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Jurisprudence of a Fledgling Federation: A Critical Analysis of Pakistan's Judicial View on Federalism

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“The state and its ideologues have steadfastly refused to recognize the fact that these regions are not mere chunks of territory with different names but areas which were historically inhabited by people who had different language culture, and even states of their own” -- Feroz Ahmed¹

I. INTRODUCTION

Federalism, according to the Supreme Court of Pakistan, is a salient feature of the Constitution of Pakistan, 1973 along with parliamentary democracy, independence of judiciary, and Islamic provisions.² The Court has emphasized the critical importance of salient features in Pakistan's constitutional law by stating that they are “the prominent features, characteristics and picture-frame studded with public expectations.”³ In concrete terms, the Court elaborated, the salient features of the constitution play an “important role in formulating the laws and interpreting the provisions of the constitution.”⁴ Pakistan's judiciary has employed the salient

¹ Quoted in HARIHAR BHATTACHARYYA, FEDERALISM IN ASIA: INDIA, PAKISTAN AND MALAYSIA 172 (2010)

² See Mahmood Khan Achakzai v Federation of Pakistan, PLD 1997 SC 426; Zafar Ali Shah v Pervez Musharraf, PLD 2001 SC 869; Pakistan Lawyers Forum v Federation of Pakistan, PLD 2005 SC 719; Dr. Mubashir Hassan v Federation of Pakistan, PLD 2000 SC 869. The preamble to the Constitution of Pakistan states: “This Constituent Assembly... resolves to frame a Constitution... [w]herein the territories now included in or in accession with Pakistan and such other territories as may hereafter be included in or accede to Pakistan shall form a Federation wherein the units will be autonomous with such boundaries and limitations on their powers and authority as may be prescribed.” PAKISTAN CONST., Preamble. Article 1 of the Constitution states: “Pakistan shall be a Federal Republic to be known as the Islamic Republic of Pakistan.” PAKISTAN CONST. art. 1.

³ Mahmood Khan Achakzai v Federation of Pakistan, PLD 1997 SC 426

⁴ *Ibid.*

features doctrine on various occasions to assert their independence, limit the powers of legislature and executive, and decide over constitutionality of legislation. If judicial view on salient features doctrine is accepted uncritically, and federalism is indeed a cornerstone of Pakistan's Constitution, Pakistan would be considered an effective federation where the rules of federation form the lifeblood of legal system and are strictly guarded by the watchful eyes of the judiciary. A closer analysis of judiciary's view on federalism, however, informs that principles of federalism are either disregarded by the Court in favor of the overarching federal identity – which can be attributed to the 'ideology of Pakistan' – or are interpreted in such a manner that leave them devoid of their essential content.

The experience of federalism in Pakistan, like the broader constitutional history, is abysmal. Although a federation under the constitution, Pakistan is considered to be “pathology of federations”.⁵ The country's history is marked by numerous ethnic movements for rights to self-determination and provincial autonomy leading to even armed conflicts between members of smaller nationalities and central government.⁶ The ruling establishment, highly dominated by military and bureaucracy, view the demands for self-determination as contradictory to their view of a homogenous Muslim identity of the people of Pakistan. Consequently, the ruling establishment treats the political assertions of smaller nations based on distinct identities as a security concern or law and order problem rather than as social and political phenomenon. The succession of East Pakistan into Bangladesh in 1971 showed the failure of an over-arching singular identity in keeping the country united. The ruling elite, however, reacted to the succession of Bangladesh by closing their ranks against demands of self-determination by

⁵ R. L. Watts, quoted in HARIHAR BHATTACHARYYA, *supra* note 1 at 69.

⁶ KATHARINE ADENEY, FEDERALISM AND ETHNIC CONFLICT REGULATION IN INDIA AND PAKISTAN 137-162 (2007)

minority nations. In the present day Pakistan, apart from Punjabis who have predominantly reconciled their ethnic identity with the broader Pakistani identity, other ethno-national groups - like Pakhtoons, Sindhis, Balochis and Saraiki – have a highly distrustful relationship with the central government of Pakistan.⁷ Pakistan has, therefore, “so far remained a federation on paper only.”⁸

Although the impediments in development of federation in Pakistan can be explored from different facets, this paper aims to critically analyze the constitutional history and judicial interpretation of federalism in Pakistan against the scholarly and conceptual debates over the idea. The paper argues that Pakistan’s judiciary, despite recognizing federalism as cornerstone of the Constitution, has not upheld the principle as strongly as other salient features of the Constitution. The superior judiciary has strengthened the official discourse of a unitary national identity leaving little room for ethnical pluralism and participatory nationalism. The paper shall also review measures introduced by the recent 18th Amendment to the Constitution of Pakistan to promote provincial autonomy and will also make further suggestions to improve the federal scheme of Pakistan.

II. THE CONCEPT OF FEDERALISM

The idea of federalism can be understood in the institutional sense, as defined by John McGarry and Brendan O’Leary, as a system of government predicated on four main features: a codified and written constitution (accompanied by an independent judiciary for enforcement);

⁷ *Id.* at 168

⁸ HARIHAR BHATTACHARYYA, *supra* note 1 at 19.

demarcation of powers under the constitution between different levels of government; a bicameral legislation with separate chamber for units; and a constitutional amendment process requiring consent of both levels of government.⁹ This definition of federation, though useful in broadly pointing the institutions essential for federal structure, does not take into account the issues of identity and does not guarantee that different ethnic and national groups will be recognized and accommodated. The purpose of federation in a country such as Pakistan is not only to demarcate functions between provinces and the centre in the administrative sense, but to create an environment for diverse ethnicities to co-exist in a union. In order to comprehend the complexities of federation in a multi-national region, it may be expedient to begin with the contrast between the multi-national federation and territorial federation.

A multi-national federation or ‘plural federalism’, following Kymlicka, can be understood in juxtaposition to territorial federalism.¹⁰ The latter form of federalism describes a system where there are no territorially based national divisions to accommodate. In such a structure, a single national community can devise and diffuse powers for various reasons like administrative, military, political, or economic concerns. In Kymlicka’s view, United States is an example of territorial federalism as the system is not primarily based to accommodate the claims of disparate ethno-national groups.¹¹ The multinational federation, on the other hand, intends to accommodate the desire of nationality based groups for recognition and self-government. The motivation behind the multinational federation is “the reconciliation of diversity within the

⁹ KATHARINE ADENEY, *supra* note 6 at 8.

¹⁰ EMILIAN KAVALSKI & MAGDALENA ZOLKOS, DEFUNCT FEDERALISMS: CRITICAL PERSPECTIVES ON FEDERAL FAILURE 2 (2008).

¹¹ JENNIFER SMITH, FEDERALISM 33 (2005).

structure of a single country.”¹² The essential difference between the two broad concepts of federations is the presence of diversity in the multinational federation. Diversity, therefore, “becomes the basis on which the federal political edifice is erected.”¹³

Diversity is the core issue in a federal polity. Federal government is primarily concerned with management and accommodation of diversity. As Daniel Elazer stated, “federalism is not to be located on the centralization-decentralization continuum but on a different continuum altogether, one that is predicated on non-centralization, or the effective combination of unity and diversity.”¹⁴ The political institutions within a federation must reflect the concerns of diversity. The issue of diversity focuses on the existence of multiple identities with which the population may associate when grappling with political concerns and issues of governance. These identities may be based on history, culture, language, and territory but are manifested in the desire to maintain distinctiveness in the political sphere. Federalism is not only concerned with division of powers but also the configuration of the identity-constellations in a multinational state. As Kavalski and Zolkas points out, “federalism is not only about deduction, division, and allocation of power and about multiple and competing sources of authority, but is also about the complex and overlapping configuration and negotiation of identities.”¹⁵

Under a federation, two main sets of identities – the federal and the national - underwrite the centrifugal and centripetal forces in a federal matrix.¹⁶ The federal identity refers to the “larger overarching identity signified by the institutions, symbols, and practices of the federal

¹² KATHARINE ADENEY, *supra* note 6 at 6.

¹³ HARIHAR BHATTACHARYYA, *supra* note 1 at 15.

¹⁴ *Id.*

¹⁵ EMILIAN KAVALSKI & MAGDALENA ZOLKOS, *supra* note 10 at 4.

¹⁶ *Id.*

state.”¹⁷ National identity, on the other hand, is the “specific cultural, historic, and emotional features that reflect an individual’s belonging to group.”¹⁸ Delineating these two different identities operating in parallel is not to suggest that they are mutually exclusive or in competition. Federalism, on the other hand, attempts to configure the identity constellations in a way that allows for accommodating the desire for social, cultural and political assertion of distinct identities by ethno-national groups. It reflects the desire of distinctiveness alongside the desire for unity. Although recognition of diversity is the fundamental requirement for a federation, diversity does not nullify unity. Unity, Elazar explained, should be seen in distinction to disunity, and diversity with homogeneity.¹⁹ Distinctiveness and unity, therefore, are not interpreted as opposites. In other words, the main concern of federalism is the management of federal and national identity. The success or failure of a federation can be gauged by the extent to which federal and national identities are able to avoid friction with each other and maintain accommodation within the arrangement of governmental structure.²⁰

Federalism is necessary to reconcile the multiple identities in a region in order to avoid tension and enhance cooperation. Federal systems, according to Ronal L. Watts “...may be necessary as the only way of combining, through representative institutions, the benefit of both unity and diversity”.²¹ Apart from the issues of governance, it is the only way to come to terms with multi-ethnic issues²² and an important method for ethnic conflict regulation.²³ Federalism is crucial for governance in regions marked by diverse populations as no other system can

¹⁷ *Id.* at 5.

¹⁸ *Id.* at 5

¹⁹ HARIHAR BHATTACHARYYA, *supra* note 1 at 15.

²⁰ EMILIAN KAVALSKI & MAGDALENA ZOLKOS, *supra* note 10 at 6.

²¹ HARIHAR BHATTACHARYYA, *supra* note 1 at p 2.

²² *Id.* at 3.

²³ *Id.*

incorporate, in words of Elazar, unity and diversity, and, as per Watts, shared government with autonomous action.²⁴

As federalism can take many forms in different contexts, defining federalism is highly complicated. The discussion outlined above shows various facets of federalism. According to Elazar, federalism, in political terms, refers to constitutional division of power among constituent units in a manner that satisfies the desire for unity for certain common goals and autonomy for some other aspiration.²⁵ Ronald Watts, a renowned authority on federalism, defines federation as:

“a compound polity combining constituent units and general government, each possessing powers delegated to it through a constitution, each empowered to deal directly with citizens in exercise of significant portion of its legislative, administrative, and taxing powers, and each directly elected by its citizens.”²⁶

Building on Watts’ idea, Kavalski and Zolkos have further elaborated the concept of federalism in the following manner:

“federalism... refers to the practice of multi-tiered government combining elements of shared-rule and regional self-rule for the purpose of maintaining the tensions between distinct identities. It is based on the presumed value and validity of combining unity and diversity, and of accommodating, preserving and promoting distinct identities within a larger political union.”²⁷

In light of the above discussion, federalism can be understood as a constitutional scheme for combining unity with diversity by constructing representative institutions that incorporate

²⁴ *Id.* at 4.

²⁵ *Id.* at 12.

²⁶ *Id.* at p 13.

²⁷ EMILIAN KAVALSKI & MAGDALENA ZOLKOS, *supra* note 10 at 3-4.

elements of shared rule with regional self-rule and by providing adequate space for expression of distinct identities within an over-arching identity derived from the larger political system.

III. BRIEF CONSTITUTIONAL HISTORY OF PAKISTAN

After independence, Pakistan retained the highly centralized federal scheme introduced by the Government of India Act, 1935 in the Interim Constitution despite the eruption of ethno-linguistic tensions soon after.²⁸ The management of ethnic identities was challenged by the unique geography of Pakistan in 1947: a country composed of two territorial units, East Pakistan and West Pakistan, held apart by a thousand miles of Indian soil.²⁹ While the East Pakistan was more or less composed of homogenous Bengali nation, West Pakistan, which essentially formed the power center was home for various ethnic groups such as Punjabis, Pathans, Sindhis, Mohajirs, and Baloch.³⁰ The disparity of power, wealth and resources between East and West wings in addition to linguistic barriers led to a feeling of disenfranchisement in East Pakistan, which had a larger population than West Pakistan. For the military-bureaucratic ruling elite of Pakistan, which had its power center in West Pakistan, the first constitutional challenge was to devise a federal scheme to keep the more populous Eastern Wing from exercising effective authority.³¹ So, when the United Front government in East Bengal demanded complete provincial autonomy after sweeping elections in 1954, the central government responded by dismissing the provincial government under the Interim Constitution on the pretext that the

²⁸ Farhan Hanif Siddiqi, *The Failed Experiment of Federalism in Pakistan (1947-1971)*, in DEFUNCT FEDERALISM: CRITICAL PERSPECTIVES ON FEDERAL FAILURE 73-75 (Emilian Kavalski & Magdalena Zolkos ed., 2010)

²⁹ HARIHAR BHATTACHARYYA, *supra* note 1 at 69.

³⁰ *Id.* at 31-38.

³¹ *Id.*

provincial government had failed to maintain law and order.³² Thus, by exercising the authority of Governor-General under the colonial constitutional setup to dismiss provincial governments in cases of emergency, the central government set a highly centralized and unitary tone for further legal developments.³³

The constitutional developments in Pakistan continued to reflect the distrust towards East Pakistan. In order to ward off the numerical strength of East Pakistan, the ruling elite came up with the ingenious idea of ‘One Unit’ in 1955 creating a federation with two units: East Pakistan and West Pakistan. The One Unit scheme, in words of the Hussein Shaheed Suhrawardy, a political leader from East Bengal, was based on “the fear of domination by East Pakistan over the west wing and to capture power at the center.”³⁴ The One Unit plan, which was later entrenched in the Constitution of Pakistan, 1956, also aggrieved the smaller nationalities in the Western wing. They saw the measure as usurpation of their ethnic identities and a step by Punjabi-dominated ruling elite to wrest control of Pakistan. The scheme was kept intact under the Constitution of Pakistan, 1962 which also dropped ‘federal’ from the description of the name of the state. The 1962 Constitution enhanced the unitary tendencies by centralizing powers in the post of President of the country, which served the political ambitions of the then President and Army Chief General Ayub Khan.³⁵ The centralizing tendencies eventually clashed with assertion of the right to self-determination by East Bengal leading in succession of East Pakistan into

³² Farhan Hanif Siddiqi, *supra* note 28 at 75.

³³ *Id.*

³⁴ Quoted in Farhan Hanif Siddiqi, *Id.* at 76.

³⁵ *Id.* at 77.

Bangladesh. The Constitution of Pakistan, 1973 dissolved the One Unit Plan and reconstituted province in what was left of Pakistan after the formation of Bangladesh.³⁶

Without delving into detailed discussion of federal scheme under various constitutions in Pakistan, a few observations can be made by taking a short glance at the constitutional history of Pakistan up to the introduction of 1973 Constitution. Firstly, the constitutional setup was based on a very distrustful view towards provincial autonomy and completely overlooked diversity in order to create a homogenous nationhood. Secondly, the constitutional organization maintained the territorial federalism and lacked multinational content and, thus, did not accommodate the concerns of minority nationalities and ethnicities in the federal scheme. Thirdly, the independence of Pakistan did not witness any clear departure from the territorial federalism introduced by the colonial regime through the Government of India Act, 1935. As the paper shows in the later part, unitary tendencies developed in the first quarter of the independence of Pakistan were retained in the legal setup under the 1973 Constitution.

IV. FEDERALISM IN JUDICIAL OPINIONS

As stated earlier, the Supreme Court of Pakistan has taken federalism to be one of the cornerstones of the Constitution of Pakistan. It is one of the main pillars on which constitutional edifice of Pakistan is supposedly constructed - a salient feature which is beyond the power of the parliament to amend. However, the Court has not elaborated on content of federalism in the judgments where they elevated the concept to a core constitutional principle. In absence of a

³⁶ KATHARINE ADENEY, *supra* note 6 at 177. For further discussion on federal aspects of Constitution of Pakistan, 1973, see HARIHAR BHATTACHARYYA, *supra* note 1 at 75-77.

legal debate about the issue, the status of federalism as a salient feature of the constitution is rather obtuse. This paper argues that the judiciary in Pakistan has not managed to step out of the narrative of the ruling elite of Pakistan on the issue of federalism. In order to substantiate this argument, Supreme Court's approach towards grievances of smaller nations in Pakistan a few years after the promulgation of Constitution of Pakistan, 1973 may be studied as an example.

The ruling establishment of Pakistan reacted to the dismemberment of Pakistan in 1971 by taking a more reactionary and cautious stand towards the assertion of regional or ethnic identity. Instead of understanding the concerns of smaller nations and taking the active steps towards reconciliation, Pakistan's rulers termed the calls for regional autonomy as 'secessionist' and 'anti-Pakistan.' The case for dissolution of National Awami Party (N.A.P.) brought before the Supreme Court of Pakistan in 1975 by the Federal Government is a classic expression of the Court's approach towards federalism and provincial autonomy in Pakistan.

N.A.P. was one of the main political parties that emerged in late 1950's against the One Unit Plan introduced by the bureaucratic regime at that time. The political party aimed to express the voices for the small nations in Pakistan and had its main support base in N.W.F.P. and Baluchistan after the succession of East Pakistan into Bangladesh. In its constitution and political program, N.A.P. asserted the existence of multiple nations in Pakistan and demanded full autonomy for the provinces with the centre retaining limited powers of defense, communication and currency. With the help of the votes gained in the 1969 elections, N.A.P., under the leadership of Khan Abdul Wali Khan, formed coalition governments in NWFP and Baluchistan. The Central Government, led by Zulfikar Ali Bhutto's Pakistan People's Party, saw N.A.P. as a

threat towards their popularity and authority. After a series of allegations raised by Bhutto against N.A.P. and Wali Khan for jeopardizing the security of Pakistan, the Central Government moved to dissolve provincial governments in Baluchistan and NWFP in 1973 before the new constitution was signed.³⁷ The Federal Government later banned N.A.P. in 1975 for operating “in a manner prejudicial to the sovereignty and integrity of Pakistan” and filed the reference in the Supreme Court under the Political Parties Act, 1962 leading to decision in *Islamic Republic of Paksitan versus Abdul Wali Khan*.³⁸ The main issue confronted by the Court was whether N.A.P. as a political party was “operating in manner prejudicial to the sovereignty of Pakistan.”³⁹

Abdul Wali Khan is probably the only expression of Supreme Court’s interpretation of the federal scheme of Pakistan. It has not been rebutted in any further decision and is perhaps the only judicial opinion simultaneously dealing with ideology of Pakistan, provincial autonomy, and the status of ethno-national identities in Pakistan. Although the voluminous judgment deals with many issues, a major part of the judgment and concurring opinion of Justice Muhammad Gul discusses the program of N.A.P. and its incompatibility with the ideology of Pakistan.

The Court found the N.A.P.’s political program that the Pakistan is composed of different nationalities as inconsistent with the ‘ideology of Pakistan’ embodied in the two-nation theory. The Court reasoned:

“the *raison d’etre* for the creation of Pakistan was that the Muslims of this sub-continent were a separate nation and they desired to have a separate homeland of their own, where they could live and prosper according to their own code of life as laid down in the Holy Quran and Sunnah. To say, therefore, that Pakistan does not consist of one ‘nation’ but

³⁷ KATHARINE ADENEY, *supra* note 6 at 157-158.

³⁸ PLD 1976 SC 57

³⁹ *Id.*

several ‘nationalities’, each having ethnic, cultural, social and political differences, is to deny the very basis of Pakistan and if along with this is also demanded the right of self-determination for each nationality then it is a demand for the breaking up of Pakistan, destroying its integrity and setting up of several independent States within Pakistan itself.

The concept of nationalities is opposed also to the fundamentals of Islam which preaches that the entire Muslim Millat is one nation under one Khalifa.”⁴⁰

In this central passage, the Court interprets the over-arching federal identity of “Muslims of this sub-continent” in contradiction with national identities to such an extent that demand for self-government by nationalities becomes the “demand for breaking up of Pakistan.” In following this reasoning, the Court put diversity in opposition to unity whereas, as Elazar propounded, “it’s a mistake to present unity and diversity as opposites.”⁴¹ As discussed earlier, diversity is juxtaposed to homogeneity and not unity. In a situation where diversity is completely nullified and not given any recognition even on paper, there can be no concern about devising the “the effective combination of unity and diversity”.⁴² In *Abdul Wali Khan*, the Court rules out the foundational principle of diversity on which federal structure may be built.

In *Abdul Wali Khan*, the Court read the distinctiveness as synonymous to disunity and the assertion for autonomy with demand for succession. The Court approved federal government’s argument that “preaching of the concept of separate nationalities within the State is nothing but the sowing of the seed of secession.”⁴³ However, assertion of a separate nationhood is not a demand for succession but for accommodation within a larger political union. Furthermore, the succession of Bangladesh informs that creation of an over-arching federal identity to negate regional and ethnic identities precipitated a feeling of alienation and the secessionist movement.

⁴⁰ *Id.*

⁴¹ HARIHAR BHATTACHARYYA, *supra* note 1 at 14.

⁴² Quoted in the HARIHAR BHATTACHARYYA, *Id.* at 15

⁴³ Islamic Republic of Pakistan versus Abdul Wali Khan, PLD 1976 SC 56.

In order to avoid secessionism, which is what federalism aims, it is crucial to not only recognize the fact of distinctiveness but build an institutional set-up that combines elements of shared rule with regional self-government.

The main purpose behind federal scheme is to arrange unity in a manner that can accommodate, preserve and promote distinctiveness within a broader political union. In absence of national diversity, the federation is merely territorial in nature and may not alleviate ethnic and national tensions. In completely ignoring the existence of parallel identities within the country in favor of a singular Muslim identity, the Court has removed the foundations of federalism and left the principle only with its administrative value. In *Abdul Wali Khan*, that the Court bought into the conventional view that assertion of national identity is mere expression of subversive proclivities instead of accommodating split-level identities in a federal scheme.⁴⁴ This led to the conclusion that N.A.P.

“have consistently been attempting to create doubts about people's belief in the Ideology of Pakistan with a view to destroying the very concept which formed the basis of the creation of this country, that they have always been preaching the doctrine of four/five nationalities/nations' to prepare the ground for the a ultimate secession of N.W.F.P. and Baluchistan on the pretext of demanding the right of self-determination for the different nationalities/nations inhabiting those Provinces.”⁴⁵

The concurring opinion of Justice Muhammad Gul is unequivocal about the territorial nature of federalism in Pakistan and completely disregards any multinational content. His interpretation of federalism is primarily based on the constitutional history of the region since the colonial era. Looking back at the development of direct British rule in India, Justice Gul rightly stated that the British Crown kept the provincial administration primarily for territorial reasons

⁴⁴ EMILIAN KAVALSKI & MAGDALENA ZOLKOS, *supra* note 10 at 6.

⁴⁵ Islamic Republic of Paksitan versus Abdul Wali Khan, *supra* note 43.

without any regard to ethnicity. The arrangement of provinces during the colonial rule, as per the concurring opinion, was done for strategic reasons and “certainly not because the inhabitants of this area formed a separate ethnic group”,⁴⁶ or, in some cases, because the region was found to be predominantly Muslim. Accordingly, the existence of diverse ethnic identities was never recognized by the British in any constitutional instrument and grant of provincial autonomy was never a concern. The British rule in India remained “not only unitary, but highly centralized.”⁴⁷ The Government of India Act, 1935 granted limited autonomy to provinces and, according to Justice Gul, the “same pattern was retained under the Indian Independence Act in the relevant fields.”⁴⁸ Federalism in Pakistan at the time of independence was, hence, not based on recognition of multiple nationalities aspiring for political union. Provinces continued to exist in the independent Pakistan for administrative concerns. As Justice Gul stated:

“The concept of the provincial administration was retained despite the common feeling of oneness, not because of ethnic differences but because the provinces had already existed since the British Crown took over the administration from British East India Company in 1858. It would be a travesty of fact to suggest that the provinces continued to remain because they were inhabited by separate “nationalities”.”⁴⁹

Thus, dissolving the multiple nationalities in Pakistan in a pervasive ‘Ideology of Pakistan’ based on Muslim identity and deriving authority from colonial constitution set-up introduced by the British, the concurring opinion concluded:

“against the background of this Constitutional history, it is difficult to understand how a claim of separate nationality in relation to the population of each province which has the effect of placing the citizenry of Pakistan into four watertight compartments, as if they have nothing in common between them, which is of value in life, is tenable?”⁵⁰

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

The concurring opinion of Justice Gul in *Abdul Wali Khan* is more problematic than the Court's judgment primarily because of its unequivocal stand about the territorial nation of federalism in Pakistan that is not meant to accommodate diverse nationalities. It is understandable that this policy of provincial administration was followed by the British colonial authorities as they extended federalism from above in absence of any local representation. Whether this form of federalism can have any space in a democratic constitutional framework is highly debatable. The concurring opinion also asserts the lack of a break from the colonial federal policy at the time of independence of Pakistan. Both the main judgment and the concurring opinion confirm that judiciary nullified diversity to a large degree in order to construct a federal unity based on a predominant and exclusive Muslim identity.

V. CONCLUSION

The judgment *Abdul Wali Khan* continues to be judicial articulation of federalism in Pakistan. Under this interpretation, only minimal accommodation is granted to ethno-national identities. The Court's opinion, in consonance with the official discourse regarding the 'Ideology of Pakistan', deals with ethnic concerns in terms of law and order, making it nearly impossible for the rights of smaller nations to argue their grievances within a federal framework. In this background, it is no surprise that ethnic tensions have arisen to the level of armed conflict in Pakistan. Furthermore, by not recognizing the diverse nature of the population and defining provincial autonomy as an administrative concern, the Court has not been able to make a departure from the British colonial policy as far as the issues of federalism are concerned. The

legal system of Pakistan has almost failed to accommodate the parallel identities within the country.

Despite the grim situation, a few recent measures from the political branches of the government highlight the new corrective approach to strengthen provincial autonomy in Pakistan. In the Baluchistan Package⁵¹ the Parliament acknowledged that “the question of provincial autonomy needs to be revisited”⁵² and committed to redefine jurisdictional boundaries between Center and provinces. The concrete move from the Parliament came in the shape of 18th Amendment to the Constitution of Pakistan. The Amendment empowered the provinces by granting them legislative and administrative jurisdiction over a large number of subjects in the Concurrent List to the Constitution to the provinces including important subjects like labor laws, transfer of property, and contracts, etc. The Amendment also enhanced the role of the Council of Common Interests for resolution of legislative concerns common to both Centre and provinces by mandating it to meet on regular basis.⁵³ The 18th Amendment, although an initial step in accommodating ethno-national minorities in Pakistan, has crucial symbolic value in directing the way forward for development of federalism in the country.

In leading Pakistan to a federal track, no amount of legal amendments can be adequate without a foundational shift in the jurisprudential approach towards dealing with national diversity in Pakistan. In building a sound federal jurisprudence, the role of judiciary as the branch of government assigned with the role of interpreting the constitution is extremely

⁵¹ *Aghaz-e-Haqooq-e-Balochistan* Package, meaning “the start of the rights of Baluchistan.” For a detailed discussion on Baluchistan Package, see Dr. Rasul Baksh Rais, *The Balochistan Package: Redefining Federalism in Pakistan*, Forum of Federations (March 25, 2011), <http://www.forumfed.org/en/where/pakistan.php>.

⁵² Text of Balochistan Package Presented in Parliament, Daily Times, Nov. 25, 2009.

⁵³ Raza Ahmed, *The Endemic Crisis of Federalism in Pakistan*, *The Lahore Journal of Economics* 15, 25-29 (2010).

important. Furthermore, for a federal system to operate, diversity shall not only be recognized in legal policy but accommodated within the institutional frameworks of governance. Only with proper accommodation of diverse national groups in the political union can federalism become the true cornerstone of the constitution in the true sense of the word.