

Federalism and Constitutional Development in Pakistan

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The study of federalism and constitutional development in Pakistan amounts to unraveling the complications embedded in its political and constitutional evolution. Any scholar visiting the Pakistani political landscape will face a paradoxical situation. Whereas there is a professed commitment through constitutional provisions to establish a federal system, the contrary happened during the periods of martial laws. Even civilian governments, though short lived, failed to behave differently. This dichotomy in federal theory and practice is the conundrum which calls for investigation and explanation.

As successor States to the British Raj, both India and Pakistan inherited the same federal structures at the time of independence. India, borrowing heavily from the Government of India Act 1935 for its constitution, kept the flavor of federal centrism, yet was successful in operating its political system with formal democracy. The charismatic personality of Nehru in the company of mature and seasoned political leaders, supported by a well-knit nationally organized Congress Party contributed to the political process. Additionally, the secular ideology served as a facilitator in a diverse society like India and the Indian army in the absence of any one dominant ethnic group dampened its appetite for military intervention. However, the civil bureaucracy continued to play a dominant role aiding and assisting the elected governments over time.

In obvious contrast to the Indian case, Pakistan took to a different constitutional and political route, though sharing the same historical experience with India. In its history of sixty years, Pakistan has changed its governance document from vice regal system to Presidential to Parliamentary to Martial Laws and a hybrid splitting the system between Presidential and Parliamentary tilting the balance of power in favour of the President. This jockeying for power runs as a recurring theme throughout. Pakistan, unlike India missed out on the contribution that a charismatic leader could have made in stabilizing and consolidating the working of the political system. Absence of mature political leaders and colleagues of Mr Jinnah along with a weak and loosely organized Muslim League did not yield the desired political results. The Islamic ideology was used as a national blanket to cover or suppress the ethno – religious, linguistic, sectarian and regional divisions in the name of national unity and integration. The civil military dominance continued from the very beginning and repeated military interventions have turned the armed forces into the most dominant, vested and entrenched interest group in the politics of Pakistan. The legitimization by the judiciary of every military ruler did not help in creating the ambience where rule of law and supremacy of constitution was respected. Geographical separation of a thousand miles between East and West Pakistan aggravated the problems of sharing of power between the two wings whereas India sitting between the two caused further complications. In the process, Pakistan experienced ‘guided’, ‘controlled’, ‘indirect’, ‘remote controlled’ or ‘military democracy’. Federalism, though declared as part of each constitution remained elusive, causing alienations among groups and regions resulting in greater demand for autonomy, accompanied by eruption of violence, insurgency and pull towards secession. Formal democracy is still struggling to find roots in Pakistan.

Whereas the above comparison between India and Pakistan is revealing, it is still deficit in terms of explaining as to why the two countries experiencing the same British colonial rule took to different political routes. Scholarly literature on this issue offers different interpretations. This paper, departing from the orthodox and general explanations, seeks to question the thesis of what is described as common British antecedents and legacy. It will be argued that the British policies of governance were so very different for what constitutes Pakistan today than the one pursued and implemented for central and southern India. The political, administrative and security concerns were negotiated from a different set of considerations by the British, for the two regions. Consequently, political norms and traditions of that period had a profound impact on the post 1947 developments in Pakistan, including the issue of federalism and constitutional engineering. The colonial legacy of the areas comprising Pakistan impacted the dialectic between state construction and political processes in critical ways. The assessment of this legacy and its role in articulating relations between State and society is a central theme of this undertaking. The issue of federalism as accommodated and practiced under various constitutions will receive attention. The political management and key challenges to federalism in contemporary Pakistan will be discussed in order to make some futuristic projections.

Federalism: Conceptual Considerations

Federalism is generally viewed as an ideal type of political arrangement of governance which accommodates the diversity of groups and regions to form a political union enabling these identities to maximize advantages by ceding some authority to the centre yet seeking to preserve and keep their separate identity by retaining a degree of autonomy. In this, two obvious but diverse political trends are discernible; urge to cooperate for mutual advantage and strong penchant to preserve socio – political, ethnic and regional identity and some space for political action. These two trends meet in an uneasy interaction in many federally organized states resulting in civil wars, secessionist movements and in the case of Pakistan to actual secession (East Pakistan becoming Bangladesh).

The widely cited example of a successful federal system is that of the United States. The route followed in this case was unique. 13 American colonies first declared independence from the British colonial authority to establish a confederation in 1781. Subsequently, these states decided to convert the confederation into a federation under the 1789 constitution. The fear of a ‘majority rule’ kept lurking in the minds of political managers. Therefore, Calhoun propounded the thesis of ‘concurrent majority’ as the operating basis of American federalism. ‘Permanent majority’ he argued, would establish ‘tyrannical rule’ to undermine the dynamics of a functional federal state. Despite the safeguards ensured under the American Constitution; the principle of separation of power, bicameral legislature, a strong upper house etc, a bloody civil war was fought on an economic issue eventually to save the Union (1860-65).

Another illustration is that of an existing unitary state that opts for a federal system by formally dividing powers between the national /federal government and the smaller administrative units like provinces. This approach was followed by Canada when it adopted the federal system in 1867. Australia also embraced federalism in January 1901.

The case of India and Pakistan falls in another category. The British Raj driven by its imperial policies and compulsions created a ‘special type’ of federal system in its colony. Introduction of this system through devolution, decentralization and autonomy to the administrative or provinces

was provided within the trappings of the vice-regal system. A federation was established under the Government of India Act 1935, comprising the States, the provinces and the princely states. The federal system stated in the Government of India Act 1935, was the one inherited by India and Pakistan at the time of independence in the middle of August 1947. Pakistan, however, continued to be governed under the Government of India Act 1935 with minor modifications till 1956. Mr. M.A. Jinnah, the leader of the Muslim community and founder of Pakistan, assumed the office of Governor General and in three Provinces, British Governors continued at the helm of affairs, while the commander –in-chief of the armed forces was also British.

Another variant and manifestation of federalism can be observed when states and territorial entities tend to be more or less centralized by adopting differing governing structures. Fear of falling apart and in order to prove the legitimacy of the freedom struggle, the instinctive and conscious choice of political managers stimulate trends of centralization. State building takes priority over nation – building and the activities of the latter are subsumed in the name of state construction.

Federalism and the Muslim Community

In the run up to federalism enshrined in the Government of India Act 1935, the Muslim community had acquired ‘orientations’ different from the majority Hindu community. Syed Ahmad Khan, a leading political thinker, leader and activist wanted the Muslims to recognize that they had their own special interests which must be secured and promoted within the constraints of the available political environment. He repudiated the Congress claim that India was ‘one nation’. His contention was that “India is inhabited by different nationalities”. They professed different religions, spoke different languages, their ways of life and customs were different, their attitude towards history and historical traditions were different. There was no one nation in India,¹ and Congress, therefore, could not claim to be the spokesman of so many nationalities.

Conscious of its minority status, the Muslim community did not respond favourably to the introduction of Western representative system of government in India, which suited the Congress ideally. Syed could clearly see that such a system was bound to reflect the domination of the Hindus, the majority community, over the Muslims. The Hindus would obtain four times as many votes as the Muslims because their population was four times as large. “It would be like a game of dice, he argued, “in which one man had four dice and the other only one”.² These concerns guided Syed Ahmad Khan to mobilize the Muslim community in the immediate post 1857 period.

The minority status within the parameters of representative system of government incrementally introduced through various constitutional instruments by the British pushed the Muslims to seek guarantees and safeguards against the prospects of majority Hindu rule. The Muslims moved politically to form All India Muslim League Party to articulate their demands. Very soon, the Muslim demand for ‘separate electorate’ was accommodated in the Government of India Act 1909. This, however, became a contentious issue between the Hindu and Muslim communities particularly after 1920 and the Congress Party consistently opposed the separate electorate throughout except conceding it only once in 1916 in the Lucknow Pact.

Another political strain running throughout the Muslim Politics was to secure autonomy of the provinces within the orbit of federal setting with maximum number of provinces obtained for the Muslims. Mr. Jinnah in his famous 'fourteen points' insisted on Muslim majorities in the Punjab, Bengal and N.W.F.P. There was demand for a new province of Sindh separated from Bombay Presidency. He urged for reforms in the N.W.F.P. and Balochistan along the same lines as in other provinces. The import for these demands was to strengthen provinces, especially the Muslim majority provinces, against the prospects of Hindu majority threat at the Center.³

The Government of India Act 1935 promoted a Federation with a strong unitary bias. The Act not only empowered the centre to legislate the federal list of subjects but also the concurrent list if so decided. The Act did not protect the Provincial autonomy as the ministerial functions were restricted by the authority of the Governor who was representative of the Governor General. The Act did not allay the Muslim apprehensions articulated all along and were reluctant to submit to a central government dominated by the Hindu majority community. They were conscious of the fact that they could never turn the majority rule into one of concurrent majority rule. Therefore, Jinnah condemned the Act saying that "it was devoid of all the basic and essential elements and fundamental

requirements which are necessary to form a Federation".⁴ The Congress rule in seven of the nine provinces brought out the ugly face of majority rule and confirmed the Muslim fears that the minority would suffer at the hand of majority. Consequently the Muslims demanded in the Lahore Resolution of 1940, that the Muslim majority provinces be autonomous and sovereign.

The dominant political trends which emerge from the above discussion are that the Muslims did not welcome the Representative Government introduced by the British and they did not agree with the federal concept of governance as it would condemn them to a permanent minority status. This inevitably would have serious and far reaching implications for the post 1947 governance paradigm for Pakistan.

Colonial Legacy

Much has been written about the common British legacy and its subsequent impact on the political proceedings and constitution making in both India and Pakistan after attaining independence. The role of legacy is significant but the areas that constitute Pakistan today deserve a fresh look and interpretation. British policies and strategic governance of North India were radically different and consequently separated these areas from the rest of India.

As regards Balochistan, the imperialistic interests demanded a different policy for managing the tribal conflicts and establishing law and order. The treaty of 1876 to be called the Sandeman system or the "forward policy", aimed at recognizing the Balochi and Pukhtun tribal chiefs and payment of allowances to them for the purposes of raising levies paid handsome dividends. Richard Bruce, who worked under Sandeman, made a pointed observation that, "we have bound Waziristan hand and foot and thereby pledged to mould our policy on such lines as will afford the Maliks efficient support and protection".⁵

British law never penetrated Balochistan tribal areas and the various Constitutional Acts had no impact on them. The tribal chiefs were free to administer their areas according to tribal customs. Additionally, these areas served as a cushion against invasion from the north and it was expected that they would serve as the first line of defence. Balochistan was controlled from the centre and

the situation did not change until 1970 when it was granted the status of a province despite the fact that its area constituted 40% of present Pakistan's total area with 5% of population. Ironically, the All India Muslim League demanded Provincial status for Balochistan from 1927 onward but the same was delayed till 1970 and hence it missed out on the impact of British laws and constitutional developments.

The British policy towards Western Punjab rested on a three pronged strategy. First, it sought to stabilize and consolidate the land owning class. Though Punjab was considered to be a province of small proprietors, the distinction of Western Punjab from the remaining part of the province was the dominance of the landed aristocracy; "at a guess about 40% of the cultivated area is in the hands of men who own over fifty acres".⁶ Additionally, Jagirs and squares of land were granted along with titles. To protect interests of the landed gentry, the Punjab Alienation of Land Act of 1900 was enacted, which allowed the free transfer of land within the agricultural tribes but prohibited the permanent alienation of the land of agricultural tribes to non-agriculturists. It is interesting to note that the landed class included majority of Muslims (being the Muslim majority province) along with Sikhs and Hindu Jatts. This combination was to stay on the government side all along. It also caused split between rural and urban based Hindu moneylenders, reducing the potency of the latter to influence the Provincial politics. The British run bureaucracy at the higher echelons and key positions (Deputy Commissioner) was there to oversee and manipulate the effectiveness of this arrangement.

Secondly, an important political move by the British was the launching of the Punjab National Unionist Party in 1923 with official blessings. This had serious implications for the governance of this area. The Unionist Party, it is amazing to note, continued to rule Punjab from 1923 to 1946 and carved out a separate role in alliance with the British establishment. It caused a split in the All India Muslim League at the time of the Simon Commission's visit (Shaffi League of Punjab) and the Punjab faction agreed to cooperate with the commission against the declared policy of the National Party. The leadership thrown up under the umbrella of the Unionist Party choked the entry points for the Muslim national leadership. In the elections of 1937, the All India Muslim League could win only two seats in the Provincial Assembly and one crossed the floor leaving Maulana Barkat Ali as the only member. Mr. Jinnah had to reach an understanding with Punjab leadership that goes under the title of Khizar – Jinnah Pact 1944. This style of governance prevented both the All India Congress and particularly the All India Muslim League from playing an effective role in the Muslim majority Province. In other words, Punjab was kept aloof from the mainstream politics of British India.

Thirdly, the most important decision of the British policy was to recruit the army from this area. The obvious advantage of the Punjabi dominant military force was that it could be deployed in the rest of India without facing the prospects of disobedience or disloyalty; a masterly stroke of strategy which paid dividends to the British but ironically, Pakistan inherited a dominant Punjabi and Pathan military force which dictated the course of events in the post 1947 period. From one particular perspective army as an institution became the key variable in the body – politics of Pakistan.

The North West frontier Province was the last area to be annexed by the British. Politically, the N.W.F.P. comprised the Tribal areas of Malakand, Khyber, Kurram, North Waziristan and South Waziristan and the settled Districts of Hazara, Mardan, Peshawar, Kohat, Bannu and Dera Ismail Khan. The Tribal areas were left to the tribes with a Political Agent serving as a liaison between the British government and the tribal chiefs.⁷ The settled areas, however, became part of the

British administrative structure. This development came rather late to these areas and even the Government of India Act 1919 was not introduced in the Province till 1932. Obviously, the Province lagged behind the rest of India in terms of constitutional evolution.

Sindh was part of Bombay Presidency despite the Muslim League demand of making it into a separate province. Living in the backyard of Bombay, the people of the area never experienced the vibrations of the developed area. The presence of landed class kept it in a backward state. After acquiring the status of a Province, it had only 11 years to function politically and administratively before becoming part of Pakistan.

East Bengal, which later became East Pakistan had a different political and constitutional evolution. It dealt with the British on arrival, underwent land reforms, and exposure to educational institutions, trade and commerce gave people different orientations. It faced partition of Bengal and the Swadeshi movement, the annulment of Partition, establishment of All India Muslim League in 1906 at Decca and subsequent developments gave its people a different temperament and political attitudes. The coming together of this Province with the remaining areas of West Pakistan had serious implications.

The Constitutional Development

At the time of independence, Pakistan, adopted the Government of India Act 1935 with minor changes to be its first interim constitution. Having failed to frame a constitution for almost a decade, the inherited vice-regal system continued to be the governance document. During this period (1947-56) attempts were made to plug in the parliamentary system within the confines of an imperial order. The structural tensions led to the tripping of the parliamentary democracy, which is a misnomer. Parliamentary working could not co-exist within the vice-regal system. Inevitably, the civil and military bureaucracy became dominant players in the body-politics of Pakistan.

The 1956 Constitution

The first constitution of Pakistan was drafted by Ch. Mohammad Ali, a civil bureaucrat turned politician. The first article of the constitution referred to Pakistan as a Federal Republic. The preamble of the constitution stressed federalism and several other provisions dealt with various aspects of federalism and Provincial autonomy. The 1956 Constitution, like the interim constitution divided powers into three categories; Central, Provincial and Concurrent. The federal government was assigned 30 items as against 61 in the interim constitution. The Provincial subject list increased to 94 subjects as against 55 and the concurrent list had 19 items.

The Government of India Act 1935 was diluted somewhat in terms of allocation of subjects. Before the 1956 constitution could be implemented by holding general election, Ayub Khan imposed Martial Law in October 1958.

The Martial Law 1958 – 62

It is interesting to note that Pakistan moved from a vice-regal system into a martial law situation, where all powers were concentrated in one individual and the institution of army.

The 1962 Constitution

Again, the second constitution was framed by a military bureaucrat, Ayub Khan. This constitution did not refer to the federal system as mentioned in Article 1, which officially described the name of the state. The preamble, however, mentioned the federal system, delineating the relationship between federal government and the constituent units of the federation.

The 1962 Constitutions excluded the Provincial list of subjects and mentioned the Central List of 49 items and a Concurrent List. It created a powerful centre with concentration of power in the office of the President and an impotent unicameral legislature. The Provincial governments were headed by the Governors, who as nominees of the President also enjoyed enormous powers. A lip service was paid to federalism but in reality a more powerful and centralized system was put in place.

The Martial Law 1969 – 72

After a highly centralized rule of a decade, Pakistan moved into another Martial Law, where power was concentrated in one individual, the army chief and the institution of army. The authoritarian style of governance continued until its break up in 1971.

The 1973 Constitution

In Article One of the 1973 Constitution, Pakistan is mentioned as Federal Republic to be known as the Islamic Republic of Pakistan. The preamble also recognizes federalism as the organizing principles of the state.

The 1973 Constitution is characterized by the absence of Provincial List of subjects and provides for a Federal List of 59 subjects and a Concurrent List of 47 subjects, where the centre will prevail in case of conflict. The sixth and seventh schedules of the 1973 Constitution place additional restrictions on the powers of the Provincial Assemblies.

For the first time, a bicameral legislature was provided to accommodate the federating units. The upper House called the Senate, has limited power and has no effective role in the passage of the budget. Pakistan has the unique distinction of passing the budget in the same way as provided in The Government of India Act 1935. The budget is divided into charged and non – charged categories. The charged items include the Defence, President, Governors and debt receiving expenditure which is mentioned as one liner statement and cannot be debated on the floor of the house. The center picks up 90 % of the revenue.

These bodies have failed to perform and in the case of Council of Common Interests have remained dormant and inactive for years. The National Finance Commission did not do any better as for the last four years, the President of Pakistan has decided the distribution of revenues among the federating units. The issues of water distribution and royalty of natural gas continue to embitter relations between the centre and the provinces. The overwhelming role of the centre continues to dominate the decision – making of the country.

The 8th and 17th Amendments

The introduction of 8th amendment and its reversal during Nawaz Sharif government and its revisit through 17th amendment under Musharraf's government tilted the balance of power in favour of the President. The 1973 Constitution functions as a hybrid system and its Parliamentary working has been seriously undermined. The federation performs under the overwhelming authority of the Centre and in fact that of the President. Federal in name, Pakistan has operated a unitary (during extended military rule) or a quasi – Unitarian federalism.

The Political Management

Uncertainties and confusion surrounded the birth of Pakistan. Obviously, the challenge was to establish a viable state despite reservations of Indian leadership on this count. India inherited a functional centre at Delhi for many decades and the federating units had an orientation of working with it. On the contrary, Pakistan had to establish a new Centre. Urgency to establish a credible centre, the decision – makers found the Government of India Act a convenient and handy instrument to do the job. State building became the focus of the new country. The colonial document of 1935 coupled with the governance policies for the areas that constitute Pakistan reinforced the centralizing tendencies and ignored the sensitivities of the federating provinces. The colonial political traditions and practices persisted through a decade and authoritarian streak of governance started broadening.

Instead of harmonizing relations between different and distinct cultural, ethnic, linguistic and regional identities with the centre, the colonial structures were not reoriented for the task. The numerical ethnic majority of East Pakistan presented a major problem for the ruling elite of Punjab – Mohajir combination. The paradox was the 55 percent population pitted against the non – elective wielders of Power, who decided to dissolve the provinces in West Pakistan to create One Unit in 1955 to establish the principle of parity between the two wings. This caused alienation among the majority and minority provinces. There was insurgency in Balochistan in 1964, 1973 and the province is still experiencing continuing unrest for the last four years. Though West Pakistan was reverted back to four Provinces in 1970, Pakistan faced a Civil War situation that led to the birth of Bangladesh in 1971.

Pakistan is the only country in post – colonial period to have broken up. Ironically, it is the majority that seceded from the union, whereas, the opposite is generally the case. The 1973 Constitution did not improve the situation and eleven years of Zia and almost 8 years of Musharraf rendered the document dysfunctional. It is intriguing to note that after 1971, it is again the majority Province of Punjab which is the villain. This 56 % majority is aided by the Punjabi and to a lesser degree Pathan overwhelming representation in the non – elective civil and military bureaucracy.

Politically, Pakistan has been governed the same way as the British ruled the province of Punjab. Feudalism remained intact despite two phony land reforms and the Civil Military bureaucracy became the actual wielder of power. Like the “officially sponsored” Unionist Party in Punjab, the ruling elite, having established one unit floated the Republican Party. Ayub Khan in the 60s established the Convention Muslim League and headed it himself. Zia – ul – Haq sponsored the Junejo League in the 80's to be followed by IJI, a coalition of parties cobbled together by the Inter Services Intelligence in 1990. Now Musharraf has put together various political groups to

be called Quaid-e-Azam Muslim League and has managed to rule for five years with these assemblies. Like the British, who did not allow the National Parties to enter Punjab, Musharraf has marginalized the main stream Political Parties (PPP and Muslim League Nawaz) and its leadership lives in exile. There seems to be not much difference in the way Punjab was ruled by the British and the way Pakistan is being governed today.

Conclusion

The British Legacy for the areas comprising Pakistan was different from the rest of India. That model of governance had a far reaching impact. In fact, the continuity of colonial policies and style of governance shaped its evolution after 1947. That prescription was good for imperial compulsions but an independent country should have negotiated with issues of state construction and nation – building differently. It seems Pakistan has not moved forward. A fierce struggle lies ahead as Pakistan travels on the road to constitutional governance.

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Notes

[1](#) G. Allana, ed. Pakistan Movement: Historic Documents, Lahore 1977, p.3

[2](#) See Sir Syed Ahmad Khan, The Present State of Indian Politics, edited by Farman Fatehpuri, Lahore 1982, pp 36-37

[3](#) For the text of “fourteen points”, see Sharif al Mujahid, Quid-e-Azam Jinnah: Studies in Interpretations, Karachi, 1981, APP.10, pp 473-81

[4](#) Jamil-ul-Din Ahmad, ed; speeches and writings of Me. Jinnah, vol. 1, Lahore, 1968, p 9

[5](#) Richard Issaq Bruce, The Forward Policy, London; Longmans 1900, p 298

[6](#) Malcolm Lyall Darling, Punjab Peasant in Prosperity and Debt, London, Oxford University Press, 1932, pp 102-103

[7](#) Tribal Areas were divided into agencies, with each agency being placed under a political agent.