

## **The 18<sup>th</sup> Amendment in the 1973 Constitution**

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### **Abstract**

*Comparing with the 37 year checkered constitutional history (1973-2010), the first decade of 21<sup>st</sup> Century, brought some hope for Pakistan. That was adoption of 18th Constitutional Amendment. It was a damage-control exercise which was proposed by an All Party Parliamentary Committee (APPC). To what extent, the 18th Constitutional Amendment restored the original constitution and what are its salient features, is the subject of this paper. Defects found in the 18th Amendment created a head on collision between Parliament and judiciary. However, these were subsequently rectified through the 19<sup>th</sup> Amendment passed after few months of the previous bill.*

**Keywords:** Constitution, Amendment, Parliamentary, Pakistan

### **An Eventful Year: A Prelude to Unanimous Amendment**

The year 2007 proved to be decisive in shaping up political and constitutional contours in Pakistan. Musharraf's clash with judiciary, assassination of Benazir Bhutto and atmosphere of political conciliation in the parliament after 2008 election, paved the way for unanimity on 18<sup>th</sup> Constitutional Amendment.

Like other dictators, General Pervez Musharraf was scared of judiciary. He wanted to tame it so that he could smoothly implement his agenda. Apart from removing judges of superior courts on the pretext of not taking oath under his Provisional Constitutional Order (PCO), he changed eight chief justices during 1999-2007.<sup>1</sup> Nevertheless Justice Iftikhar Muhammad Chaudhry, a hard nut, refused to give in. Justice Iftikhar had taken many sensitive cases for hearing in the Supreme Court. They included Missing Persons Case, Privatization of Karachi Steel Mills case and Construction of Golf Course at a children Park in Islamabad. On the question of missing persons there had been an unpleasant meeting between Justice Iftikhar Muhammad Chaudhry and Director General Inter Services Intelligence (ISI).<sup>2</sup> After passing orders

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by the Chief Justice in the above mentioned cases, the patience of military dictator came to its brim. Moreover, Musharraf planned to contest election for the post of president, despite retaining army slot, and he feared that if that was challenged in Supreme Court, Chief Justice might disqualify him.<sup>3</sup>

Accordingly Musharraf called Justice Iftikhar Muhammad Chaudhry to army headquarter in Rawalpindi on 9<sup>th</sup> March 2007 and in the presence of top army brass, asked him to tender resignation. To their surprise, Justice Iftikhar Muhammad Chaudhry flatly refused to oblige, resultantly he was ordered not to move. He was kept in custody till another senior judge of the Supreme Court Justice Javed Iqbal was appointed a new Chief Justice.<sup>4</sup> The ill-treatment meted out to Justice Iftikhar Muhammad Chaudhry resulted in wide spread protest demonstrations from legal fraternity all over Pakistan. The moment was given the title of *Adliya Bachao Tehreek* (Movement for protection of Judiciary). The movement had two goals: (i) reinstatement of Justice Iftikhar Muhammad Chaudhry (ii) restoration of independence of the judiciary.<sup>5</sup> The lawyers' movement continued till restoration of Justice Iftikhar Muhammad Chaudhry and other senior judges.

Benazir Bhutto returned in the midst of lawyers' movement after her self-imposed exile in October 2007. Her return added charge to political atmosphere in Pakistan. However, she was murdered in a bomb blast in Rawalpindi on 27<sup>th</sup> December 2007. People's Party supporters in Pakistan, in general, and in Sindh, in particular, strongly reacted to her assassination. Farahnaz Isfahani wrote that the Benazir's murder "has unleashed a wave of emotion throughout the country" The violent PPP workers inflicted heavy damages on public properties.<sup>6</sup> However, both, Asif Ali Zardari (her husband) and son Bilawal Zardari tried to cool down the wide spread demonstrations. On his party website, Bilawal wrote:

*"For those in my country who would find it easier to walk away from democracy and seek revenge through violence, I urge you to remember my mother's words: democracy is the sweetest revenge. To plunge the country into more violence and chaos, would only play into the hands of those who hope for democracy's failure. The terrorists have no use for democracy, and the current government fears it. We must unite and rise above both"*<sup>7</sup>

Cashing on post-assassination emotions and sympathies, PPP bagged 124 seats in the house 342, emerging biggest party but still away from simple majority. She had to rely on coalition partners to form governments in centre and provinces. The following table shows results of February 2008 election:

**Party Position in the 2008 Election**

Name of Political Party	National Assembly	Balochistan Assembly	Khyber Pakhtoonkhwa Assembly	Punjab Assembly	Sindh Assembly
Awami National Party	13	4	48	0	2
Balochistan National Party (A)	1	7	0	0	0
Independents	18	12	11	4	0
Muttahida Qumi Movement Pakistan	25	0	0	0	51
Muttahida Majlis-e-Amal Pakistan	7	10	14	2	0
National Party	0	1	0	0	0
National People Party	1	0	0	0	3
Pakistan Muslim League (F)	5	0	0	3	8
Pakistan Muslim League (N)	91	0	9	171	0
Pakistan Muslim League (Q)	54	19	6	84	9
Pakistan Peoples Party (S)	1	0	6	0	0
Pakistan Peoples Party Parliamentarians	124	12	30	107	93

Source: Associated Press of Pakistan <http://www.app.com.pk/election>

The above table shows that although Pakistan People's Party emerged largest party with 124 seats in National Assembly, but it was still 47 seats short of simple majority (171 seats) required for election of Speaker, Deputy Speaker and Prime Minister. So the only option open for Co-Chairperson Asif Ali Zardari was to enter into alliance with various political forces. The first to approach was Pakistan Muslim League (Nawaz), the second largest party in National Assembly with 91 members. Later on, he was able to muster support of MQM, ANP and other political groups in the National Assembly. Prime Ministerial candidate Yousaf Raza Gilani fielded by PPP was unanimously elected. In fact that spirit of unanimity facilitated desirable changes in the 1973 constitution.

**Parliamentary Committee on Constitutional Reforms (PCCR)**

The task of proposing amendments in the Constitution was assigned to the 27 member Parliamentary Committee on Constitutional Reforms (PCCR), led by Mian Raza Rabbani. The Committee proposed 95 amendments in approximately 70 articles of the Constitution. On majority of amendments, the PCCR took unanimous decisions. However, on renaming of NWFP and judges appointment, there occurred a deadlock but that was over come. On March, 31, 2010, the committee signed the draft. Federal Minister for Water and Power Raja Pervaiz Ashraf was the first one to sign the draft followed by Professor Khurshid Ahmed (Jamaat-e-Islami), Aftab Ahmed Khan Sherpao (PPP-S), Syed Naveed Qamar, Dr Babar Awan, Haji Lashkari Raisani, (PPP)

Ishaq Dar, Sardar Mehtab Ahmed Khan Abbasi, Ahsan Iqbal, Abdul Razaq Taheem (PML N) Wasim Sajjad, S M Zafar, Humayun Saifullah (PM-Q), Dr Farooq Sattar, Haider Abbass Rizvi(MQM) , Afrasyab Khattak, Haji Muhammad Adeel (ANP), RehmatUallah Kakar (JUI), Baluch leaders Mir Israr Ullah Zehri, Hasil Bizenjo Abdul Rahim Mandokhel and Shahid Bugti, and last but not the least Munir Khan Orakzai (FATA) with the Committee Chairman, Raza Rabbani putting his signature at the very end.<sup>8</sup> Some features of the Act are discussed below:

### **The 18th Amendment**

The 18th Amendment in the 1973 constitution combines in itself almost 100 amendments and it has affected 83 articles which are:

1,6,10,17,19,25,27,29,38,41,46,48,51,58,62,63,70,71,73,75,89,90,91,92, 99,100,101,104,105,112,116,122,129,130,131,132,139,140,142,143,144, 147,149,153,154,155,156,157,160,167,168,170,171,172,175,177,193,194,198,199,200,203,209,213,215,216,218,219,221,224,226,228,232,233,234,242,243,246,260,267,268,269,270<sup>9</sup>

The 18th Amendment has almost undone the impacts of the 8th Amendment (enacted by Gen. Zia ul Haq) which had altered over 90 Articles of the Constitution, and the 17th Amendment (enacted by Gen. Pervez Musharraf) which had altered 26 Articles of the Constitution

The new name of the NWFP is to be Khyber-Pakhtunkwa. The PML-N which had long held out on this issue finally agreed to this name change. Similarly, spellings of names of two other provinces were changed from “Baluchistan” to “Balochistan” and “Sind” to “Sindh”. No explanation was made public as to what difference those spelling changes would make? However, Sindhi and Balochi members of Parliamentary Committee on Constitutional Reforms (PCCR) opined that the former spellings were legacy of British imperialism.<sup>10</sup>

Article 6 of the 1973 Constitution provides for punishment of person found guilty of High Treason. As a result of the 18<sup>th</sup> Amendment, this article has been changed considerably. A new clause 6(2A) has been added which reads that an act of high treason mentioned in Article 6 shall not be validated by any court including Supreme Court and a High Court. We have noticed in the case of all military take-overs in Pakistan that abrogation/suspension of constitutions and imposition of military laws have been validated by the superior judiciary and subsequent indemnity by the post-martial Law assemblies. Hopefully the new clause added to Article 6 will play the role of deterrence for the judiciary in the days to come.<sup>11</sup>

In the Fundamental Rights and Principles of Policy chapters, few good things have been added. In order to guarantee the right of every

citizen of Pakistan to enjoy fair trial and have an access to information in all matters of public importance, a new articles 10 A and 19A have been inserted. Moreover, another new Article 25-A has been added to the same chapter which provides for free and compulsory education to all children of the age five to sixteen years. In order to remove disparities in services to people of different areas, a proviso was added to article 27. As per article 29, the report of Principles of Policy will now be discussed in Senate as well. Previously it was discussed in National Assembly only. Through addition of a new paragraph to article 38 of Principles of Policy, disparities regarding share of provinces in various services have been removed.<sup>12</sup>

The famed article 58 (2) (b), which had first been inserted into the Constitution by Gen. Zia ul Haq, allowed the President to dissolve Parliament, and which was re-enacted by Gen. Pervez Musharraf, has been removed from the Constitution<sup>13</sup>

One of the significant changes introduced through the 18<sup>th</sup> Amendment was the one incorporated in Article 175. Previously only Supreme Court of Pakistan and four provincial High Courts were mentioned in clause (1) of that article. Now Islamabad High Court has also been added. Similarly, the old practice was that President used to appoint judges of Supreme Court and High Courts in consultation with Chief Justice but now the same function will be performed by a Judicial Commission and a Parliamentary Committee.<sup>14</sup> A new article 175A was added to the Constitution which provided for Judicial Commission and a Parliamentary Committee. For appointment of judges to the Supreme Court, the 7-member commission is to be consisted of Chief Justice of Pakistan as its chairman, two most senior judges of Supreme Court, a former Chief Justice or a former judge of Supreme Court, Federal Law Minister, Attorney General of Pakistan, and a senior Advocate of Supreme Court nominated by Pakistan Bar Council, as members. For the High Courts, the above commission shall also include four more members i.e. Chief Justice of the concerned High Court, a most senior judge of the High Court concerned, provincial Law Minister and a senior advocate to be nominated by the provincial Bar Council.<sup>15</sup>

For appointment of judges to Islamabad High Court, the Judicial Commission will also include Chief Justice and the most senior judge of that court. Finally, for appointment of judges to Federal Shariat Court, the commission shall also include the Chief Justice and most senior judge of that court.<sup>16</sup>

As for as Parliamentary Committee for appointment of judges is concerned, it shall consist of eight members; four each from the Senate and the National Assembly. Of the 8-member Committee, 4 each shall be from treasury and opposition benches to be nominated by leaders of the

House and the opposition respectively. The chain of communication has been set as the commission will send nominations to the Parliamentary Committee, which shall confirm these nominations by simple majority within 14 days. The Committee may also reject nominations coming from the Commission with three-fourth majority thereby asking the commission to send new nominations. The Parliamentary Committee will forward list of confirmed nominations to the President of Pakistan for appointment.<sup>17</sup>

The Act ensured Provincial autonomy. The following articles were either partially or fully altered. 70, 142, 143, 144, 149, 157, 160, 161, 167, 172, 232, 233, 234. The issues included production of electricity; National Finance Commission affairs; natural gas; borrowing of provinces; emergency provisions and legislative powers.<sup>18</sup> The most important change was Article 142(b) and (c) give right to provincial assemblies to make laws with respect to criminal law, criminal procedure and evidence. Similarly Article 270AA provides that all existing laws will remain in force unless provincial assemblies replace them by new laws.<sup>19</sup>

Another land mark feature of the 18<sup>th</sup> amendment is the restoration of parliamentary form of government. In this connection articles: 46, 48, 75, 90, 91, 99, 101, 105, 116, 129, 130, 131, 139, 231 and 243 got affected.<sup>20</sup> The areas where of more powers were given to parliament, provincial assemblies and Prime Minister included: duties of Prime Minister to President; holding of referendum; Assent to bills by president and governors; status of Prime Minister as Chief Executive, Election of Prime Minister by NA, Conduct of Business, appointment of provincial governors, provincial cabinets, executive authority of provinces, election of chief ministers, duties of chief ministers to governors, provincial governments' conduct of business and appointment of services chiefs.<sup>21</sup>

How far the office of Prime Minister or institution of parliament have been strengthened is evident from these facts. Previously as per article 46, the Prime Minister was bound to inform President of all decisions taken in cabinet and the President could ask for reconsideration of certain decisions. Nevertheless after the amendment the power of reconsideration by the president lapsed. Article 48 empowered only President to hold referendum on issues of national importance. After amendment, now the Prime Minister will consult joint sitting of parliament to hold referendum.<sup>22</sup>

The Act "purged" the name of Gen. Zia-ul-Haq as President from the Constitution

### The 19th Amendment

The 19th Amendment was incorporated in the constitution in a quick succession after the 18<sup>th</sup> Amendment. It was passed by National Assembly on 22<sup>nd</sup> December 2010<sup>23</sup>. In fact the 19<sup>th</sup> amendment was a rectification of the previous i.e. 18<sup>th</sup> amendment act. Some parts of Constitutional (Eighteenth Amendment) Act, 2010, were challenged in the Supreme Court of Pakistan. Of them Article 175A regarding appointment of judges was significant.<sup>24</sup> The 17-judge bench of the SC, headed by the Chief Justice of Pakistan Iftikhar Muhammad Chaudhry returned to the parliament with reservations, recommendations and observations the new procedure of appointment of superior judges for Supreme Court, Federal Shariah Court and High Courts.. Earlier the Court expressed reservations expressed regarding constitution of the 7-member Judicial Commission during hearing of the petitions challenging some provisions of the 18th amendment particularly in reference to the appointment of judges of superior courts.<sup>25</sup>

In the post 18<sup>th</sup> amendment constitution, article 175A provided for the Judicial Commission headed by Chief Justice of Pakistan. It consisted of members such as: two senior most judges of the apex court, a retired judge of SC, Attorney General of Pakistan, Federal Law Minister and a senior lawyer nominated by Pakistan Bar Council.<sup>26</sup>

The court objected to making administration as part of the commission and giving parliamentary committee veto power on recommendations of Judicial Commission<sup>27</sup> The Supreme Court vide Paras 7 and 13 of the aforesaid Order made a reference to the Parliament for re-consideration of the provisions of Article 175A in the light of the observations made in the above order.<sup>28</sup> As such, the 19<sup>th</sup> Amendment Bill gave effect to certain amendments in the Constitution after giving consideration to the observations of the Supreme Court. As a result of 19th Amendment Act, a total of 26 amendments have been fitted into six Articles i.e. 81, 175, 175A, 182, 213 and 246<sup>29</sup> Salient features of the Act are given below:

- In order to include judges of the newly established Islamabad High Court in the list of those who will get remunerations from the Federal Consolidated Fund, amendment were incorporated in Article 81 of the Constitution. Similarly for charging administrative expenditure of Islamabad High Court, paragraph (b) of article 81 was amended accordingly.<sup>30</sup>
- Once again Islamabad High Court was inserted in article 175. Thus it was decided that in the Constitution, Article 175, for the Explanation the following shall be substituted, namely, Explanation. Unless the context otherwise requires, the words

‘High Court’ wherever occurring in the Constitution shall include ‘Islamabad High Court’<sup>31</sup>

- The most important aspect of the 19<sup>th</sup> amendment was incorporating changes in the Article 175A of the constitution. They were: (a) in clause (2), in paragraph (ii) and in paragraph (iii), for the word ‘two’ the word ‘four’ shall be substituted. It is a part of the 19<sup>th</sup> Amendment where the parliament fully implemented the October 2010 directives of the Supreme Court by doubling the number of judges in the commission. Needless to say, the Chief Justice, in addition to the four judges, will be part of the commission.<sup>32</sup>
- Similarly in paragraph (iv) of clause (5), 15 years legal practice in a High Court has been made mandatory for the member of commission coming from lawyers’ community. Under 18 Amendment, only nomination by the concerned Bar Council was required.<sup>33</sup>
- As per routine, National Assembly may be dissolved either completing its term or otherwise while Senate is a permanent body. In the 18<sup>th</sup> Amendment, it was not specified as what would be the fate of Parliamentary Committee for appointment of judges when such an eventuality occurs. For this purpose additional wording was inserted in the proviso of clause (9) as follows:

*“Provided that when the National Assembly is dissolved, the total membership of the Parliamentary Committee shall consist of the members from the Senate only mentioned in paragraph (i) and the provisions of this Article shall, mutatis mutandis, apply.”*<sup>34</sup>

- Unlike the 18<sup>th</sup> Amendment, now rejection of Judicial Commission’s nomination of judges by the Parliamentary Committee will require two things (a) Recording of reasons (b) three-fourth majority of committee’s total membership, for this purpose provisions of clause (12) of Article 175 were amended/substituted.<sup>35</sup>
- For clause (13), the substitution was that the Committee shall send the name of the nominee confirmed by it or deemed to have been confirmed to the Prime Minister who shall forward the same to the President for appointment.<sup>36</sup>
- As far as bringing conduct of judges under discussion in legislature is concerned, Article 68 of the constitution puts bar on it. However in the 19<sup>th</sup> Amendment clause (16) was added



which states that the provisions of Article 68 shall not apply to the proceedings of the Committee.<sup>37</sup>

- For the appointment of Ad hoc judges in the Supreme Court, Article 182 of the Constitution was amended. Now appointment of those judges will be possible for Chief Justice of Pakistan only after consultation with the Judicial Commission as provided in clause (2) of Article 175A.<sup>38</sup>
- Article 213 of the constitution specifies number of members of Parliamentary Committee for appointment of judges. So after the 19<sup>th</sup> amendment, in Article 213, in clause (2B), (i) for the second proviso, these words shall be substituted, “Provided further that the total strength of the Parliamentary Committee shall be twelve members out of which one-third shall be from the Senate.”<sup>39</sup> and (ii) in the third proviso, for the words “Parliamentary Committee shall comprise” the words “total membership of the Parliamentary Committee shall consist of” shall be substituted.<sup>40</sup>
- Article 246 of the Constitution gives details of the Tribal Areas of Pakistan. After the 19<sup>th</sup> amendment, in paragraph (a), sub-paragraphs (iii) and (iv) were omitted and in paragraph (c) after sub-paragraph (iii) the new sub-paragraph containing words “Tribal Areas adjoining Lakki Marwat district” were inserted. Similarly after sub-paragraph (iv) the new sub-paragraph containing words “Tribal Areas adjoining Tank district,” were inserted.<sup>41</sup>

As mentioned earlier, the 19<sup>th</sup> Amendment was a positive response to the directives of Supreme Court which were conveyed to the Parliament in the October 2010 interim order. The 100% increase in the number of judges in the Judicial Commission was a leap forward. However, the 19<sup>th</sup> Amendment did not accommodate another important observation of the Supreme Court regarding appointment of judges. The Court had desired in October 2010 Order that in case the Parliamentary Committee rejects nomination of a judge, then that rejection should be put to judicial review but the amendment ignored the same. Another power taken away from the Chief Justice was that approval of Judicial Commission was made mandatory for appointment of ad hoc judges.

### Conclusion

Rules, regulations and constitutional provisions are mechanical in nature while societies are organic. Therefore rules and statues are changed off and on so that these are adjusted to the needs of a society. However, in the case of Pakistan, the successive rulers, whether dictators or

democrats, incorporated amendments in constitution to serve their personal interests.

The case of 18<sup>th</sup> Amendment is different from previous amendments in the sense that it was introduced through all partisan approach. The PPP-led Federal Government during 2008-2013 might have not performed well in other fields but on parliamentary sector, it achieved a landmark by adopting the 18<sup>th</sup> Amendment bill unanimously. In the foregoing pages, main features of the 18<sup>th</sup> Amendment have been taken to account.

After adoption of 18th Amendment, a serious rift emerged between judiciary and Parliament on the question of judges' appointment procedure. Nevertheless both the organs of government wisely resolved the issue which resulted in incorporation of 19<sup>th</sup> Amendment in the constitution.

Hopefully, guaranteeing provincial autonomy and shifting of power balance to parliament and elected Prime Minister will usher new democratic era in Pakistan. The hanging sword of Article 58(2) (b) was removed which, together with other factors, enabled the elected government to complete its term in 2013. The hitherto toothless Election Commission asserted itself and tough code of conduct was applied to intending candidates in the May 2013 general election. The appointment of caretaker governments in centre and provinces was exactly on the pattern suggested by the 18<sup>th</sup> Amendment. In short, the adoption of 18th Amendment will be remembered as a great occasion in the political and constitutional history of Pakistan

## Notes & References

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<sup>33</sup> *Ibid.*

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