

# NEED FOR CONSTITUTIONAL REFORMS



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The enactment of Practice and Procedure Act 2023 by the Parliament last April and its recent endorsement by the Supreme Court upholding its constitutionality is a significant advance in Pakistan's history of constitutional evolution and reforms. Coming in the 50th year of the adoption of the unanimous Constitution in 1973, it has triggered thoughts about an enlightened public debate on whether and what constitutional reforms are needed.

The creation of Pakistan was based on a consensus among the provinces to live together in a federation in a parliamentary democracy. Within years of the creation of Pakistan, however, the centrists, supported by the civil-military bureaucratic complex, imposed One Unit on the then West Pakistan and introduced a novel principle of 'parity' between the then two wings of the country, the East and the West Pakistan. This blatant disregard of the principles of a federal parliamentary democracy resulted in extreme distrust and discontent amongst the federating units culminating finally in the breakup of the country in 1971.

In this Golden Jubilee Year of the Constitution, PIDE's Discourse has done well to initiate a debate on whether the existing constitutional scheme needs some amendments to strengthen the federation.

The devolution of power to provinces has been seen as a threat by entrenched power centres and powerful lobbies which have sought to revive debate on the settled political issue of federal parliamentary structure from time to time. Some very clumsy and crude attempts were made including the outlandish claim recently of discovery of a note in the personal diary of Mr. Jinnah favouring the presidential system. Although such attempts have fortunately failed, the centrist machinations have not ended. Remember the 18th Constitutional Amendment passed in April 2010 was dubbed by these elements as "worse than Shaikh Mujib's Six Points".

The 1973 Constitution introduced a bicameral legislature. Equal representation given to all provinces in the Senate was intended to give a measure of political equality to the federating units. However, devoid of any financial powers, the Senate could not grant a sense of political equality to the provinces. Financial powers were vested entirely in the National Assembly in which seats were allotted on the basis of population. Thus power remained concentrated in the most populous province which had 51% seats in the National Assembly.

Out of a total of 266 general seats in the National Assembly Punjab alone had 141 and Balochistan only 16. Large and populated districts of Punjab and Sindh like Lahore, Faisalabad and Karachi have more National Assembly seats than the entirety of Balochistan.

Political parties thus were tempted to invest more in these large cities of populous provinces instead of investing in sparsely populated Balochistan, with only 16 seats in the National Assembly. Balochistan voice thus remained muted as the state veered towards a majoritarian one instead of a federal parliamentary state as originally envisaged.

Amendments in the Constitutional Articles relating to the Senate, the House of Federation, are thus needed to address this issue. To begin with five amendments are particularly worthy of consideration. One, greater weightage needs to be given to Senate votes in any joint sitting of the parliament while considering non-money bills by making each Senate vote equal to three votes of National Assembly. The majority vote provision gives National Assembly a far greater advantage as it has thrice the number of Senators and strengthens brute rule by majority.

Two, even if the Senate does not have financial powers it should at least be made mandatory for the National Assembly to inform the Senate of the reasons why its recommendations on money bills, if any, were not incorporated.

Three, co-extensive powers need to be given to the Senate – along with the National Assembly – for disapproving a presidential ordinance before the expiry of 120 days or extending it for another 120 days. At present, the Constitution distinguishes between ordinances regarding money and non-money bills. It mandates only the National Assembly, and not the Senate, to disapprove or extend the life of ordinances involving money matters.

Four, in the event of the federal government failing to announce the five-yearly NFC award, the Senate should have the powers to extend the previous one by increasing shares of provinces in the federal divisible pool by 1%. This is necessary to discourage the federal government's practice of extending the previous NFC award on a yearly basis to the detriment of the provinces.

Five, perhaps it is time to introduce the concept of minority negative vote. It means that if a simple majority of Baloch MPs in a House rejected a bill or a parliamentary instrument relating to the province it should be deemed to have been rejected by the whole House.

Another factor which entrenches the majoritarian state is the current NFC formula which distributes the federations' revenues among the provinces overwhelmingly on the basis of population, giving it a whopping 82 % of weightage. Other critical factors like poverty and backwardness, revenue generation and collection, as well as inverse population density have very small shares of weightage in the distribution formula.

This weightage to population not only concentrates financial powers in the most populous province, it also

creates a novel state narrative: "Increase the population and get greater share in the overall national kitty". This narrative has trumped all efforts to control population growth. Pakistan has incentivised population growth in the NFC narrative.

No other country in the world distributes finances among its federating units on the basis of population as much as Pakistan. There is a need to revisit the distribution formula envisaged in the NFC Award.

Another area that needs attention to trigger a move away from a majoritarian to a pluralistic federation is the domain of local governments.

There is need for a constitutional amendment to protect the form, tenure and fiscal empowerment of local governments to ensure that local bodies are able to carry out their functions effectively. A strong democracy rooted in a federal parliamentary structure is not possible without effective and well-resourced local governments.

The present constitutional provision contained in Article 140-A does not adequately safeguard local governments. There is a need to delink provincial governments' municipal responsibilities from its legislative functions and remove the 'asymmetry' between political and fiscal decentralisation. The local governments should be able to make their own rules of business. The existing practice of provincial governments sacking local governments can be checked by providing that changes to local government laws should require a two third majority in a provincial assembly.

But no matter how strong the building blocks of the federation are and what constitutional amendments are made, a huge stumbling block remains.

It is the stumbling block of non-observance of the constitutional provisions relating to tri-chorotomy of powers between the legislature, the judiciary and the executive. A new form of controlled democracy has emerged during the past decades, the constitution notwithstanding. Under this form of controlled democracy, the actual driver of state craft is invisible but remotely controls all levers of power without responsibility and without accountability.

In this year of the Golden Jubilee of the Constitution (and hopefully of elections next year), the foremost concern is the issue of remote controlled democracy. The present form of driving of statecraft is unsustainable. Let there be no doubt or mistake about it. A vehicle driven, not by the driver seen on the wheel but by some 'invisible' entity sitting in the rear seat and controlling all vital levers is doomed to meet a disastrous accident.

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