

PRESENTATION BY

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ON

**THE 18TH AMENDMENT:
RESTRUCTURING THE FEDERATION**

AT THE
LUMS CONFERENCE

ON

**FEDERALISM IN PAKISTAN AFTER
THE 18TH AMENDMENT**

14TH MARCH, 2012

SECTION 1: RE-DISTRIBUTION OF CONSTITUTIONAL POWERS

The unanimous passage of the 18th Amendment to the Constitution was brought about by a confluence of several political factors. First, there was the near consensus amongst political parties, civil society, the legal community and other stake holders that the 'distortions' made in the Constitution during the Musharraf era, through transfer of powers from Parliament and the Prime Minister and his Cabinet to the Presidency, should be removed. Second, there was the insistent demand of the PML-N for repeal of the 17th Amendment which validated Nawaz Sharif's removal from power in October 1999. Third, there was the unrelenting pressure of the smaller provinces that they would support the re-conversion of Pakistan's quasi-presidential system to a true Parliamentary democracy, as envisaged when the present Constitution was first adopted in 1973, only if their demand for provincial autonomy was met simultaneously. Fourth, there was the agreement, at least initially, between the PML-N and the PPP to implement the Charter of Democracy agreed to between Mian Nawaz Sharif and Mohtarama Benazir Bhutto in 2006.

The All-Party Raza Rabbani Committee which produced the report that led to amendment of as many as 102 articles inclusive of annexure and schedules i.e. over one third of the Constitution, set out for itself the following objectives:

- i. Transparency;
- ii. Reduction of individual discretion;
- iii. Strengthening of the Parliament and the Provincial Assemblies;

- iv. Provincial Autonomy;
- v. Independence of Judiciary;
- vi. Strengthening of fundamental rights;
- vii. Improving merit;
- viii. Good governance, and
- ix. Strengthening of institutions.

The 18th Amendment appears to have met, to a substantial degree, the objectives of strengthening Parliament and the Provincial Assemblies, devolution of power to the provinces, enhancement of fundamental rights and strengthening of institutions such as the Election Commission, the Council of Common Interests, the Office of the Auditor-General and the Federal Public Service Commission. Element of individual discretion has also been reduced to some extent. However, there have to be large question marks over whether the Amendment has led to greater transparency or improved merit or produced good governance. Immediately after passage of the 18th Amendment there was great debate whether independence of the judiciary had been safeguarded or eroded as a result of the new procedure prescribed for appointment of Superior Court Judges. The controversy appears to have been satisfactorily resolved through passage of the 19th Amendment in response to concerns expressed by all 17 judges of the Supreme Court in the hearings on Article 175-A providing for Judicial Commissions and a Parliamentary Committee for appointment of Superior Court Judges.

The 18th Amendment has restored the original spirit of the Parliamentary system. It has transferred key presidential powers to the Parliament and its elected Prime Minister. Major changes include that the Prime Minister and his Cabinet will be collectively responsible to both Houses of Parliament. Earlier, such responsibility was to the National Assembly only. The Prime Minister shall be the Chief Executive and the Executive Authority of the Federation shall be exercised by the Federal Government comprising the Prime Minister and the Federal Ministers in accordance with Rules of Business made by the Federal Government and not by the President as per the Pre-18th Amendment provision. Similar changes have been made at the Provincial level.

The position and powers of the President have been reduced very considerably. All Musharraf specific provisions relating to the election to the Presidency have been removed. The President retains the right to be informed on all matters of internal and foreign policy and in regard to all legislative proposals, but cannot now require a report on any administrative or other matter. Time limits have been fixed for the President to act on the advice given to him by the Prime Minister and his Cabinet. The President's discretionary powers to dissolve the National Assembly or to refer a question to a Referendum have been removed. The President is now to appoint the Governors, the Service Chiefs and the Chairman Federal Public Service Commission on the binding advice of the Prime Minister.

Article 89 relates to the Ordinance making power. Now the President can issue an Ordinance only once and that also when neither the National

Assembly nor the Senate is in session. One-time extension to an Ordinance can be given by a Resolution of the National Assembly or the Senate.

The position and powers of the Federal Representatives in the Provinces viz the Governors, have been reduced to that of the President in the Federation.

The role of the Senate has been substantially enhanced. The annual report on implementation of Principles of Policy is to be placed before the Senate also. Unlike the previous position, the President cannot now promulgate an Ordinance while the Senate is in Session. The number of days that the Senate may take to give its recommendations on money bills has been enhanced from seven to fourteen. The Prime Minister and his Cabinet will henceforth be collectively responsible both to the Senate and the National Assembly. The number of Senate Members has been increased from one hundred to one hundred and four. The number of compulsory working days for the Senate has been increased from ninety to one hundred and ten.

In a move towards good governance, the number of Ministers, inclusive of Ministers of State, has been restricted to eleven percent of the total membership of Parliament (446) and the Provincial Assemblies with the proviso, in case of Provincial Assemblies, that the number can go up to fifteen if eleven percent yields a lower figure. However, this provision is to be effective after the next General Elections.

The restriction on a person to be a third-time Prime Minister and/or Chief Minister has been removed. The Prime Minister is to be elected in the

first round by a majority of the total membership of the National Assembly and, if there is no such majority in the first round then in a two-man race in the second round by a majority of the members present and voting. Only a Muslim member can be Prime Minister.

SECTION 2: DEVOLUTION OF POWERS TO THE PROVINCES

The main structural change brought about by the 18th Constitutional amendment has been with reference to the nature of Federalism in Pakistan. Articles 141 to 159 of the Constitution delineate the relationship between the Federation and the Provinces. In this relationship, the transforming change is that the Concurrent List, comprising subjects on which both the Parliament and the Provincial Assemblies could legislate, has been done away though Criminal Laws, Criminal Procedure and Evidence remain subjects on which both the National and Provincial legislatures can make laws.

The Federal Legislative list has been divided into two revised parts and the following subjects added to Part I of the Federal List:

- i. Boilers insofar as they relate to nuclear energy, and
- ii. International treaties, conventions and agreements and International Arbitration.

Part I contains the subjects in regard to which only Parliament can make laws.

Matters enumerated under Part II of the List are within the legislative competence of Parliament but subject to overall policy control of the Council of Common Interests. In Part II the following subjects have been added to the eight that were already there:

- i. Electricity;
- ii. Major Ports;
- iii. All Regulatory Authorities established under the Federal Law;
- iv. National Planning and National Economic Coordination including planning and coordination of scientific and technological research;
- v. Supervision and management of Public debt;
- vi. Census;
- vii. Extension of the powers and jurisdiction of members of a police force belonging to any Province to:
 - a. any area in another Province, but not so as to enable the police of one Province to exercise powers and jurisdiction in another Province without the consent of the Government of that Province,
 - b. areas outside the Province;
- viii. Legal, medical and other professions;
- ix. Standards in institutions for higher education and research, scientific and technical research, and

x. Inter provincial matters and coordination.

Furthermore, Federation's powers to entrust functions to Provinces will now be subject to ratification/ approval of such entrustment by the Assembly of the concerned Province.

The Council of Common Interests has been greatly strengthened. It now has to be chaired by the Prime Minister himself and is to have a permanent Secretariat. As before the members will be the four Chief Ministers and any three members of the Federal Government that the Prime Minister may nominate. There are as many as 18 subjects, over which it has policy control. In addition to this the CCI will also have policy control over reservoirs apart from natural sources of water supply. In future the Federation shall not build new hydroelectric stations in any Province except after consultation with that Province. Finally, in case of a dispute between the Federation and a Province in respect of a matter relating to Electricity, the CCI is to resolve the dispute. Even prior to the 18th Amendment the CCI had power to resolve disputes in regard to natural sources of water supply which power now encompasses reservoirs also.

After deletion of the Concurrent list and transfer of some of the functions from the defunct Concurrent List to Part II of the Federal List, the further responsibilities that stand transferred to the Provinces include amongst others:

- i. Civil Procedure including law of limitation;
- ii. Marriage and divorce, infants and minors, adoption;

- iii. Wills, intestacy and succession;
- iv. Arbitration;
- v. Contracts including partnership and agency;
- vi. Trusts and trustees;
- vii. Transfer of property;
- viii. Actionable wrongs;
- ix. Removal of prisoners from one Province to another;
- x. Preventive detention;
- xi. Arms, fire-arms and ammunition;
- xii. Explosives;
- xiii. Opium;
- xiv. Drugs and medicines;
- xv. Infections and contagious diseases;
- xvi. Mental illness;
- xvii. Environmental pollution and ecology;
- xviii. Population planning and social welfare;
- xix. Welfare of labour;
- xx. Trade unions;
- xxi. Labour exchanges, employment information bureaus and training establishments;
- xxii. Safety of labour in mines, factories and oil-fields;

- xxiii. Unemployment insurance;
- xxiv. Shipping and Navigation on inland waterways;
- xxv. Mechanically propelled vehicles;
- xxvi. Newspapers, books and printing presses;
- xxvii. Evacuee property;
- xxviii. Ancient and historical monuments;
- xxix. Curriculum, syllabus, planning, policy, centres of excellence and standards of education (except in institutions of higher education and research and scientific and technical institutions);
- xxx. Islamic education;
- xxxi. Zakat;
- xxxii. Production, censorship and exhibition of films;
- xxxiii. Tourism, and
- xxxiv. Auqaf.

The demands of all provinces for greater autonomy, administrative and financial, have been met, to a very great extent, by the above changes. Apprehensions of the provinces in regard to revenues have also been addressed, by inclusion of Clause 3A and 3B in Article 160 of the Constitution which read as under:

“(3A) the share of the Provinces in each Award of the National Finance Commission shall not be less than the share given to 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 Majlis e Shoora (Parliament) and the Provincial Assemblies.”

The more or less concurrent agreement on the NFC Award has placed substantially larger resources in the hands of the provinces, especially Balochistan and Khyber Pakhtunkhwa, to meet their enhanced responsibilities. Through this Award the provinces have become entitled, as of right, to the entire proceeds of the excise duty on oil in addition to the excise duty on natural gas. The Provinces have also been given power to raise domestic or foreign loans with the approval of the National Economic Council.

The question remains whether the transfer of administrative and financial autonomy to the Provinces is matched by required administrative expertise and infrastructure at the provincial level. And in practical terms will the Provinces be able to run their affairs with greater efficiency and benefit to the common man. According to a 2011 PILDAT Report on the Assessment of the Quality of Democracy in Pakistan an amount of Rs. 934.3 billion was allocated to the Provinces in the eight years from 2002-03 to 2010-11 under PSDP. But only Rs 171.75 billion, i.e. less than 19 % was utilised, which leads to the conclusion that the Provinces, especially the smaller ones, are still to bridge a yawning capacity gap to improve upon their service delivery.

In other areas also, the post 18th Amendment performance of the Provinces has been less than satisfactory. For instance, under Article 140A, it is a Constitutional requirement for each province to enact a local government law and to devolve financial, administrative and political authority to the local governments and to hold local government elections. All four provinces have failed to fulfil this constitutional obligation especially in regard to holding of local government elections.

Likewise, matters relating to Education, having been fully and entirely devolved to the Provinces, carry the responsibility of ensuring free education to all children between the ages of five and sixteen years as mandated by newly inserted Article 25A. To date, none of the provinces have legislated in this regard but for a piece of token legislation by KPK which guarantees nothing more than that Pashto shall be the language adopted in schools. It will evidently take many many years before the right of free education guaranteed by Article 25A becomes a reality.

At the same time, devolution of certain powers, e.g. registration and control of drugs, have led to co-ordination problems which have been aggravated by the so far tepid performance of the Council of Common Interests and its Secretariat. It is unfortunate that political considerations have aggravated this problem. The proposal of the Federal Government that it should retain the Drug Regulatory Authority was reportedly endorsed by the other three provinces but opposed by the Punjab. This led to a vacuum where neither the Federation nor the Provinces exercised effective authority in this matter of vital public importance and finally the Supreme Court had to intervene.

SECTION 3: PROVISIONS RELATING TO TRANSFER OF POWER.

The Election Commission of Pakistan has been greatly strengthened. The term of office of the Chief Election Commissioner has been extended from three to five years and the mode of appointment of the CEC who was previously appointed by the President in his discretion, has been revised to ensure, to the extent possible, a politically neutral person, as under:

- i. The Prime Minister and the Leader of the Opposition in the National Assembly shall agree on three names;
- ii. The three names shall be sent to a Parliamentary Committee consisting of not more than twelve members of whom half are to be from the Treasury benches and half from Opposition benches (based on the strength of the Opposition parties in Parliament);
- iii. In the absence of a consensus between the Prime Minister and the Leader of the Opposition, each can send a separate list of names to the Parliamentary Committee for its consideration, which may confirm any one name, and
- iv. The person selected by the Parliamentary Committee shall be appointed by the President.

The Chief Election Commissioner must of course fulfill the Constitutional requirements as per clause 2 of Article 213, i.e. he or she must be or have been a Judge of the Supreme Court or be or have been a

Judge of the High Court and constitutionally eligible to be appointed a Judge of the Supreme Court.

The Election Commission of Pakistan shall have five permanent members including the Chief Election Commissioner. The remaining four members, one from each Province, are to be appointed in the same manner as provided for the appointment of the CEC. They must also have been Judges of the High Court.

Post 18th amendment, it is the Commission, and not the CEC on his own, which shall have power to prepare electoral rolls, to hold elections to fill a casual vacancy, to appoint Election Tribunals, to hold general elections to the National or Provincial Assemblies and of the Local Governments and to appoint staff of the election Commission, etc. And as mandated earlier all executive authorities in the Federation and in the Provinces are to assist the CEC and the Election Commission in the discharge of their functions.

As per the changes brought about by the 18th amendment, the CEC and the members of the Election Commission are to be appointed from amongst nominees who enjoy the support and confidence of both the Government and Opposition parties and are necessarily consensus candidates. This will add greatly to the credibility of the electoral process and lessen the likelihood of claims of bias or partiality in the conduct of elections. Having said that, new entrants to politics like the PTI have had no say in the present constitution of the ECP.

The fact that the constitutional provisions relating to the establishment of the Election Commission enjoy the broad based support of

all the political parties in Parliament is further borne out by the passage of the 20th Constitutional Amendment Bill, unanimously in the National Assembly and by a clear majority in the Senate, in February 2012. The extension in term of office of the members of the Commission, who may only be removed from office following an inquiry by the Supreme Judicial Council further adds to the perception and hope that they shall be fair and impartial.

In response to suggestions from Civil Society groups, the CEC issued a directive barring the holders of public office from visiting any area where an election is being held, or openly or in secret giving or promising to give donations to any institution within that constituency or making any promises of development work in that constituency.

The ECP has successfully teamed up with NADRA to prepare a computerized Electoral Roll on the basis of one CNIC, one vote. This means that all members of the adult population, who are in possession of CNICs, can take part in the electoral process with reasonable assurance that the Electoral Rolls are true and correct. The Electoral Rolls will also have the picture of the voters to safeguard against bogus voting. The ECP has also accomplished the task of an SMS voter verification service whereby any eligible voter can send an SMS to verify that his registration details are correct. The ECP seems to have done its bit to ensure that ordinary citizens can exercise their constitutionally guaranteed fundamental right to vote in a manner that is simple and participatory. It is important for political parties and Civil Society organizations to encourage the public to make use of this opportunity to ensure that the electoral rolls are as free from error

as possible and to foster a sense of participation which will go a long way in increasing the legitimacy of future governments which requires that voter participation should be at least 50% of the enrolled number.

Now for the negatives. The door to door voter registration campaign of the ECP has been rightly criticized by many who were not approached. Since 200, 000 officials of the ECP were given 40 days in which to complete the task, an average of 10 voter verifications per day per official – not an unattainable target – this brings into question the administrative ability of the ECP to conduct large scale exercises. It is unfortunate that the ECP did not sufficiently equip itself to meet its declared objective.

There were credible accounts in the media that the by-poll elections in 2011 were rigged, including accusations that Gilgit-Baltistan officials were using State resources to influence voters. The by-elections in February 2012 saw outbreaks of violence and disturbance. In the Senate elections there were credible reports of votes being bought for large sums of money. The ECP has not addressed any of these issues.

The ECP has been given adequate constitutional and legal powers which are no less than those of the Election Commission in India. It has to flex its muscles and exercise these powers effectively. In this behalf the present perception of a tussle between the Supreme Court and the ECP is unfortunate and needs to be removed as soon as possible.

After dissolution of the Assembly the President shall appoint a Care-taker Prime Minister in consultation with the out-going Prime Minister and the leader of the Opposition in the National Assembly. This provision has

been further amended through the 20th Amendment to provide for a reference to a Parliamentary Committee and finally to the Election Commission in case an agreed candidate cannot be found at the first two stages. The Care-taker Ministers shall be appointed on the advice of the Care-taker Prime Minister. Immediate family of the Care-taker Ministers i.e. spouse and children, shall not be eligible to contest the elections being supervised by the Care-taker Cabinet. The provisions for caretaker set-ups in the Provinces are more or less identical.

SECTION 4: OTHER NOTE-WORTHY CHANGES

NWFP has been renamed. In the event the new name viz **“Khyber-Pakhtunkhwa”** has become controversial especially in the Hazara Division. It bears mention here that the spellings of **‘Sind’** and **‘Baluchistan’** have been changed. It is now **“Sindh”** and **“Balochistan”**.

In Article 6, the definition of high treason has been expanded. Now an act of suspending the Constitution or holding it in abeyance or any attempt to do so shall also be high treason. Further, high treason cannot now be validated by the Supreme Court or a High Court. Whether this will deter a future would be military dictator from taking over, only time will tell.

The number of Fundament Rights has been increased to include the right of fair trial [Article 10A], the right to information [Article 19A] and the right to education [Article 25A]. The State is now bound to provide free and compulsory education to all children from age 5 to 16 years in such manner

as may be determined by law but, as noted earlier, the Provinces have yet to legislate in this matter.

Article 17 has been amended so as to do away with, amongst other things, intra political party elections. The excuse being given for this change is that the law (Political Parties Act 1962) already provides for such elections. However, the fact is that a constitutional requirement is on a higher plane and consequently the popular perception is that this is a negative change.

In Article 27 relating to safeguards against discrimination in services, a proviso has been added that under-representation of any class or area in the service of Pakistan is to be redressed by Act of Parliament.

In Articles 62 and 63 relating to qualifications and disqualifications for election to Parliament and Provincial Assemblies, there are some positive, some negative changes. Earlier a person was not qualified if he had been convicted for an offence involving moral turpitude or giving false evidence. This has been removed. On the positive side, time limits for disqualifications viz five years from date of release in case of jail terms, five years from date of dismissal from public service, two years from date of compulsory retirement, have been re-introduced in place of Musharraf-era life-time bans.

In Article 63-A relating to defection, the main changes, to be effective after next general elections, are that disqualification for defection will be triggered on a reference made by Head of Party [by whatever name called] in place of Head of Parliamentary Party, and the Speaker or Presiding

Officer will not be able to 'sit on', i.e. delay the reference. In this manner the position and power of Mr. Asif Zardari in PPP, Mian Nawaz Sharif in PML (N) and Mr. Altaf Hussain in MQM have been strengthened.

Article 140-A relating to devolution of power to local governments has been retained and expanded to provide that elections to local governments shall be held by the Election Commission of Pakistan.

The Auditor-General of Pakistan has been given a constitutional four-year term of office. The Auditor-General has also been empowered to audit the accounts of the Federal and Provincial Governments and all their bodies, corporations and authorities.

A new High Court has been set up at Islamabad. Its judges shall be drawn from all four Provinces and the Islamabad Capital Territory.

For appointment of judges there shall be a nine-member Judicial Commission headed by the Chief Justice of Pakistan. The recommendations of the Judicial Commission shall be sent to an eight-member Parliamentary Committee with power to reject the recommendations / nomination by not less than three-fourth majority. Benches of the Peshawar and Quetta High Courts have been set up at Mingora and Turbat respectively. A provision has been re-inserted into Article 199 to provide that any interim order against levy of tax or public dues shall cease to have effect after six months. Article 200 has been amended so as to do away with a provision for compulsory retirement of a High Court Judge in case he refuses to accept transfer to another High Court. High Court Judges cannot now be

transferred from one court to another without their specific consent even for short periods.

Emergency rule in any Province on account of internal disturbances can now only be imposed with the consent of the Provincial Assembly concerned. However Governor's Rule can be imposed without such consent if there is a break-down of the constitutional machinery.

The Sixth and Seventh Schedules to the Constitution have been omitted. Sixth Schedule included thirty-five laws which could only be amended with the prior consent of the President. Seventh Schedule included eight laws which could only be amended in the manner provided for amendment of the Constitution.

Annexure to the Constitution is the Objectives Resolution passed by the Constituent Assembly in 1949. It has been clarified in said Resolution that minorities have a right to "freely" profess and practice their religion.

Musharraf's take over on 12th October 1999 and all subsequent Proclamations, Orders, etc. have been declared void. However, the Acts, Notifications, etc. during the Musharraf period have been nevertheless validated till set aside by the competent authority. The provisions are similar to what happened after Yahya Khan's tenure.

SECTION 5: SOME CONCLUDING THOUGHTS.

We have been plagued by a high rate of Constitutional mortality. The Constitution of 1956 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. In the face of this history, the thirty seven years old Constitution of 1973 has shown amazing resilience probably because there is political consensus embedded in its foundations which enabled its survival notwithstanding the fact that it was held in abeyance by General Ziaul Haq and General Pervez Musharraf. Political voices, civic society activists and intellectuals kept the hope alive to reclaim the original social contract between the 180 million citizens and The State. The Charter of Democracy (2006) inked by Benazir Bhutto and Nawaz Sharif and the outcome of the 2008 Election provided impetus for this serious engagement to cleanse the Constitution of aberrations incorporated by military regimes and to redefine the relationship between the citizens and the State by expanding the scope of fundamental rights, restoring the supremacy of the federal parliamentary democratic system and by addressing the lingering mistrust between the Centre and the federating units. The existence of fifteen notes of reiteration reflects that the 18th Amendment was not the ideal outcome but the 'best possible' step forward in a divided society.

The passage of the 18th Constitutional Amendment can be regarded as a historic step forward towards a consensus oriented rejuvenation of democratic federalism in Pakistan. It epitomizes a 'grand national political consensus' as all mainstream and peripheral parliamentary-political parties participated and legitimized this process. The process also documented, as already noted above, fifteen 'notes of reiteration' that may be the basis for future Constitutional amendments to address remaining contentious

issues. A set of eleven recommendations articulated by the Parliamentary Committee on Constitutional Reforms testify that it was fully aware of the critical concerns to make Pakistan a vibrant federation with an inclusive approach. Hammering out a political consensus in the Parliament where no party enjoys even a simple majority, let alone the required two-third majority to amend the Constitution, reflects the maturity of the elected representatives.

The theoretical construct is in place but much still remains to give effect to the changes in the Constitution. There are several areas especially in the fields of education, health, labour and the environment where the Council of Common Interests and the Inter-Provincial Coordination Ministry must act to harmonize and coordinate between the Federation and the Provinces particularly where Pakistan is bound by International Treaties and Obligations. Theoretically, powers have been transferred from the President to the Prime Minister and his Cabinet. In actual fact, the President is still calling the shots. His position as leader of the ruling party has meant that, in effect, all major appointments and all major policy decisions are in his control. There is still a wide gap between the newly inserted provisions providing for a Parliamentary system and the realities of power. This gap will likely persist till such time as the Presidency is finally occupied by an apolitical personality. The next major Constitutional challenge will likely be over the formation of new Provinces. If and when such debate reaches the floor of the Senate, the National Assembly and the concerned Provincial Assemblies it is to be hoped they exhibit the same levels of tolerance for each others' view and maturity of thought and

consideration for the national interest as they did when they unanimously approved the 18th Amendment.