the Amendment, however, has been on the issue of devolution. Did the 18<sup>th</sup> Amendment devolve too much power and resources away from the centre? This question has arisen over the country's current response to the pandemic,<sup>27</sup> its need to execute projects related to the lucrative China Pakistan Economic Corridor<sup>28</sup> and steer away from the precipice of economic collapse.<sup>29</sup> Whether the provinces were prepared for the expansion of administrative responsibilities<sup>30</sup> or whether devolution has delivered on its promise of producing better governance are concerns which dovetail current debates on the 18<sup>th</sup> Amendment.<sup>31</sup> Another issue is that the devolution of power and resources from provincial governments to local governments as stipulated by the insertion of Article 140A remains unfulfilled.<sup>32</sup> This has become a point of contention

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<http://www.millat.com/wp-content/uploads/pdf/democracy/Impactofthe18thConstitutionalAmendmentonFederalProvincesRelations-BriefingPaper.pdf> . Accessed 7 August 2020.

<sup>26</sup> Aqil Shah, "Constraining consolidation: military politics and democracy in Pakistan (2007–2013)", *Democratization*, Vol. 21, no. 6 (2014), p. 1017, <https://www.tandfonline.com/doi/abs/10.1080/13510347.2013.781586>. Accessed 5 August 2020.

<sup>27</sup> Dr Saeed Ahmed Rid, "Why 18th Amendment and 7th NFC Award under threat?", *Daily Times*, 2 May 2020, <https://dailytimes.com.pk/605805/why-18th-amendment-and-7th-nfc-award-under-threat/>. Accessed 9 August 2020.

<sup>28</sup> Fatima Khan, "Why the 18th Amendment has become a cause for irritation for the Pakistani Army", *The Print*, 12 June 2020, <https://theprint.in/opinion/why-the-18th-amendment-has-become-a-cause-for-irritation-for-the-pakistani-army/440126/>. Accessed 7 August 2020.

<sup>29</sup> Ayesha Siddiqi, "Pakistan military won't take budget cuts easily, even for Covid. So this man has been hired", *The Print*, 30 April 2020, <https://theprint.in/opinion/pakistan-military-wont-take-covid-budget-cuts-hired-ex-dg-ispr/411641/>. Accessed on 11 August 2020.

<sup>30</sup> Suhail Warraich, "The Bajwa Doctrine: from chauvinism to realism", *The News*, 18 March 2018, <https://www.thenews.com.pk/print/293885-the-bajwa-doctrine-from-chauvinism-to-realism>. Accessed on 11 August 2020.

<sup>31</sup> Karim Khan and Sadia Sherbaz, "18th Amendment and deprivation", *The Express Tribune*, 13 March 2020, <https://tribune.com.pk/story/2174895/6-18th-amendment-deprivation>. Accessed on 18 August 2020.

<sup>32</sup> Hubaish Farooqui, "Karachi Urban Flood, Power of Local Government and State Obligation Under International Law", *Courting The Law*, 2 September 2020, <https://courtingthelaw.com/2020/09/02/commentary/karachi-urban-flood-power-of-local-government-and-state-obligation-under-international-law/>. Accessed 2 September 2020.

especially recently as local governments struggle to respond to the devastating floods which have swept Karachi. Neither the incentive, nor the willingness to carry out this further step of devolution appears to be present leading to a crisis in governance at the local level and mounting calls for military intervention in Sindh.<sup>33</sup>

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<sup>33</sup> Shamil Shams, "Urban flooding — who is responsible for Karachi's woes?", *DW*, 28 August 2020, <https://www.dw.com/en/flooding-causes-havoc-in-karachi/a-54732877>. Accessed 29 August 2020.