

# FROM BIG BANG TO INCREMENTALISM: CHOICES AND CHALLENGES IN CONSTITUTION BUILDING

The second Melbourne Forum on Constitution Building in Asia and the Pacific

Manila, the Philippines

3-4 October 2017

*Jointly organised by International IDEA and the Constitution Transformation Network*

*Hosted by Department of Political Science, University of the Philippines Diliman*

## Session II Amending an Existing Constitution

### Pakistan

#### Sadaf Aziz

##### ***What events led to the 18th Amendment of the Constitution?***

The events which led to the Eighteenth Amendment of the Pakistan Constitution in 2010 are closely connected both with the removal of General Musharraf from the office of President in 2008 and with federalism.

The main thrust of the package of 102 reforms undertaken through the Eighteenth Amendment of 2010 related to redefining the terms of formal federalism. However, this amendment was also oriented to whittling away the powers of the President in favour of bolstering the powers of the elected assemblies. The Eighteenth Amendment also addressed the issue of judicial appointments, and it was this issue that prompted a long process of challenging the constitutional amendment power of the legislature, as will be remarked upon below.

##### *Executive power*

The Eighth Amendment of 1985 had introduced Article 58(2)(b), granting the President the power to dissolve the National Assembly in “his discretion where in his opinion a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary.”

This structure existed without alteration until the Thirteenth Amendment was passed as a corrective in 1997. The 1990s in Pakistan were emblematic of the internecine conflict between the President and the Prime Minister in which the former's power to dissolve elected assemblies as per 58(2)(b) were repeatedly made use of. There were four dissolutions in the course of a decade. Following upon General Musharraf's coup in 1998 and the ‘transition’ to democracy he engineered in the coming years, he acted under a judicial validation of the coup and self-assumed authority as Chief Executive to reincorporate certain provisions of the Eighth Amendment. While the power of dissolution was one mechanism of vesting ultimate sovereign authority in the office of the President, the Seventeenth Amendment (2003) also once again increased the subject matters on which the President would exercise discretionary authority.

2007 was a politically tumultuous year in which Musharraf, who hoped to continue his presidential reign for a considerable period, suspended the Chief Justice of the Supreme Court, Iftikhar Muhammad Chaudhry, and replaced him with his preferred candidate. This precipitated the famous lawyers movement of that year, which began as the refusal of lawyers to participate in court processes and culminated in mass protests. The movement was successful in that Chaudhry was eventually restored. However, in November Musharraf suspended the Constitution, declared a State of Emergency, and this time forcibly retired Chief Justice Chaudhry along with a great number of judges from the higher judiciary.

The elections of 2008 returned a minority government for a populist political party, the PPP, which whose leader Benazir Bhutto was assassinated during the campaign. The tenor of popular politics had been tempered somewhat and this was evident by an initially smooth assumption of some central cabinet positions by the rival PML-N in the central government, for a coalition government to function. This demonstrated a far greater degree of political conciliation than had been the case through the 1990s when each party had attempted, often in service to other establishment figures, to unseat their rival parties' governments, both in the provinces and at the centre and thereby contributed in many ways to the use of article 58(2)(b). This newly constituted Parliament was eventually able to force the resignation of President Musharraf. The Eighteenth Amendment was enacted in the context of this new balance of power.

The amendment restored the office of the President as near as may be to the status it held in the original 1973 Constitution by removing article 58(2)(b) once again.

### *Federalism*

Until the founding of the state of Pakistan in 1947, its provinces were administrative units. Other than the North-West Frontier Province (NWFP), which itself had undergone a process of incorporation and then severance from the larger administrative unit of the Punjab to emerge as a Province in 1905, there were no popular referenda held in any of the provinces about whether or not to join the emergent state of Pakistan. Of the remaining provinces, the assemblies in Punjab and Sindh voted to join Pakistan and the province of Balochistan was acquired by the new state, first through the signing of a 'stand-by' agreement between the central government and the customary ruler of what was then known as the Kalat state. Within a short period, the territory was annexed by the Pakistani state.

What has been experienced in practice following promulgation of the 1973 constitution are various acute failures of the federal formula. While much of the blame for these failures has been directed at the centralizations of power that are traced to periods of military rule, a weddedness to certain principles dating back to colonial governmental statutes and colonial forms of rule subsist and determine what are in effect the conditions of deep inequality across the federation. Illustrative of the fractious terrain of Pakistani federalism are the problems of religious militancy that were given space to grow in the relative neglect accorded to Federally Administered Tribal Areas (FATA) in the province of Khyber Pakhtunkhwa (formerly the NWFP) as well as the rising ethno-nationalism in the province of Balochistan.

While now long recognized that these conditions need redressing, the federal formula was tinkered with rather than overhauled by the package of reform that the 18th Amendment heralded in 2010.

***At what point was it decided to amend the existing constitution rather than make a new one? Who made the decision, how was it made, and what factors influenced it?***

The Charter of Democracy was signed between leaders of the major political parties in the country in 2006, prior to the successful movement to overhaul governance and remove President Musharraf. Called a 'preconstitutional declaration' by Anil Kalhan, the Charter established a code of conduct between the major parties and terms of conduct for excising government from the control of the army as well as particular points agreed to for future constitutional innovation.

The first point of the agenda agreed that "the 1973 Constitution as on 5 October 1999, before the military coup shall be restored". This was accompanied by an enumeration of features to be reformed. Interestingly though, the difficulties flowing from the repeat amendment of so many 'basic features' of the Constitution were betrayed in the fact Musharraf himself had, first through an executive order and later through the Seventeenth Amendment to the Constitution (2003), already reversed some of the structural alternations formalized by General Zia's 1985 constitutional reform package. Zia had, through his transition to a managed and Islamized democracy, undertaken the elaboration of apartheid-like separate electorates for members of different religious communities. The 2003 Seventeenth Amendment had already restored joint electorates for Muslims and non-Muslims, bolstered numbers of seats in general and introduced a greater number of reserved seats for women.

In reference to the formal features of federalism, the Charter referred to the principle of "cooperative federation with no discrimination against federating units". It also specifically recommended legislative devolution to the provinces through abolition of the "Concurrent Legislative List" and the announcement of a new National Finance Commission Award, a mechanism which determines distribution of revenue to the central government. These two issues are paramount in reframing the terms of federalism. The list system of legislative powers that included Federal, concurrent and provincial lists was itself an inheritance of the 1935 Government of India Act, which had retained an expansive set of legislative powers for the non-elected centre. Whereas it is reported that the drafters of the 1973 constitution had anticipated that the concurrent list would be done away with after ten years, this had not in fact transpired.

The need to redress the federal formula as it had been inherited in the 1973 Constitution had something of a trial run through the instance of trying to renegotiate, on somewhat asymmetrical grounds, the terms of Balochistan's continued existence within the federation. Balochistan has historically been the most insurgent region in Pakistan, owing to the violent nature of its forcible annexation as well other features. These include a system of indirect rule related to the retention of the central government's control and access to Balochistan's plentiful natural resources. Altogether, the province has the features of a garrison state, where central control has been further accentuated by the heavy presence of the military and increasingly of security agencies as well as the control of population inflows to alter the demographics of the population so as to marginalize native Baloch.

Since 2003, the insurgency against central control has become more violent at the interface of the military regime under President Musharraf seeking to develop Gwadar, a port on the Baloch coastline, in line with national political and economic objectives. Perceived as a particular threat by Baloch nationalist groups, this became an incendiary issue within the province. A set of further outstanding grievances, particularly involving the payment of royalties for the extraction of natural gas from the province resulted in a greater popular uprising, which was violently put down. The central government

itself, once constitutionally controlled by a military leader, was mostly unchecked in its use of force in the province.

In 2009 the People's Party government attempted reconciliation with the disaffected Baloch population. A prolonged process of consultation, which was limited by the unwillingness to talk with members of nationalist parties, but with supposedly fair representation accorded to 'stakeholders', was staged so as to render what would pass for a compromise solution to Balochistan's reincorporation in the federation. While the central government made some acknowledgement of army heavy handedness in dealing with the issue of missing persons, whereby thousands of Baloch had gone missing and often turned up dead and with visible marks of torture, the centre nonetheless did not concede to a withdrawal of forces or even a curtailment of the construction of cantonments in the province. This, along with the emphasis placed on the development of the port town of Gwadar as a Special Economic Zone and the initiation of mega projects including the building of dams provides a truer indication of the manner in which the national elite political class still understood Balochistan: as a region for the appropriation of resources and wealth towards an aggregate national good.

This short experiment with what could have been an instance of defining the terms of an asymmetrical federalism was ultimately abandoned in favour of a more uniform set of negotiations between political elites representative of all regions. For instance, after long deliberations, the package defining the terms of fiscal federalism was redefined so as to supplement federal provincial transfers to account for the underdevelopment of specific provinces.

Altogether, a confluence of features militated for a reformed federalism, albeit one that was predicated on maintaining the centre's prerogative to define the particular contours of the relationship, for which amendment rather than a renewed constitution was the preferred route.

***Were the procedures for amendment set out in the existing constitution followed? Were the prescribed formal procedures for constitutional amendment supplemented by other processes? If so, how were these processes determined and why were they used?***

Article 239 provides that a constitutional amendment bill can be introduced in either house of Pakistan's bicameral legislature and must achieve the support of a two-thirds majority in each house. Only in cases where the territorial limits of a province are being altered is a majority vote in the affected province also a part of the amendment procedure.

The introduction of a constitutional amendment bill has sometimes been preceded by, or even proposed by, a special Parliamentary committee and in some instances has flowed from the deliberations of specially constituted judicial commission (as per the 1974 Second Amendment Act declaring persons of the Ahmadi faith non-Muslims). Accordingly, a Special Committee on Constitutional Reforms was constituted in April 2009 and 26 members drawn from both houses, all men, were appointed to it. The Committee "was to propose amendments to the constitution keeping in view the 17th Amendment, the Charter of Democracy signed in 2006". In the course of deliberations, additional matters including judicial independence, governmental transparency, the revision of rights guarantees were also taken on board. Special advisors were appointed from civil society organizations to offer input in certain areas. In addition, it is reported that over 900 petitions were accepted from the public about needed reforms.

In this way, the procedure for amendment as set out in the existing constitution was followed as were historical norms.

The Eighteenth Amendment also provided for an Implementation Commission to assist in the transition to the altered constitution. The Commission was primarily constituted to “create and monitor the mechanism and institutional procedures required to complete the process of devolution” and was made up of members of Parliament. Over thirteen months, the Commission met 68 times and made a number of important decisions which assisting in establishing the new framework of inter-governmental relations. The Commission had the powers to “make or pass such directions, orders, undertake proceedings or require the making of amendments to regulations, enactments, notifications, rules or orders as may have been necessary to further the objectives of Clause 8 of Article 270AA of the Constitution” (Declaration and Continuance of Laws). Specifically, its role was to ensure that the continuing activities of the central government were supported by the new constitutional framework. The Commission’s work concluded in 2011 as anticipated by the amendment.

***Was judicial review of the constitutional amendments possible, and if so did this affect the process or substance of the amendments?***

Judicial review of Constitutional Amendments is specifically barred by Article 239(4) which was introduced through the Eighth Amendment of 1985. However, the basic structure doctrine, as imported from Indian jurisprudence, has been considered as a potential limitation on Article 239(4). There is a specific higher law and higher morality basis to the basic structure doctrine, which provides that a constitutional amendment must, in all cases, maintain fidelity to a set of transcendental principles of that Constitution. In the Indian case, these were originally elaborated as parliamentary democracy, federalism, independence of the judiciary and minority rights, although the list has grown further. Employment of the basic structure doctrine enables the judiciary to act as the guarantor of these principles and strike down a constitutional amendment, even where validly passed by a legislature, if it derogates from or impinges upon these principles.

Many cases arose in which the basic structure doctrine could have provided an easy fix for constitutional deviations engineered by Musharraf. In spite of the court repeatedly hearing petitions that employed the doctrine to challenge such deviations, the court did not affirm basic structure as valid law in Pakistan. In a way this was simply in keeping with precedent; while insufficient for challenging a constitutional amendment, it was used in some fashion nonetheless to elaborate a set of proscriptive guidelines on the kinds of amendment that could be framed by a non-elected government. The closest affirmation however of the basic structure doctrine came in a *suo moto* petition regarding the amended judicial appointments procedure. The Eighteenth Amendment Act of 2010 had introduced a new Article 175A to the Constitution, which would provide for a Parliamentary Committee and a Judicial Committee to operate in tandem to vet nominations to the Higher Judiciary. The Court thus undertook to review a constitutional amendment and direct the legislature to reconsider its ambition to be a part of this process. On the basis of upholding judicial independence, a principle that was part and parcel of a basic structure doctrine not fully avowed to this point, the Court under Chaudhry referred the matter back to Parliament for ‘reconsideration’, with recommendations regarding the changes that need to be introduced to the appointment process under Article 175A. There was more or less a wholesale incorporation of these recommendations in the new Article 175A that was introduced through the Nineteenth Amendment Act in 2011. While the committee structure still stands, the balance has tipped towards the judicial branch in terms of effective power.

### ***With hindsight, might anything have been done differently?***

While the proceedings of the Special Committee were shielded from media and or public view, the notes appended to the introduction of the bill are telling of a range of perspectives brought by various committee members and their parties. Dealing specifically with the amendments proposed to the federal formula, regionalist parties expressed displeasure on points mostly that pertained to either resource sharing and/or cultural rights. For instance, parties representing Khyber Pakhtunkhwa administrative province cited water and hence hydro-generation and its placement within the list system as something that remained unsatisfactory. Also, they referenced the position of pakhtuns throughout the federation, especially in Balochistan as needing some recognition and amelioration of disadvantage. However, the formal counterpart to such a claim was not stated.

Also, a range of parties which are at least notionally nationalist, made recourse to an old demand. This demand had been made prior to the break-away of Bangladesh, when Sheikh Mujibur Rehman articulated the desire that the centre retain power only over currency, defence, foreign relations and a nominal other legislative and policy areas. The nationalist parties echoed this claim.

These controversies are examples of the many points of discontent that exist with the extent of the alterations brought to the formal contours of Pakistani federalism through the Eighteenth Amendment. Given the strong centrist tendencies of Pakistan's deep state, it is not surprising that this is the case. However, a more incorporative process, involving existing conciliation committees representing provinces and other regional entities could have provided a forum for opening up options that were more reflective of regional demands, including of the redrawing of provincial boundaries.

### **Sadaf Aziz**

Sadaf Aziz is Assistant Professor at the Shaikh Ahmad Hassan School of Law. Her research is situated in the field of law and society and focuses on the interplay between Islamic and secular legality, the political impact of rule of law narratives. Her book, *The Pakistani Constitution: A Contextual Analysis* was published in 2018 by Hart. Sadaf is completing her doctoral dissertation at the University of Melbourne and has held visiting fellowships at the universities of Cambridge, Michigan, Oxford and New York University.