

Constitution and Environment Law: Recent Developments

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Constitutional position prior to the 18th Amendment

The subject of 'Environment' was not mentioned in the Federal, Provincial or Concurrent Legislative Lists of the 1956 Constitution, or in the (sole) Legislative List in the 1962 Constitution which enumerated matters with respect to which the Central Legislature had exclusive power to make laws. Hence 'Environment' was in the exclusive jurisdiction of the Provincial Legislature under these Constitutions. Both Constitutions however empowered Parliament / the Central Legislature to make laws for implementation of decisions of international organizations and agreements with other countries.

In the 1973 Constitution, as originally enacted, 'Environmental pollution and ecology' was mentioned at entry no. 24 of the Concurrent Legislative List in the Fourth Schedule, thereby empowering both Parliament and the Provincial Assemblies to make laws with respect to matters relating thereto. It was in the exercise of these powers that the Pakistan Environmental Protection Act [PEPA] was enacted by Parliament in 1997. This superseded and repealed the Pakistan Environmental Protection Ordinance promulgated in 1983.

The 18th Amendment

The Constitution (Eighteenth Amendment) Bill, 2010 [hereinafter "the 18th Amendment"] became an Act of Parliament on 19th April, 2010. Amongst its most important provisions are those relating to amendment of the Fourth Schedule of the Constitution, which contained the Federal Legislative List (Part I and Part II) ["FLL Part I and FLL Part II"] and Concurrent Legislative List [CLL]. By omitting the CLL and amending FLL Part I and FLL Part II, the 18th Amendment fundamentally altered the division of legislative powers between Parliament and the Provincial Assemblies, resulting in a significant increase in the extent of Provincial autonomy.

'Environmental pollution and ecology' was one of the subjects in the CLL which now stands in the legislative domain of the Provincial Assemblies. This has far-reaching implications for environmental governance in the country, not only in terms of future law-making, but also for implementation of existing environmental laws, rules and regulations and Pakistan's obligations under multi-national environmental agreements.

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Impact of the 18th Amendment

The subject of 'Environment'

Omission of the CLL (including entry 24 'Environmental pollution and ecology') from the Fourth Schedule means that now a Provincial Assembly shall, and Parliament shall not, have power to make laws with respect to the subject of 'Environment', except for areas in the Federation not included in any Province such as the Islamabad Capital Territory (ICT).

The 18th Amendment has also amended Article 144 to provide that even one Provincial Assembly may pass a resolution requesting Parliament to make a law regulating any matter not mentioned in the FLL. [Previously resolution of at least two Provincial Assemblies was required.] Hence Parliament may be empowered to legislate regarding 'Environment' for a Province by a resolution of the Provincial Assembly concerned. The Provincial Assembly may however amend or repeal any such law enacted by Parliament. .

The legislative competence of Parliament and the Provincial Assemblies may of course overlap. For example, laws relating to certain entries in the FLL Part I and Part II which are in the exclusive legislative domain of Parliament may also relate to the subject of 'Environment'. These entries, included through the 18th Amendment, are:-

- (a) Entry no. 32 in FLL Part I: 'International treaties, conventions and agreements and International arbitration';
- (b) Entry no. 7 in FLL Part II: 'National planning and national economic coordination including planning and coordination of scientific and technological research';
- (c) Entry no. 13 in FLL Part II: 'Inter-provincial matters and co-ordination'.

In addition, the following entries existing in the pre-18th Amendment Constitution are also relevant:-

- (a) Entry no. 3 in FLL Part I: 'External affairs; the implementing of treaties and agreements etc.;
- (b) Entry no. 58 in FLL Part I: 'Matters which under the Constitution are within the legislative competence of Majlis-e-Shoora (Parliament) or relate to the Federation'; and
- (c) Entry no. 59 in FLL Part I and entry no. 18 in FLL Part II: 'Matters incidental or ancillary to any matter enumerated in this Part.'

In the light of these provisions, Parliament has exclusive power to make laws to implement international treaties, conventions and agreements to which Pakistan is a party, or for national planning, or for inter-provincial matters and coordination, or other matters falling within the legislative competence of Parliament, or which are incidental or ancillary to any matter enumerated in the FLL Part I or Part II. These laws may well relate to 'Environment' directly or indirectly, such as laws required to implement the multi-national environmental agreements (MEAs) to which Pakistan is a party.

Proponents of the view favouring legislative competence of Parliament in such matters point out that their interpretation is in consonance with the concept of cooperative federalism, and with judgments of the superior courts that entries in legislative lists should be liberally construed. However this interpretation is not undisputed. The opposing view is

that execution of an international treaty or agreement relating to a residuary subject (such as 'Environment') does not transfer legislative or executive powers in respect of that subject from the Provincial Assemblies to Parliament and that even after Parliament enacts a law incorporating the principles of a treaty into the country's legal system, in the absence of resolutions under Article 144 only the Provincial Assemblies are empowered to pass the requisite legislation creating rights and liabilities in accordance therewith. A decision of the Supreme Court of Pakistan in the case of *Air League of PIAC vs Federation of Pakistan* (2011 SCMR 1254) is cited in support of this argument.

Meanwhile Parliament has recently enacted the Industrial Relations Act, 2012, a law relating to the subjects of trade unions, industrial and labour disputes, etc. which were included in the erstwhile CLL. Preamble to the law mentions the fundamental right of freedom of association and ILO Conventions ratified by Pakistan on Freedom of Association and Right to Organize and Collective Bargaining. Since the legislative competence of Parliament to implement international conventions qua residuary subjects was not considered in the *Air League* case, a definitive judgment of the Supreme Court of Pakistan on this issue may be forthcoming as and when vires of this law is challenged in a proper case.

PEPA 1997

Article 270AA (6), as amended by the 18th Amendment, provides that notwithstanding omission of the CLL, all laws with respect to any of the matters enumerated in the said List (including Ordinances, Orders, rules, bye-laws, regulations and notifications and other legal instruments having the force of law) which were in force immediately before the commencement of the 18th Amendment, shall continue to remain in force until altered, repealed or amended by the competent authority. The Explanation to Article 270AA (6) defines "competent authority" to be: (a) in respect of all laws, the appropriate Legislature; and (b) in respect of notifications and rules etc., the authority in which the power to make, alter, repeal or amend the same notifications and rules etc. vests under the law.

In the light of the said provisions of Article 270AA (6), PEPA 1997 shall continue to remain in force until repealed or amended by the competent authority, which is now the Provincial Assembly in respect of each Province. and Parliament in respect of the ICT and other areas in the Federation not forming part on any Province.

PEPA 1997 can be repealed or amended, vis-à-vis its application to a particular Province, through a Provincial Act enacted by the Provincial Assembly concerned. The only restriction is contained in Article 143 of the Constitution. This lays down that if the provision of a Provincial Act is repugnant to any provision of a Federal Act which Parliament is competent to enact, the Federal Act shall prevail and the Provincial Act shall, to the extent of the repugnancy, be void.

PEPA 1997 can, and should, be amended by Parliament for purposes of application to the ICT / other areas in the Federation not included in any Province.

PEPA Rules and Regulations

In accordance with Article 270AA(6), all Rules and Regulations made / notified under PEPA 1997 shall also continue to remain in force until altered, repealed or amended by the competent authority.

Vide notifications dated 27th October, 1998 various powers of the Pakistan Environmental Protection Agency, (henceforth "Pak EPA") under PEPA 1997 were delegated by the Federal Government to the Provincial Governments. However, the rule-making power of the Federal Government under section 31 and regulation-making power of the Federal Agency (Pakistan Environmental Protection Agency, henceforth "Pak EPA") under section 33 were not so delegated. No Provincial rule or regulation has therefore been prescribed thus far. Clearly, sections 31 and 33 should be amended (by Act of the Provincial Assembly) to empower the Provincial Government to make or amend rules and to empower the Provincial Agencies to make or amend regulations in future.

Executive authority of the Provinces relating to the Environment

Article 137 declares that subject to the Constitution, the executive authority of the Province shall extend to the matters with respect to which the Provincial Assembly has power to make laws. In other words the executive authority of a Province is co-terminus with the legislative competence of the Provincial Assembly. The proviso to Article 137 however states that such executive authority shall be subject to, and limited by, the executive authority conferred upon the Federal Government by the Constitution or by law in any matter with respect to which both Parliament and a Provincial Assembly have power to make laws.

Article 147 provides that a Provincial Government may, with the consent of the Federal Government, entrust functions in relation to any matter to which its executive authority extends to the Federal Government or to its officers. A proviso added by the 18th Amendment requires that the functions so entrusted shall be got ratified from the Provincial Assembly within 60 days. Hence the Constitution provides for 'reverse' devolution also. A Province can not only request Parliament to make a law pertaining to 'Environment' through resolution of the Provincial Assembly under Article 144, it can also entrust its existing functions under PEPA 1997 to the Federal Government or its officers under Article 147, subject to ratification by the Provincial Assembly within 60 days.

Multinational Environmental Agreements

Entry no. 32 in FLL Part I ('International treaties, conventions and agreements...') and entry no. 3 in FLL Part I ('...the implementing of treaties and agreements), mean that Parliament has exclusive powers to make laws to implement international treaties, conventions and agreements to which Pakistan is a party. Implications for MEAs have been discussed above.

PEPA 1997 empowers the Federal Government to make rules for implementing the provisions of the international environmental agreements specified in the Schedule. The Schedule to the Act lists 14 environmental conventions and agreements to which Pakistan is a party. The Federal Government may amend the said Schedule by adding to, or modifying or omitting any entry in it. However these powers have not been exercised. No such rules have been framed; nor has the Schedule been amended.

Post-devolution developments

The 18th Amendment required the Federal Government to constitute an Implementation Commission to supervise the process of devolution of matters in the CLL to the Provinces, which was to be completed by 30th June, 2011. As decided by the Commission and approved by the Federal Cabinet, the Ministry of Environment (MoE) was 'devolved' to the Provinces

with effect from 1st July, 2011. Vide Cabinet Secretariat Notification dated 29th June, 2011, functions previously being dealt with by the MoE were either devolved to the Provinces, or were retained at the Federal level and 'relocated' in other Divisions / Ministries, viz the Planning and Development, Inter-Provincial Coordination, Capital Administration and Development Divisions and the Ministries of Science and Technology, Water and Power and Ports and Shipping.

The devolution / assignment of matters previously dealt with by the MoE vide Notification dated 29th June, 2011 was disputed and controversial. Many NGOs had opposed the very concept of devolution of the MoE, basically on the grounds that because of lack of capacity and readiness in the Provinces, it was necessary to maintain national-level institutions for: (a) effective policy-making and inter-provincial co-ordination; (b) negotiation, oversight, monitoring and reporting of implementation of MEAs; and (c) liaison with donors for receiving aid for specific programmes and projects. Concerned environmentalists termed the devolution to the Provinces and division of responsibilities amongst various successor Federal authorities as "demolition and distribution" and predicted that another constitutional amendment would soon be required to reverse the whole process, after considerable wastage of time and money.

In an attempt to remove these misgivings and doubts, another Notification was issued on 26th October, 2011, whereby most of the "re-located" functions were assigned to a newly-created National Disaster Management Division (NDMD). However this Notification is itself controversial.

First, the subsequent Notification dated 26th October, 2011 has not removed the ambiguities and overlap in the earlier Notification regarding assignment of MoE functions. The Notification dated 29th June, 2011 assigned "National policy, plans, strategies and programmes regarding environmental pollution, ecology, forestry, wildlife, biodiversity, climate change and desertification" to the Planning and Development Division. On the other hand, the Notification dated 26th October, 2011 has used different terminology and assigned "Policy, legislation, plans, strategies and programmes with regard to Disaster Management including Environmental Protection and Preservation" (which are not shown as assigned to any Division at present) to the NDMD. Since the subsequent Notification does not state that it supersedes the earlier Notification, clarification is required to reflect the actual position, i.e. that all the subjects assigned to the Planning and Development Division have actually been transferred to the NDMD, (apparently under the nomenclature of "Environmental Protection and Preservation").

Secondly, if the all-encompassing subject of "Environmental Protection and Preservation" is now assigned to the NDMD, how is this compatible with the earlier Notification showing devolution to the Provinces of "(National) policy, plans, strategies and programmes regarding (a) improvement in environmental conditions of air, water and land; (b) incorporation of environmental concerns in development schemes" and (c) energy conservation" ? Confusion arising out of these ambiguities and apparent overlap needs to be removed.

Thirdly, while there may be a case for placing all essential non-devolved functions of the former MoE under one Division for purposes of coordination and administrative convenience, is there an implicit acknowledgement of the state of affairs in the Environment

sector by assigning "Environmental Protection and Preservation" to the National Disaster Management Division? Also, any decision to create new Ministries/ Divisions should not lose sight of what should be one of the associated benefits of devolution, viz savings in administrative expenditure as a result of abolition of the devolved Ministries. In fact post-devolution 8 new Divisions / Ministries have been created!

As regards the earlier notification dated 29th June, 2011, the Punjab Government has protested against the assignment of the matter relating to allocation of hunting areas for foreign dignitaries to the Ministry of Foreign Affairs, on the ground that since forestry and wildlife, environmental pollution and ecology are not on the FLL, the executive authority of the Federation does not extend to these subjects or incidental / ancillary matters. Hence the allocation of potential sites as hunting areas and identification of negative areas for Houbara bustard fall within the sole authority of the Provincial Governments. The dispute remains unresolved.

Matters relating to MEAs previously assigned to the Planning and Development Division have now been assigned to the new NDMD. Reporting and other duties of a Contracting Party under each MEA will be performed by the Federal Government through the NDMD instead of the MoE. As implementation will take place in the Provinces, it is important to keep effective liaison with the Provincial Governments / EPAs (and for the ICT with Pak EPA) to monitor progress and to send timely reports to the MEA secretariats.

Clearly the success of the entire devolution process initiated by the 18th Amendment can only be judged after assessing the results achieved, in terms of the improvements and benefits accruing from policy-making and implementation at the provincial level. This is a huge challenge for the Provincial Governments, given the tremendous euphoria and high expectations of the general public from the quantum increase in provincial autonomy, as well as likely political backlash should it cause administrative chaos. In the circumstances political will and resolve to show positive results will not be lacking in the Provinces. What is required is the building and enhancement of capacity on priority basis to enable the efficient and effective handling of the post-devolution increased workload.