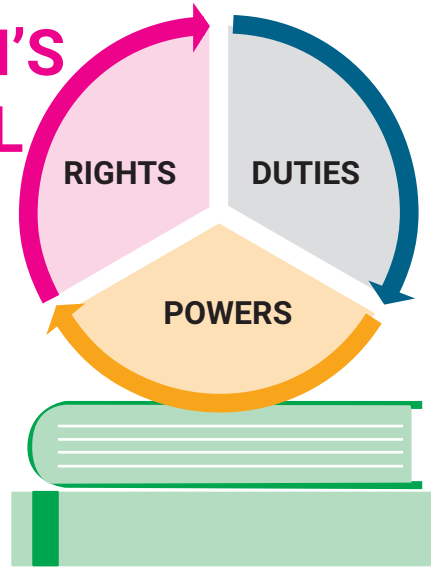




**FRIEDRICH NAUMANN
FOUNDATION** For Freedom.
Pakistan

RIGHTS, DUTIES, AND POWERS: UNDER PAKISTAN'S CONSTITUTIONAL FRAMEWORK



Walid Iqbal



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Preface

Democracy is more than a system of government!

When asked what constitutes a democratic system of government, most people will answer that a democracy is about regular, fair and free elections. Although this is a major element of a democratic system of government, a living democracy is so much more than the mere technicality of regular elections. Democracy is always a work in progress, which aims at fostering transparent political decision-making based on a broader stake-holder dialogue in society. This decision-making process needs to be based on a strong fundament, which provides the legitimacy and acceptance for political decisions in society. This backbone of democracy is enshrined in the constitution of a democratic polity. To make a democracy "live", it needs to be "worked" in a proper mindset, which goes far beyond the organization of regular elections. Citizens, politicians and administrators alike need to be well aware of their rights, obligations, and the institutional framework surrounding them, otherwise they cannot execute them and make democracy live.



This book aims at providing a short guide to rights, obligations and powers as laid down in the Constitution of Pakistan so that citizens and policy-makers have a clear idea about how they can exert their rights and meet their obligations.

Birgit Lamm
Head of Pakistan Office

Background

The people of Pakistan, through their representatives in the National Assembly (elected in the polls held on 7 December 1970), adopted, enacted, and gave to themselves the existing Constitution of the Islamic Republic of Pakistan, 1973. This supreme law of the land was enacted on 10 April 1973, authenticated by the President of the National Assembly and published in the Gazette of Pakistan two days later, and came into force on 14 August 1973 – the 26th anniversary of Pakistan’s independence – which was referred to as its “commencing day”.¹

Constitution-making in Pakistan generally, and the 1973 Constitution specifically, have had a chequered history. For the first almost nine years of its existence, Pakistan was governed under the Government of India Act, 1935, read with the Indian Independence Act, 1947. Finally, a Constituent Assembly not elected through adult franchise gave the country its first Constitution in 1956, only to see it abrogated in 1958 upon proclamation of martial law by Pakistan’s first military ruler, Field Marshall Ayub Khan. Strongman Ayub singly promulgated Pakistan’s second Constitution in 1962, but that, too, stood abrogated by Ayub’s handpicked Commander-in-Chief, General Yahya Khan, who proclaimed martial law in 1969 when Ayub was forced to step down after a popular uprising that lasted nearly two years.

Eventually, it was General Yahya Khan who conducted and oversaw Pakistan’s first general elections in 1970, which were followed by insurrection, war and the secession of East Pakistan in 1971, thereby causing the popularly-elected Zulfikar Ali Bhutto to “pick up the pieces” and get on with constitution-making in Pakistan’s defeated and truncated western wing, culminating with the emergence of the existing 1973 Constitution.

The 1973 Constitution was held in abeyance and suspended between 1977 and 1985 by Pakistan's third military ruler, General Zia-ul-Haq, and then between 1999 and 2002 by Pakistan's fourth military ruler, General Pervez Musharraf. In each case, the Supreme Court of Pakistan held the forced interruption to be valid and lawful, invoking the doctrine of necessity. But when Musharraf suspended the Constitution yet again for a period of six weeks in 2007 to harness the judiciary in the face of an aggressive lawyers' movement against him, the Supreme Court of Pakistan finally declared the action to be invalid and unlawful, thus standing in the way of the infamous necessity's destruction of democracy in Pakistan.

Upon restoring the 1973 Constitution after their respective periods of military rule, both Zia and Musharraf made similar sets of sweeping changes to the document, whereby all power and authority were concentrated in the office of a strongman President, while all responsibilities and rubber-stamping were left to the elected assemblies and the civilian leaders of the houses. After Musharraf's ouster, however, the leading political forces of the time got united to bring about a major overhaul through the 18th Constitutional Amendment in 2010, under which the parliamentary form of government was fully restored, the federal structure was reset by the devolution of a range of powers from the Federation to the Provinces, certain new fundamental rights were recognized and introduced, and alterations were made to the process of holding general elections towards making it more fair and objective.

That is where the framework of the 1973 Constitution presently stands.

1 The Constitution and Parliamentary Democracy

In the words of Justice Muhammad Munir, the second Chief Justice of Pakistan, who was considered to be a learned man, but for his foundational reliance on the doctrine of necessity that set the tone for the judicial validation of practically all of Pakistan's Constitutional disruptions, "The Constitution is the supreme law of the land, the fundamental law from which all public authorities derive their powers, all laws their validity and all subjects their rights".²

What stands out in the foregoing statement is the use of the word "subjects" when referring to rights, reflective of the colonial hangover in the era immediately following the country's independence – in this day and age, the word to be used in this context would be "citizens".

Furthermore, the global connotation of "parliamentary democracy" is a constitutional system that makes provision for, at least: (1) a parliament whose members are elected by the people on the basis of adult franchise; (2) the leader of the majority party having the right to form the government; (3) the executive being responsible to the legislature; (4) the executive remaining in power until it enjoys the confidence of the house; and (5) independence of the judiciary.

The state of the 1973 Constitution, in the light of all its genuine authoritative interpretations to date, remains consistent with all of the above.

A Rigid Constitutional System

A fundamental concept of Constitutional Law is the bright line distinction between a rigid and a flexible constitutional system. In essence, a rigid constitutional system is one where the procedure of passing constitutional amendments by the legislature is different from, and has higher procedural standards than, the passing of ordinary statute law. By contrast, a flexible constitutional system is one where the procedure governing constitutional amendments and ordinary statute law is substantially the same.

By definition, Pakistan's constitutional system, including under the existing 1973 Constitution, has always been a rigid one, whereby the legislative procedure governing ordinary statute law requires passage of the underlying legislation by a simple majority of an in-quorum legislature,³ while the legislative procedure governing constitutional amendments requires passage of the underlying legislation by a two-thirds majority of the total membership of the legislature.⁴

The reasoning behind this varying set of procedural standards is simple. Statutory amendments are subject to lower procedural standards because they enable the government to handle the affairs of the state more efficiently. After all, it is by virtue of the powers vested through statutory provisions that the government runs its day to day administration, enforces law and order, collects taxes, and so on. Unless the mechanism allowing change is uncomplicated, the government administration would sooner or later come to a grinding halt.

On the other hand, constitutional provisions perform a different, more critical function – documenting the ideology behind a state's creation, determining the structure and authority of the state and its political sub-divisions, acknowledging, defining and protecting fundamental rights, and providing a system of state organs and functionaries through which the executive, legislative and judicial powers are exercised. Among other reasons, it is due to its fundamental character that the Constitution is elevated to a rank higher than ordinary statute law and is made to be more tamper proof in the face of political expediency.

2 Salient Features of the Constitution

In addition to being rigid by definition, the 1973 Constitution also has certain other basic or salient features by way of judicial declaration.

Even though the 1973 Constitution gives the Parliament unfettered powers to make Constitutional amendments through the requisite two-thirds majority, and even though it is a global Constitutional principle that Courts may only strike down ordinary statute law (passed by a minimum simple majority) if it is inconsistent with the Constitution, the novel theory of “basic structure” has been evolved adopted by Courts in some parts of the Subcontinent, whereby certain features are declared as so basic to a Constitution that even properly passed Constitutional amendments going against those features have been judicially struck down to preserve the basic Constitutional structure originally put in place by the founding assembly.⁵

While the Supreme Court of Pakistan is yet to strike down a properly passed constitutional amendment on grounds that Parliament cannot amend the Constitution so as to destroy any of its fundamental pillars, but it has, in a series of judgments passed from 1996 onwards, at least academically discussed and theoretically declared certain bastions as the basic or salient features of the 1973 Constitution, namely:⁶

- Federalism;
- Parliamentary form of government;
- Independence of the judiciary; and
- Islamic provisions.

The Objectives Resolution as Preamble and Substantive Part

The first formal step taken towards constitution-making in Pakistan – albeit a step taken more than six months after the demise of the Father of the Nation, Quaid-e-Azam Mohammad Ali Jinnah – was the passing of the Objectives Resolution by Pakistan's first Constituent Assembly on 12 March 1949, setting out the objectives on which the future Constitution of the country was to be based, and summoning the basic principles of both the Islamic political system as well as western democracy.

It is thus no surprise that the 1973 Constitution (just like its precursors of 1956 and 1962) commences by reciting the contents of the Objectives Resolution, and the principles and provisions of the Objectives Resolution were made a substantive part of the 1973 Constitution twelve years after its commencing day.⁷

As reproduced in the 1973 Constitution's Preamble and Annex, the Objectives Resolution lays down the following principles:

- Sovereignty over the entire universe belongs to Almighty Allah alone.
- Authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust.
- The State shall exercise its powers and authority through the chosen representatives of the people.
- Principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed.
- Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah.
- Formation of a federal structure wherein the units will be autonomous.
- Guarantee of fundamental rights – equality of status, of opportunity and before law, social, economic and political justice, and freedom of thought, expression, belief, faith, worship and association.
- Independence of the judiciary shall be fully secured.
- Integrity, independence and sovereignty of the entire territory, including

sovereign rights on land, sea and air shall be safeguarded.

- Adequate provisions shall be made to safeguard the legitimate interests of minorities and backward and depressed classes.
- Adequate provision shall be made for the minorities freely to profess and practise their religions and develop their culture.

It is worthy of mention, as far as the last of the above-listed principles is concerned – about enabling minorities to profess and practise their religions and develop their culture – that when General Zia-ul-Haq made the Objectives Resolution a substantive part of the 1973 Constitution upon restoring it by a martial law order in 1985, he dropped the word “freely” from the relevant sentence of the historic 1949 document while reproducing it in the Annex to the 1973 Constitution, and it took nearly a quarter of a century for this dishonesty to be corrected by the re-insertion of the word “freely” through the 18th Constitutional Amendment in 2010.

Introductory Provisions

The introductory provisions set out in Part I of the 1973 Constitution lay down the character and territory of the Republic, together with the basics of the rule of law, the supremacy of the Constitution, loyalty to the State, and the State’s mandate to enforce social justice.

Pakistan is declared a Federal Republic, to be known as the Islamic Republic of Pakistan, with territories comprising Punjab, Sindh, Khyber-Pakhtunkhwa, Balochistan, and Islamabad Capital Territory, together with (surely mindful of, among other things, the disputed status of Kashmir) such states and territories as are or may be included in Pakistan, whether by accession or otherwise.⁸ Islam is declared to be the State religion of Pakistan.⁹

The 1973 Constitution also clarifies, at the earliest stage, that rights and duties are mirror images of each other for citizens and non-citizens alike: to enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen of Pakistan, wherever located, and of every non-citizen on Pakistani soil; conversely, obedience to the Constitution and law is the inviolable obligation of every citizen of Pakistan, wherever located, and of every non-citizen on Pakistani soil; but loyalty to the State is a basic obligation obviously imposed on citizens of Pakistan alone.¹⁰

The 1973 Constitution also bears a socialistic tinge, owed to the era of its enactment, as it requires the State to ensure the elimination of all forms of exploitation and the gradual fulfillment of the fundamental principle, from each according to his ability to each according to his work.¹¹

Mindful of the fate of its 1956 and 1962 precursors, the framers of the 1973 Constitution introduced the crime of high treason by originally stipulating that any person who abrogates, or attempts or conspires to abrogate, subverts, or attempts or conspires to subvert, the Constitution by use of force, or show of force, or by other unconstitutional means shall be guilty of high treason.¹² Generals Zia and Musharraf, however, remained undeterred and found their ways around this by suspending the Constitution, or holding it in abeyance, instead of abrogating it, followed by validations from the Supreme Court of Pakistan based on the doctrine of necessity.

The scope of high treason now, therefore, stands expanded after the 18th Constitutional Amendment of 2010 to encompass: (1) abrogating, subverting, suspending, or holding in abeyance, the Constitution by use of force, show of force, or by any other unconstitutional means, (2) attempting or conspiring to abrogate, subvert, suspend, or hold in abeyance, the Constitution by use of force, show of force, or by any other unconstitutional means, and (3) aiding, abetting, or collaborating the acts mentioned in (1) and (2) above. Furthermore, the Supreme Court of Pakistan, and each of the High Courts subordinate to it, have also been forbidden to validate any act of high treason falling within its aforesaid expanded scope.¹³

Fundamental Rights

The fundamental rights conferred by Chapter 1 of Part II of the 1973 Constitution lie at the heart of the State's side of the social contract contained in this supreme law of the land, as it promises that any law, or any custom or usage having the force of law, to the extent it is inconsistent with these fundamental rights, shall, to the extent of the inconsistency, be void, plus the State shall not make any law which takes away or abridges the rights so conferred, and any contravening law shall, to the extent of such contravention, be void.¹⁴

Furthermore, in the entire Part II of the Constitution, which sets out fundamental rights as well as principles of policy, "the State" means the Federal Government, the Parliament, a Provincial Government, a Provincial Assembly, and such local or other authorities in Pakistan as are by law empowered to impose any tax or cess.¹⁵

The fundamental rights conferred by the 1973 Constitution can be divided into three categories, namely, absolute rights, rights subject to qualifications, and rights subject to law. Each of these categories is explained and discussed by example as below.

Absolute Rights

These are the unfettered fundamental rights upon which the 1973 Constitution neither imposes qualifications or restrictions by itself, nor calls upon any qualifications or restrictions to be imposed by ordinary statute law. They are discussed by example through certain parts of the relevant constitutional provisions as follows:

Article of the Constitution	Title	Formulation of the Fundamental Right
10A	Right to fair trial	For the determination of his/her civil rights and obligations, or in any criminal charge against him/her, a person shall be entitled to a fair trial and due process.
11	Slavery, forced labour, prohibited	Slavery is non-existent and forbidden, and no law shall permit or facilitate its introduction into Pakistan in any form. All forms of forced labour and traffic in human beings are prohibited.
12	Protection against retrospective punishment	No law shall authorize the punishment of a person: (a) for an act or omission that was not punishable by law at the time of the act or omission; or (b) for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed.
13	Protection against double punishment and self-incrimination	No person: (a) shall be prosecuted or punished for the same offence more than once; or (b) shall, when accused of an offence, be compelled to be a witness against himself/herself.
14	Inviolability of dignity of man	The dignity of man shall be inviolable. No person shall be subjected to torture for the purpose of extracting evidence.
21	Safeguard against taxation for purposes of any particular religion	No person shall be compelled to pay any special tax, the proceeds of which are to be spent on the propagation or maintenance of any religion other than his/her own.
22	Safeguards as to educational institutions in respect of religion	No person attending any educational institution shall be required to receive religious instruction, or take part in any religious ceremony, or attend religious worship, if such instruction, ceremony or worship relates to a religion other than his own.

It is noticeable that all of the absolute rights discussed above are available to citizens of Pakistan, and non-citizens, alike.

Rights Subject to Qualifications

These are the fundamental rights upon which the 1973 Constitution by itself imposes qualifications or restrictions, or calls upon restrictions or qualifications to be imposed by ordinary statute law by specifying the associated parameters, or imposes qualifications or restrictions through a combination of both means. They are discussed by example through certain parts of the relevant Constitutional provisions as follows:

Article of the Constitution	Title	Formulation of the Fundamental Right	Formulation of the Qualification or Restriction
15	Freedom of movement	Every citizen shall have the right to enter and move freely throughout Pakistan, and to reside and settle in any part thereof.	Subject to any reasonable restriction imposed by law in the public interest.
16	Freedom of assembly	Every citizen shall have the right to assemble.	Peacefully, without arms, and subject to any reasonable restrictions imposed by law in the interest of public order.
17(1)	Freedom of Association	Every citizen shall have the right to form associations or unions.	Subject to any reasonable restrictions imposed by law in the interest of the sovereignty or integrity of Pakistan, public order, or morality.
17(2)	Freedom of Association	Every citizen shall have the right to form or become a member of a political party.	Provided such citizen is not in the service of Pakistan, and subject to any reasonable restrictions imposed by law in the interest of the sovereignty or integrity of Pakistan, and such law shall provide that where the Federal Government declares that any political party has been formed or is operating in a manner prejudicial to the sovereignty or integrity of Pakistan, the Federal Government shall, within fifteen days of such declaration, refer the matter to the Supreme Court whose decision on such reference shall be final.

Article of the Constitution	Title	Formulation of the Fundamental Right	Formulation of the Qualification or Restriction
19	Freedom of speech	Every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press.	Subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, or commission of or incitement to an offence.
20	Freedom to profess religion and to manage religious institutions	Every citizen shall have the right to profess, practice, and propagate his/her religion, and every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions.	Subject to law, public order and morality.
23	Provision as to property	Every citizen shall have the right to acquire, hold and dispose of property in any part of Pakistan.	Subject to the Constitution and any reasonable restrictions imposed by law in the public interest.

Incidentally, all of the rights subject to qualifications discussed above are available solely to citizens of Pakistan.

Rights Subject to Law

These are the fundamental rights that the 1973 Constitution expressly makes subject to ordinary statute law, but remains silent about the nature, scope or parameters of the qualifications, requirements, or restrictions that ordinary statute law might impose in that regard. They are discussed by example

Article of the Constitution	Title	Formulation of the Fundamental Right
14	Inviolability of privacy of home	Subject to law, the privacy of home shall be inviolable.
18	Freedom of trade, business or profession	Subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business.
19A	Right to information	Every citizen shall have the right to have access to information in all matters of public importance subject to regulation and reasonable restrictions imposed by law.
22	Safeguards as to educational institutions in respect of religion	Subject to law: (a) no religious community or denomination shall be prevented from providing religious instruction for pupils of that community or denomination in any educational institution maintained wholly by that community or denomination; and (b) no citizen shall be denied admission to any educational institution receiving aid from public revenues on the ground only of race, religion, caste or place of birth.
24	Protection of property rights	No person shall be compulsorily deprived of his property save in accordance with law.
25A	Right to education	The State shall provide free and compulsory education to all children of the age of five to sixteen years in such manner as may be determined by law

through certain parts of the relevant constitutional provisions as follows:

As is evident, some of the rights subject to law discussed above are available solely to citizens of Pakistan, while others are available to both citizens and non-citizens alike.

3 Principles of Policy

Chapter 2 of Part II of the 1973 Constitution sets out the principles of policy by making it the responsibility of each organ and authority of the State, and of their respective officials, to act in accordance with those principles to the extent they relate to the functions of the organ or authority. But if the observance of any particular principle of policy may be dependent upon resources being available for the purpose, that principle shall be regarded as being subject to the availability of resources.¹⁶

Diametrically opposed to the promise made by the 1973 Constitution in relation to the enforcement of the immediately preceding fundamental rights, the principles of policy constitute a practically inoperative part of the supreme law of the land, because the validity of an action or of a law cannot be called in question on the ground that it is not in accordance with the principles of policy, and no action can be taken against the State or any organ or authority of the State or any person on such ground.¹⁷

It is nevertheless important to take a survey of the principles of policy as summarized in the table below, because they have, over time, had a varying impact on the shaping of the policies of the State and its organs.

Article of the Constitution	Title	Formulation of the Principle of Policy
31	Islamic way of life	<p>Steps shall be taken to enable the Muslims of Pakistan, individually and collectively, to order their lives in accordance with the fundamental principles and basic concepts of Islam and to provide facilities whereby they may be enabled to understand the meaning of life according to the Holy Quran and Sunnah.</p> <p>The State shall endeavour, as respects the Muslims of Pakistan:</p> <ul style="list-style-type: none"> (a) to make the teaching of the Holy Quran and Islamiyat compulsory, to encourage and facilitate the learning of Arabic language, and to secure correct and exact printing and publishing of the Holy Quran; (b) to promote unity and the observance of the Islamic moral standards; and (c) to secure proper organisation of zakat, ushr, auqaf and mosques.
32	Promotion of local government institutions	The State shall encourage local government institutions composed of elected representatives of the areas concerned, and in such institutions special representation will be given to peasants, workers, and women.
33	Parochial and other similar prejudices to be discouraged	The State shall discourage parochial, racial, tribal, sectarian and provincial prejudices among the citizens.
34	Full participation of women in national life	Steps shall be taken to ensure full participation of women in all spheres of national life.
35	Protection of family	The State shall protect the marriage, the family, the mother and the child.
36	Protection of minorities	The State shall safeguard the legitimate rights and interests of minorities, including their due representation in the Federal and Provincial services.

Article of the Constitution	Title	Formulation of the Principle of Policy
38	Promotion of social and economic well-being of the people	<p>The State shall:</p> <ul style="list-style-type: none"> (a) secure the well-being of the people, irrespective of sex, caste, creed or race, by raising their standard of living, by preventing the concentration of wealth and means of production and distribution in the hands of a few to the detriment of general interest and by ensuring equitable adjustment of rights between employers and employees, and landlords and tenants; (b) provide for all citizens, within the available resources of the country, facilities for work and adequate livelihood with reasonable rest and leisure; (c) provide for all persons employed in the service of Pakistan or otherwise, social security by compulsory social insurance or other means; (d) provide basic necessities of life, such as food, clothing, housing, education and medical relief, for all such citizens, irrespective of sex, caste, creed or race, as are permanently or temporarily unable to earn their livelihood on account of infirmity, sickness or unemployment; (e) reduce disparity in the income and earnings of individuals, including persons in the various classes of the service of Pakistan; (f) eliminate riba as early as possible; and (g) secure the shares of the Provinces in all federal services, including autonomous bodies and corporations established by, or under the control of, the Federal Government, and rectify any omission in the allocation of the shares of the Provinces in the past.
39	Participation of people in Armed Forces	The State shall enable people from all parts of Pakistan to participate in the country's Armed Forces.

Article of the Constitution	Title	Formulation of the Principle of Policy
40	Strengthening bonds with Muslim world and promoting international peace	The State shall endeavour to preserve and strengthen fraternal relations among Muslim countries based on Islamic unity, support the common interests of the peoples of Asia, Africa and Latin America, promote international peace and security, foster goodwill and friendly relations among all nations, and encourage the settlement of international disputes by peaceful means.

The Basis of a Welfare State?

Taking a pause here would be in order – as the first forty Articles of the 1973 Constitution have now been closely examined – because a whole segment of legal scholars and political scientists in Pakistan genuinely believe that the mere proper implementation of Articles 1 to 40 of the 1973 Constitution (without more) would elevate the country to the level of the welfare state it was originally envisaged to be.

4 Distribution of Legislative Powers

The 1973 Constitution distributes legislative powers at three levels, namely: (1) Parliamentary (or Federal), (2) Concurrent, and (3) Residuary (or Provincial), it being specified that Parliament (or the Federal Legislature) can make laws (including laws having extra-territorial operation) for the whole or any part of Pakistan, while a Provincial Assembly can make laws for the Province or any part thereof.

1) Federal Legislative Powers

Parliament (or the Federal Legislature) has the exclusive power to legislate on matters set out in the Federal Legislative List, comprising about 70 items, including the following:¹⁸

- Defence
- Foreign affairs
- Nationality and citizenship
- Posts, telecoms, and electronic media
- Currency
- Federal libraries and museums
- Federal research and training centers
- Nuclear energy
- Ports, shipping, and admiralty
- Aircraft, air traffic control, and airports
- Transport by sea or air
- Intellectual Property
- Weights and measures
- Customs duties

- Income taxes (but not agricultural)
- Sales tax on goods (but not services)
- Corporate taxes
- Railways
- Oil and gas
- Electricity
- Census
- Inter-provincial matters/coordination

2) Concurrent Legislative Powers

Parliament and each Provincial Assembly are now left with concurrent powers to legislate on only three matters, namely, criminal law, criminal procedure and evidence.¹⁹ By the 18th Constitutional Amendment, the Concurrent Legislative List (containing more than 40 matters) was abolished, causing devolution of almost all of those 40 matters to the provinces, and leaving just the aforesaid three matters in the concurrent domain.

In this regard, federal supremacy has always formed part of the 1973 Constitution, whereby federal law overrides provincial law as to matters on which both tiers have concurrent legislative powers.²⁰

3) Residuary Powers

All residuary matters, that is to say, those not set out on the Federal Legislative List, along with those not named among the three concurrent matters as above, fall within the exclusive legislative domain of the Provincial Assemblies.²¹

That said, if one or more Provincial Assemblies pass resolutions to the effect that Parliament may by law regulate any matter not set out in the Federal Legislative List, then Parliament may pass a law for regulating that matter accordingly, but any act so passed may, as respects any Province to which it applies, be amended or repealed by the related Provincial Assembly.²²

Historical Positioning

Interestingly, there are also at least two historical positions behind the foregoing constitutional distribution of legislative powers.

First, the topmost among the renowned Fourteen Points posited in 1929 by the Father of the Nation, Quaid-e-Azam Mohammad Ali Jinnah, in relation to a self-governing India was to the effect that, "The form of the future Constitution should be Federal, with the residuary powers to be vested in the provinces".²³

Secondly, Pakistan's spiritual father, the poet-philosopher Allama Muhammad Iqbal, in his famous 1930 address at Allahabad wherein he presented the idea of a separate Muslim homeland in the Subcontinent, also stipulated, "To my mind, a unitary form of government is simply unthinkable in a self-governing India. What is called 'residuary powers' must be left entirely to self-governing States, with the Central Federal State exercising only those powers which are expressly vested in it...".²⁴

5 Executive Powers – Federal, Provincial, and Local

In terms of the 1973 Constitution, executive and legislative powers involving the two top tiers of government are completely aligned.

First, the executive authority of the Federation extends to the matters with respect to which Parliament has power to make laws, exactly being the matters set out on the Federal Legislative List (and also the three concurrent matters to the extent any Province takes a contrary position).²⁵

Secondly, the executive authority of a Province extends to the matters with respect to which a Provincial Assembly has the power to make laws, exactly being the residuary matters (and also the three concurrent matters, except to the extent the Federation might have a prevailing position).²⁶

Thus, the respective executive powers of the Federation and the Provinces are co-extensive with their respective legislative powers.

Lastly, and for the sake of completeness as to the third tier of government, the 1973 Constitution additionally requires each Province to establish, by law, a local government system and devolve political, administrative, and financial responsibility and authority to elected local government representatives.²⁷

The President as Head of State

The President of Pakistan is the Head of State and represents the unity of the Republic. He has to be a Muslim, at least 45 years of age, qualified to hold office as a member of Parliament, and elected for a term of five years by vote of the members of both Houses of Parliament as well as all Provincial Assemblies.²⁸

On the face of it, the President has wide-ranging powers, including judicial powers to grant pardon or reprieve, legislative powers to promulgate ordinances of limited tenure, executive powers involving governance of the Federation, powers to dissolve the lower House of Parliament, powers to make Constitutional appointments to judicial, quasi-judicial, and executive offices, and powers to proclaim an emergency, but almost all of them are ceremonial powers only to be exercised in his name and subject to the binding advice of the Federal Government led by the Prime Minister.²⁹

A joint sitting of Parliament, by votes of at least two-thirds of its total membership, may remove the President from office on the ground of physical or mental incapacity, or impeach him on a charge of violating the Constitution.³⁰

Federal and Provincial Governments – True to Parliamentary Form

The executive authority of the Federation is to be exercised by the Federal Cabinet led by the Prime Minister, who must be a Muslim and the leader of the majority in the National Assembly (the lower House of Parliament), and may hold office until ousted by the passing of a vote of no confidence, with the Federal Cabinet and State Ministers being collectively responsible to the Parliament during their term of office.³¹

Likewise, the executive authority of a Province is to be exercised by the Provincial Government led by the Chief Minister, who must be the leader of the majority in the Provincial Assembly, and may hold office until ousted by the passing of a vote of no confidence, with the Provincial Cabinet during the term of its office being collectively responsible to the Provincial Assembly.³²

This is true to form under a parliamentary democracy as defined right at the beginning.

Concluding Observations – Overcoming Strains and Tensions

Along with the entire 1973 Constitution (having fallen victim to deviations legitimized by the doctrine of necessity), at least two of its basic features, namely, federalism and parliamentary form of government, have come, and remain, under tension and strain in recent times. This is most likely attributable to two competing schools of thought involving the country's governance structure: one driven by the authoritarian style emphasizing on a strong center, and the other by sub-divisional autonomy emphasizing on decentralization and devolution of powers.

Over seven decades of the country's history, and over almost five decades of the 1973 Constitution's, the balance has mostly remained in favor of the first school of thought, manifesting itself either through direct military rule or through a political class groomed by the associated authoritarian mindset. Another manifestation of this has been the raft of amendments introduced by Generals Zia and Musharraf upon their restorations of the 1973 Constitution in 1985 and 2002 respectively, thereby transplanting overwhelming presidential powers into the realm of its parliamentary character. This balance has been tipped somewhat to the other side by the 18th Constitutional Amendment, as it has restored the parliamentary system

in full, and has devolved a range of powers to the provinces. But nearly thirteen years down the road, calls for reconsidering certain of the powers so devolved, and for giving a presidential form of government to Pakistan, are intensifying.

As posited by the 1973 Constitution at the very outset, speeding up the attainment of a robust democracy, acceptable to all shades of opinion, is the best way to overcome the aforesaid strain and tension – while sovereignty over the entire universe belongs to Almighty Allah alone, and authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust, the State must exercise its powers and authority through the chosen representatives of the people.

So it is best to let the people genuinely choose their representatives, let them complete their terms, and let them decide what scheme works best for Pakistan. It might also be in order for Pakistan to undergo further and more authentic electoral reforms so that the election process is deemed transparent, and accusations of electoral fraud become minimal. Last but not least, political parties themselves need to adopt democracy and promote democratic values within their ranks, instead of indulging in dynastic rule or ganging up with unelected forces for measly gains.

References

- 1 Zain Sheikh, *The Constitution of the Islamic Republic of Pakistan*, 1973, Karachi: Pakistan Law House, 2004, p. 1
- 2 As cited by Justice Munawar Ahmed Mirza, Judge, Supreme Court of Pakistan, *Judicial System of Pakistan*, Address to Course Participants at National Defence College, Islamabad, on 15 September 1998, PLD 1998 Journal 125, p.126.
- 3 *The 1973 Constitution*, Articles 70–77.
- 4 *Ibid*, Articles 238–239.
- 5 On several occasions in India since 1973, and at least on one occasion in Bangladesh (in 2010), their respective Supreme Courts have struck down Constitutional amendments on grounds that they are inconsistent with the basic structures of the underlying Constitutions.
- 6 These judgments include *Al-Jehad Trust v Federation of Pakistan* (PLD 1996 SC 324), *Mahmood Khan Achakzai v Federation of Pakistan* (PLD 1997 SC 426), *Zafar Ali Shah v General Pervez Musharraf* (PLD 2000 SC 869), and *Sindh High Court Bar Association v Federation of Pakistan* (PLD 2009 SC 879).
- 7 *The 1973 Constitution*, Preamble, Article 2A, and Annex.
- 8 *Ibid*, Article 1.
- 9 *Ibid*, Article 2.
- 10 *Ibid*, Articles 4–5.
- 11 *Ibid*, Article 3.
- 12 *Ibid*, Article 6 (in its original form).
- 13 *Ibid*, Article 6 (as it presently stands after the 18th Constitutional Amendment).
- 14 *Ibid*, Article 8.
- 15 *Ibid*, Article 7.
- 16 *Ibid*, Article 29.
- 17 *Ibid*, Article 30.
- 18 *Ibid*, Article 142(a) and the Fourth Schedule.
- 19 *Ibid*, Article 142(b).
- 20 *Ibid*, Article 143.
- 21 *Ibid*, Article 142(c).
- 22 *Ibid*, Article 144.

- 23 See <https://historypak.com/fourteen-points-of-quaid-i-azam/>.
- 24 Muhammad Iqbal, "Presidential Address Delivered at the Annual Session of the All-India Muslim League, 29th December 1930", in *Speeches, Writings and Statements of Iqbal*, ed. Latif Ahmed Sherwani (Lahore: Iqbal Academy Pakistan, 5th Edition 2009), p. 15.
- 25 The 1973 Constitution, Article 97.
- 26 *Ibid*, Article 137.
- 27 *Ibid*, Article 140-A.
- 28 *Ibid*, Articles 41 and 44.
- 29 *Ibid*, Articles 45, 48, 58, 89, 90, 175-A, 177, 193, 213, 232–236, 242, and 243.
- 30 *Ibid*, Article 47.
- 31 *Ibid*, Articles 90–91 and 95.
- 32 *Ibid*, Articles 129–130 and 136.

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