18th Constitutional Amendment and Devolution of Labour Ministry
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With the passage of 18th Constitutional Amendment and abolition of the concurrent list, Labour has become a provincial subject. However, there are many lingering concerns related to the transfer of labour-related matters to exclusive provincial domain which need to be addressed before complete transfer to the provinces takes place.

In light of the 18th Amendment, there may be the possible challenges in the enforcement of international conventions and treaties, especially with regards to labour rights such as ILO Conventions 87, 98, ILO Declaration on Fundamental Principals and Rights at Work. Moreover, provincial compliance with the principles prescribed in these conventions and treaties is an area of concern especially with regards to formulation of policies and laws in administrative areas such as reporting, complaint procedures and enforcement. Furthermore, management of Employees Old-age Benefit Insurance (EOBI) and Workers Welfare Fund (WWF), uniform measures to cover all provinces in safety and social protection, standardization of occupational safety and health regulations across all provinces with similar levels of minimum enforcement mechanisms; and for the other related areas there is need for uniformity and minimal standardization across provinces. Future of worker unions and federations, which were functioning at the national levels, has also been in limbo after the devolution of the labour department. These are some of the major grey areas demanding serious level of consideration at this stage.

PILDAT attempted to brainstorm on some of these issues in the Consultative Session organized for Labour experts, analysts and all stake holders on April 21, 2011 to identify some core issues of this devolution process. We are grateful to Mr. Babar Sattar who has used his insight in compiling key areas of concern and recommendations in this paper, also benefitting from the outcome of the discussions of the Consultative Session.

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Disclaimer
The views expressed in the paper are not necessarily those of PILDAT or of the NED or the Solidarity Center, Pakistan.

Islamabad
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Introduction

Pakistan is a federation and giving effect to the concept of provincial autonomy is vital for the future of democracy. In order to further provincial autonomy, the 18th Constitutional Amendment enhanced the fiscal, administrative and legislative authority of the federating units: by erasing the concurrent legislative list; granting provinces greater control over their natural resources and proceeds; enhancing the role of the Senate and the Council of Common Interests; and making it harder for the president to clamp emergency rule over a province and requiring that governors be residents of their respective provinces.

As a matter of principle, devolution and decentralization of power is welcome. Wider distribution of power – while keeping in place sensibly sized administrative units – is the most effective measure to prevent its abuse. As a matter of policy, devolving power and simultaneously building institutional capacities to effectively exercise it brings government closer to people and leads to citizen empowerment and more efficient and accountable service delivery. But does the principle of provincial autonomy and devolution, as articulated by the Constitution, require federal ministries and attached statutory bodies to be partially devolved and partially disbanded as proposed by the Implementation Commission?

The promulgation of the 18th Amendment and deletion of the Concurrent Legislative List, which enumerated subjects in relation to which the Parliament and the provincial legislatures were authorized to legislate, has triggered a debate with regard to the respective legislative competence of the federal and provincial legislatures. The Constitution, as amended through the 18th Constitutional Amendment, now limits the legislative competence of the Parliament to matters enumerated in the Federal Legislative List, but the Parliament’s ability to legislate in relation to matters enumerated therein or ancillary thereto, remains unfettered.

Consequent to the promulgation of the 18th Constitutional Amendment, Items 26 and 27 of the Concurrent Legislative List reflecting concurrent legislative competence of the Parliament and the provincial legislatures in relation to “welfare of labour; conditions of labour, provident funds; employer’s liability and worker’s compensation, health insurance including invalidity pensions, old age pensions”, and “trade unions; industrial and labour disputes”, respectively, also stand abolished. However, the State’s obligation in respect of ensuring universal labour freedoms and guarantees remains intact.

Our Constitution’s legislative scheme and requirements related to devolution are as follows. The Parliament at the centre has the exclusive authority to legislate in relation to items included in Part I of the Federal Legislative List, and in consultation with the Council of Common Interests when it comes to matters listed in Part II of this list. All residuary powers, including those in relation to items included in the erstwhile Concurrent Legislative List (which could be legislated upon by the Parliament and the provincial assemblies prior to the 18th Amendment), fall within the exclusive domain of provinces. But legislative subjects do not exist in isolated compartments. Despite the abolition of the Concurrent List, the centre and the provinces still retain overlapping legislative competence in innumerable matters.

The central thesis of this paper is that the Constitution, as amended through the 18th Constitutional Amendment, does not stipulate that the Parliament has been completely stripped off its legislative authority in relation to labour and social security and that these matters now fall within the exclusive administrative and legislative domain of the provinces. It argues that the right to free association and the right to life, dignity and social welfare are guaranteed as fundamental rights by the Constitution. And given that regulation of labour rights and social welfare are interprovincial matters and further, that Pakistan has assumed international obligations in relation to them that can only be translated into municipal law by the Parliament, these matters still fall within an area that is properly within the responsibility of the Parliament and the Federal government.

This paper argues that the Implementation Commission’s overall approach toward the project of devolution is wanting. It lists various constitutional provisions that relate to labour and social welfare rights. This is followed by a discussion on the problems confronting labour that are accentuated by the absence of a social safety net in Pakistan and how they could be further aggravated in the event that labor and social security came to be viewed as an exclusive provincial responsibility. The paper then identifies provisions of the Constitution suggesting that the Parliament retains the authority to legislate in relation to labour rights and social pensions and how it ought to establish minimum labor standards, administer labour rights that cut across provinces, enforce Pakistan’s international obligations and provide minimum financial security to all citizens of Pakistan through a universal pension scheme.
Implementation Commission's Approach To Devolution

The Implementation Commission established to facilitate devolution of matters mentioned in the erstwhile concurrent legislative list appears to support a complete surrender of Federal authority and responsibility toward subjects such as health, education, labour and social security. The Implementation Commission seems to believe that there is only one way to express allegiance to devolution and stronger federating units: chop off any function linked to subjects in the erstwhile Concurrent List and let the provinces pick up the pieces. This surgical straitjacket approach toward redistribution of State authority is flawed and the Implementation Commission is floundering on at least two fundamental levels.

One, its work seems marred by a combination of zeal and self-restraint, except that it needs to reverse the manner in which it exercises such zeal and restraint. The Commission seems to be dabbling into areas that fall beyond the scope if its authority. For example, it seems to have mistakenly assumed the authority to determine whether or not statutory bodies such as the Employees Old-Age Benefits Institution and the Workers Welfare Fund are to be devolved or not while it is not legally competent to do so. Article 270AA introduced by the 18th Constitutional Amendment prescribes transitional arrangements to strike the right balance between continuity and change. The status and future of Federal laws and statutory bodies has been explicitly protected under Article 270AA(6) of the Constitution, which states that: "Notwithstanding omission of the Concurrent Legislative List by the Constitution (Eighteenth Amendment) Act, 2010, all laws with respect to any of the matters enumerated in the said List (including Ordinance, Orders, rules, bye-laws, regulations and notifications and other legal instruments having the force of law) in force in Pakistan or any part thereof, or having extra-territorial operation, immediately before the commencement of the Constitution (Eighteenth Amendment) Act, 2010, shall continue to remain in force until altered, repealed or amended by the competent authority." 1

The relevant provision that provides for devolution of Federal functions is provided under Article 270AA(8) which states that, “on the omission of the Concurrent Legislative List, the process of devolution of the matters mentioned in the said List to the Provinces shall be completed by the 30th day of June, 2011.” And further sub-clause (9) of the same Article continues that, “for purposes of the devolution process under clause (8), the Federal Government shall constitute an Implementation Commission as it may deem fit within 15 days of the commencement of the Constitution (Eighteenth Amendment) Act, 2010”.

Thus, the legal mandate of the Implementation Commission is limited to giving effect to devolution of matters being handled directly by the Federal government ministries that were mentioned in the erstwhile Concurrent List. It doesn't have the sanction to determine the future of statutory bodies functioning under valid Federal laws and the timeline of June 30, 2011 stipulated in Article 270AA(8) to complete the devolution (which consequently also determines the lifeline of the Implementation Commission) has no relevance for Federal laws and Federal statutory bodies that might have been created in exercise of powers derived from the erstwhile Concurrent Legislative List. Further, the Implementation Commission is not a legislative body and cannot conclusively rule on the continuing legislative competence of Parliament in relation to matters mentioned in the Federal Legislative List.

Commitment to the principle of devolution ought not be confused with the manner of giving effect to the principle. The Implementation Commission's zeal to slice the number of Federal ministries comes along with a self-imposed restraint to learn from effective federal models operating in other jurisdictions. The task of devolving subjects to the federating units essentially translates into the responsibility of reorganizing the federal government. And this is what makes the job of facilitating devolution more than black and white implementation of the written word. There can be multiple approaches to transferring responsibility to provinces and consolidating the functions of the Federal government without being unfaithful to the command of the Constitution. In denying this zone of discretion the Implementation Commission seems to restrain itself from considering preferable alternatives to the mechanical abolition of vital ministries and distributing their parts amongst others.

Two, the Implementation Commission has failed to

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1 Article 270AA(2): “For the purposes of Clause (2) and Clause (6), “competent authority” means, (a) in respect of President's Orders, Ordinances, Chief Executive's Orders and all other laws, the appropriate Legislature; and (b) in respect of notifications, rules, orders and bye-laws, the authority in which the power to make, alter, repeal or amend the same vests under the law.”

2 Annexure A
articulate a concept of federalism supported by the text of our Constitution. In the absence of a clear conceptual understanding of the nature of our federalism, there is no thumb rule that can guide the process of devolution while insuring that enforcement of this principle does not undermine other principles enshrined in the Constitution, especially that of equality of citizens and protection of fundamental rights. Our Constitution endorses the idea of cooperative federalism as opposed to dual federalism. The center and the provinces cannot be seen as two completely separate and sovereign branches of government. The sovereign authority of Pakistan vests in the Parliament and the constitutional scheme of devolution then requires division of labour and surrender of certain functions by a superior government to a subordinate government to the extent of its territorial limits.

There are at least two aspects of the legislative distribution of authority that need to be appreciated. One, the distribution of authority between the center and the provinces is for the advantage of all citizens of Pakistan and not the provinces or citizens of a particular province, as our Constitution doesn't endorse the concept of dual-sovereignty. Our provinces do not have independent constitutions, they do not confer citizenship on their residents, their parliaments do not have unlimited legislative competence and they cannot create laws that undermine the fundamental rights of non-residents or afford preferential treatment to residents in a manner that breaches the constitutional promise of equality. And two, notwithstanding the division of authority between the Federal and provincial governments and the omission of the Concurrent Legislative List, there will always remain a common field to both governments that will continue to be administered concurrently.

Any effort to unduly simplify the task of isolating the legislative powers of the center and the federating units is bound to be futile for it is impossible to make so clean a cut between the powers of various legislatures. Irrespective of whether you substitute three lists for two or provide for a hierarchy of jurisdictions, the overlap of subject matter is inevitable. Our courts have already held that entries within legislative lists must be construed liberally. Consequently, despite the omission of the Concurrent Legislative List, the Parliament will be required to continue exercising legislative power derived from items within the Federal List that could also be seen as encroachment on provincial domain.

The Parliament ought not to usurp the legislative authority of provinces. But outsourcing the constitutional obligation to protect and promote fundamental rights of all citizens equally in the name of devolution is also indefensible. Education, health, right to association, life, dignity and social welfare are fundamental human rights. Dissolving ministries named after entries within the erstwhile Concurrent List is one thing. But the view that Parliament no longer has any business legislating on these matters is neither backed by a purposive understanding of our constitutional scheme and principles nor amounts to a sound policy choice.

**Labour and Social Security under Pakistani Law**

The Constitution defines a framework of rights for labour and contains provisions for the economic and social well being of the people and for the promotion of social justice. Fundamental rights with regard to the security of life or liberty, prohibition of slavery and forced labour, and the right to form associations or unions, among others, are enshrined in the Constitution. Any law, custom, or usage inconsistent with these fundamental rights is void and the State is prohibited from making any law that takes away or curtails these fundamental rights.

Most of the rights and privileges secured to the working people of Pakistan under labor laws are enshrined in Part II of the Constitution, which needs to be read together with Part I;  

a. **Article 4** states that the right to enjoy the protection of law and be treated in accordance with law is the inalienable right of every citizen;  

b. **Article 9** stipulates that no person shall be deprived of life or liberty, save in accordance with the law;  

c. **Article 11** prohibits slavery and all forms of forced labour and trafficking in human beings as well as impermissible child labour;  

d. **Article 17** deals with freedom of association and provides that every citizen shall have the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interests of morality or public order;
e. Article 18 prescribes the right of its citizens to enter upon any lawful profession or occupation and to conduct any lawful trade or business;

f. Article 25 lays down the right to equality before the law and prohibition of discrimination on the grounds of sex alone;

g. Article 37(c) creates an entitlement of all citizens of Pakistan to social security by compulsory social insurance or other means;

h. Article 37(d) requires the State to provide basic necessities of life (food, clothing, housing, education, medical relief) for citizens temporarily or permanently unable to earn their livelihood due to infirmity, sickness or unemployment; and

i. Article 37(e) makes provision for secure and humane conditions of work, ensuring that children and women are not employed in vocations unsuited to their age or sex.

Pakistan's International Obligations

Since 1919, the International Labour Organization (ILO) has sought to define and guarantee labor rights and improve conditions for working people by building a system of international labour standards expressed in the form of Conventions, Recommendations and Codes of Practice. The ILO has adopted more than 180 Conventions and 190 Recommendations covering all aspects of the world of labor and employment. In addition, dozens of Codes of Practice have been developed. The ILO declared eight Conventions as fundamental to workers' rights worldwide (known as the Core Conventions) grouped by ILO under four most basic labour rights i.e. (i) core labour rights that include the right to organize and engage in collective bargaining,4 (ii) the right to equality at work5, (iii) the abolition of child labour6, and (iv) the abolition of forced labour7.

Pakistan joined the ILO in 1947, and has since then ratified 34 ILO Conventions. Pakistan has ratified all eight Core Conventions fundamental to workers' rights worldwide:

**Freedom of association and the right to collective bargaining**

- ILO Convention No. 87 - Freedom of Association and Protection of the Right to Organize, 1948
- ILO Convention No. 98 - Right to Organize and Collective Bargaining, 1949

**Forced labour**

- ILO Convention No. 29 - Forced Labour, 1930
- ILO Convention No. 105 - Abolition of Forced Labour, 1957

**Equality of opportunity and treatment**

- ILO Convention No. 111 - Discrimination (Employment and Occupation), 1958
- ILO Convention No. 100 - Equal Remuneration, 1951

**Child Labour**

- ILO Convention No. 138 - Minimum Age Convention, 1973
- ILO Convention No. 182 - Worst Forms of Child Labour, 1999

Article 1 of ILO Convention No. 98 provides that “workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment”. Paragraph 2 spells out the scope of such protection: “Such protection shall apply more particularly in respect of acts calculated to (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership; (b) cause the dismissal or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours”. This form of workers' protection is a key aspect of freedom of association, as acts of anti-union discrimination can in practice lead to a denial of the guarantees provided in Convention No. 87.

The effectiveness of the protection accorded under the law depends not only on the content of the provisions concerned, but also on the way in which they are applied in practice and, in particular, on the efficacy of measures designed to ensure their application. It is this context that brings out the full meaning of Article 3 of Convention No. 98,
which states that, “machinery appropriate to national conditions shall be established, where necessary, for the purposes of ensuring respect for the right to organize...”

Article 2.1 of Convention No. 98 further states that “workers' and employers' organizations shall enjoy adequate protection against any acts of interference by each other or each others' agents or members in their establishment, functioning or administration”. Article 4 of Convention No. 98 provides that “measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements”.

Pakistan is under obligation to transform these Convention policies into a legally binding form. Although the standards are flexible, governments are not permitted to pick and choose which articles of a Convention they wish to apply. When a member state ratifies a Convention, it agrees to (i) implement the Convention in its entirety and to review its national legislation vis-à-vis the provisions of the ratified Convention, and (ii) report at regular intervals to the supervisory mechanisms of the ILO.

The proposed devolution, to the extent that the Federal Government considered itself absolved of all responsibility in relation to labour matters and their regulation, will also compromise effective compliance with Pakistan's international obligations under the aforementioned international labour treaties and charters. There is not only the fear that the provinces might be unable to fully uphold Pakistan's international obligations under the ILO Conventions if left to their own devices without any assistance from the Federal government, but also that the obligation that a state assumes at the time of ratifying an international treaty binds the state as a whole, and does not create a bilateral agreement or treaty between the international body/organization and each individual province/state in a federation.

Item 3 Part I of the Federal Legislative List exclusively endows the Parliament with the duty to give effect to Pakistan's international obligations under various international agreements and treaties. It is settled law that international treaties and multilateral agreements even when signed and ratified by the State of Pakistan do not have the force of law within the country. And it is only through legislation that the rights and obligations pursuant to treaties acquire the force of law. Given that treaties and international obligations remain part of the Federal Legislative List, it is only the Parliament that can give effect to such treaties. Consequently laying the burden of giving effect to the international obligations related to labour and social security squarely on the shoulders of the provinces would not only be a retrograde step from a policy perspective but also unconstitutional.

Challenges Afflicting Labour and Social Security

The total labour force of Pakistan is comprised of approximately 55.88 million people out of a total population of approximately 180 million, with 47% within the agriculture sector, 10.50% in the manufacturing and mining sector and remaining 42.50% in various other professions. Although there has been a reversal of the declining trend in employment growth as was witnessed in the post-2000 period, there has also been a simultaneous increase in unemployment rates as employment growth has not kept pace with growth in labour supply. Unemployment rates have been high and increasing, especially amongst certain groups – such as youth, women and young graduates.

The organized sector that offers desirable and meaningful work employs a very small percent of the workforce. An overwhelming majority of workers are currently employed in the unorganized sector where most of the new jobs are also created. Even within the organized sector, the limited numbers of new jobs being created are informal in nature. Low earnings, poor work conditions and lack of social protection or organization, mostly characterize these jobs. While some of these developments are caused by demand and structural constraints in the economy, the lack of appropriate policy responses to the employment challenge is likely to aggravate these tendencies both directly and indirectly, and increase the existing inequalities in the labor

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8 http://www.indexmundi.com/pakistan/labor_force.html
9 Estimated on the basis of population of 137.5 million for mid-year 2000, the total labor force came to 39.4 million. Of this 2.4 million were unemployed and unemployment rate was 6.1 per cent. In June 2009, the unemployment rate was estimated to be 15.2%.
10 The female labor force participation rate in Pakistan is exceptionally low at just 14.4 percent, compared to 70.3 percent for males, while the unemployment rate is 16.5 percent for females and 6.7 percent for males.
market.

The aforementioned challenges of increasing unemployment and the dearth of policies designed to tap the potential of the untrained and unemployed youth and women are further compounded by defective legislative framework in some areas, and ill-enforcement of existing laws in others. Pakistan has been willing to adopt the best labor practices and standards in theory at least, and, as aforesaid, Pakistan has ratified 34 ILO conventions including the eight Core Conventions. Likewise, Pakistan has ensured participation in many other global initiatives such as the United Nations (UN) Global Compact. It has also ratified the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW), and the Convention on the Rights of the Child (CRC) along with its two additional protocols.

Despite undertaking the aforementioned measures, Pakistan's labor profile remains far from flawless. In a 2008 report, the International Trade Union Confederation (ITUC) observed that ILO's Core Conventions, although ratified, are violated massively and flagrantly in Pakistan. While the report's findings were primarily directed towards the now-repealed Industrial Relations Ordinance, 2002, it also denounced the fact that while Pakistan has ratified Conventions combating both forced and child labor, the practice of forced labor, especially involving children, is widespread within the country. The actual number of working children in Pakistan is estimated to be between 2 and 19 million.

Bonded labour is a major issue despite legislation that should have outlawed the practice. The report equally recalls that Pakistan is a source, transit and destination country for trafficking people and that currently, women and children are the categories most vulnerable to such practices. Women suffer from discrimination in the workplaces. While harassment has been a long-running serious problem, legislation to combat it has only recently been enacted in the form of The Protection Against Harassment of Women at the Workplace Act, 2010.

In a devolved regime, to the extent that no minimum labor rights and standards are prescribed by the federation for all provinces to abide by and consequently four disharmonious labor regimes emerge in the country, all the aforementioned challenges are expected to be aggravated. Also, experience from other jurisdictions suggests that effective legislative regulation of labor matters poses greater challenges where provincial legislatures are exclusively responsible for legislating upon these matters or where there exist no federally mandated minimum labor standards.

Desirability of an Exclusive Provincial Mandate

In Pakistan, increasing population, greater expectations for higher wages, the growing phenomenon of urbanization and industrialization, and a search for better living conditions motivates inter-provincial migration of labor from rural areas toward urban areas. Consequently, there is movement of labour from informal sectors of the economy within provinces that are less developed industrially and economically toward formal sectors of the economy in provinces that have growing urban and industrial centers. The administration and enforcement of labor setting varied standards across the four provinces within the country could adversely affect the labor migration trends as well as the welfare and rights of labor across the country.

In addition, the ability of various provinces to raise revenue for purposes of fostering social welfare of the underprivileged is extremely divergent, with Sindh and Punjab being better equipped to discharge such mandate. The revenue generated for purposes of social welfare contributions under the Employees Old-Age Benefits scheme and the Workers Welfare scheme is disproportionate in view of the needs of the populace of each province given that the productive members of a family tend to migrate to urban centers in other provinces to earn a living and consequently contribute to the welfare

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11 Based on the ratification of conventions, the ILO has a system of regular supervision and reporting to ensure that member countries respect the international labor standards. In addition, parties can bring complaints on standard violations before the ILO.

12 The United Nations Global Compact, also known as Compact or UNGC, is a United Nations initiative to encourage businesses worldwide to adopt sustainable and socially responsible policies, and to report on their implementation. The Global Compact is a principle-based framework for businesses, stating ten principles in the areas of human rights, labor, the environment and anti-corruption.


14 The Pakistan Labor Force Survey (1990-1991) put the number of child workers in the age group 10 to 14 at two million. The Pakistan Institute of Development Economics (PIDE) maintains that two million is a gross underestimate because a) of serious under-reporting due to the fact that child labor is illegal, and b) working children below 10 years are not included. A. R. Kemal, Child Labor in Pakistan (Pakistan: UNICEF-PIDE, 1994). A 1990 UNICEF study estimated the total number of children at not less than 8 million. Pakistan’s then Secretary of Labor stated that the UNICEF figure was “on the high side,” but appeared to accept the figure as being in the general range. (May 19, 1994).

15 Bonded Labor System (Abolition) Act, 1992
scheme of such host provinces, whereas the burden of providing welfare benefits to the families of such migrant laborers as well as the laborers themselves once they return to their native province upon retirement would continue to lie with the province of origin.

The limited ability of smaller provinces to guarantee and promote social welfare of their citizens as opposed to better equipped provinces has the potential of rendering the State in breach of its obligations pursuant to Articles 25 and 4 of the Constitution, which articulate, respectively, that “all citizens are equal before law and entitled to equal protection of law” and “to enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen...” The State risks breaching its constitutional obligations of ensuring equal protection of law, universal coverage of minimum labour standards and proportionate distribution of the benefits of social welfare schemes to the indigent labour class across the four corners of Pakistan, if some harmony is not achieved in devising schemes guaranteeing such rights by mandating some minimum standards of labor protection at the Federal level.

Further, the performance of provincial bodies created for purposes of furthering social security in their respective jurisdictions has so far been lackluster and leaves a lot to be desired. The only substantial benefits being disbursed to workers and their dependents, invalids, indigent persons, persons suffering from disabilities and old-age are being assured pursuant to the Employees Old-Age Benefits Act, 1976 and the Workers' Welfare Fund Ordinance, 1971 – schemes which have both been administered and formulated at the Federal level.

Thus, devolution of administration of old-age benefits and worker welfare schemes to the provincial level could adversely affect labour rights and related pension benefits in some provinces due to the disparate levels of industrial development across the provinces and the diminished ability of some to generate and recover pension collections to satisfy the needs of its resident ageing employees. Where divergent provincial laws exist to regulate industrial relations, minimum working age, minimum wages, or employment pensions, additional resource contribution in terms of devising uniform enforcement and effective administration mechanisms would need to be made in order to determine issues arising from portability of employment across provinces etc.

Continuing Federal Mandate

Article 142(c) of the Constitution, as amended through the 18th Constitutional Amendment, states that “a Provincial Assembly shall, and the Majlis-e-Shoora (Parliament) shall not, have power to make laws with respect to any matter not enumerated in the Federal Legislative List.” The 18th Constitutional Amendment thus abolishes the Concurrent Legislative List, which read together with Articles 142(c) and (d), holds that only Provincial Assemblies and not the Parliament will be competent to legislate in relation to matters previously enumerated in the Concurrent Legislative List.

While the Constitution, as amended through the 18th Constitutional Amendment, now limits the legislative competence of the Parliament to matters enumerated in the Federal Legislative List, it does not fetter the ability of the Parliament to continue to legislate in relation to matters enumerated in the Federal Legislative List or matters ancillary thereto, even if such legislation can be seen as linked to matters enumerated within the erstwhile Concurrent Legislative List. Further, the Constitution, as amended through the 18th Constitutional Amendment, creates no obligation for the Federal Government to transfer any assets or institutions of the Federal Government to the provincial governments.

Any Federal assets that have duly accrued to the Federal Government under valid laws that the Parliament, in its competence, promulgated prior to the 18th Constitutional Amendment cannot automatically devolve to provincial governments merely because the legislative competence of the Parliament in relation to the subjects of such validly enacted laws now stands limited. Such limitation cannot be given retrospective effect, as the 18th Constitutional Amendment has explicitly protected all laws presently in force under clause (6) of Article 270AA. Thus, the legislative limitation of the Parliament does not translate into an obligation to transfer assets accrued to the Federal Government and the bodies and institutions controlled by the Federal Government pursuant to and created under valid statutory instruments.

Industrial Relations

The Parliament is authorized to promulgate a Federal industrial relations law even after the 18th Constitutional Amendment. The relevant provisions of the Constitution that confer such legislative authority on the Parliament are
The Employees Old-Age Benefits Institution ("EOBI") is a Federal institution created under the Employees Old-Age Benefits Act, 1976 ("EOB Act"), and manages the Employees Old-Age Benefits Fund ("Fund") that vests in the Federal Government and has been raised partly through contribution of the Federal Government under Section 9A of the EOB Act and partly by imposing a levy on employers and employees across Pakistan through this Federal law. The EOBI and the Fund fall within the domain and the control of the Federal Government and do not need to be devolved to the provinces, in the aftermath of the 18th Constitutional Amendment, for the following reasons:

a. Implementation of treaties and international agreements falls within the exclusive legislative domain of the Parliament, as enumerated in Item 3 of Part I of the Federal Legislative List, and the Parliament is competent to legislate in order to abide by Pakistan's sovereign commitments to international organizations and other nation-states. Pakistan is party to ILO Conventions, pursuant to which it is obliged to provide social welfare and financial security to its citizens. Thus while Provincial Assemblies are competent to legislate on matters related to labour welfare, social welfare and related pensions pursuant to Items 25 and 26 of the erstwhile Concurrent Legislative List, omission of such List doesn't curtail Parliament's competence to legislate in order to comply with and give effect to Pakistan's international obligations under Item 3 of Part I of the Federal Legislative List, which is the foundational purpose of the EOB Act.

b. Under items 58 and 59 of Part I of the Federal Legislative List, the Parliament is competent to legislate in relation to "matters which under the Constitution are within the legislative competence of the Majlis-e-Shoora (Parliament) or relate to the Federation," and "matters incidental or ancillary to any matters enumerated in this Part", respectively. The aforesaid provisions read with Article 17, which makes it a State obligation to guarantee to "every citizen... the right to form associations or unions" allow the Parliament to legislate in relation to its obligations under Article 17 of the Constitution.

c. Additionally, legislation on labour matters that affect (i) industries that remain Federal subjects, (ii) industries that fall within Federal areas, and (iii) industries and unions that spread across two or more Provinces, can be undertaken Federally under Item 13 in Part II of the Federal Legislative List concerning "inter-provincial matters and coordination".

EOBI

The Employees Old-Age Benefits Institution ("EOBI") is a Federal institution created under the Employees Old-Age Benefits Act, 1976 ("EOB Act"), and manages the Employees Old-Age Benefits Fund ("Fund") that vests in the Federal Government and has been raised partly through contribution of the Federal Government under Section 9A of the EOB Act and partly by imposing a levy on employers and employees across Pakistan through this Federal law. The EOBI and the Fund fall within the domain and the control of the Federal Government and do not need to be devolved to the provinces, in the aftermath of the 18th Constitutional Amendment, for the following reasons:

a. Implementation of treaties and international agreements falls within the exclusive legislative domain of the Parliament, as enumerated in Item 3 of Part I of the Federal Legislative List, and the Parliament is competent to legislate in order to abide by Pakistan's sovereign commitments to international organizations and other nation-states. Pakistan is party to ILO Conventions, pursuant to which it is obliged to provide social welfare and financial security to its citizens. Thus while Provincial Assemblies are competent to legislate on matters related to labour welfare, social welfare and related pensions pursuant to Items 25 and 26 of the erstwhile Concurrent Legislative List, omission of such List doesn't curtail Parliament's competence to legislate in order to comply with and give effect to Pakistan's international obligations under Item 3 of Part I of the Federal Legislative List, which is the foundational purpose of the EOB Act.

b. Under Item 12 of Part I of the Federal Legislative List, the Parliament is competent to legislate in relation to "federal pensions, that is to say, pensions payable by the Federation or out of the Federal Consolidated Fund." Under Items 47 and 54 of Part I of the Federal Legislative List, the Parliament has unfettered authority to impose "taxes on income other than agriculture income" and to impose "fees in respect of any of the matters in this Part", respectively. Thus, Parliament can continue to legislate in order to impose fees, levies and taxes on employers, employees and ordinary citizens for purposes of
raising funds to provide pensions payable by the Federation, including old-age and invalidity pensions, and can continue to use funds belonging to the Federal Government that are presently vested in the Fund to provide such pensions.

c. Under items 58 and 59 of Part I of the Federal Legislative List, the Parliament is competent to legislate in relation to "matters which under the Constitution are within the legislative competence of the Majlis-e-Shoora (Parliament) or relate to the Federation" and "matters incidental or ancillary to any matters enumerated in this Part" respectively. Article 38 of the Constitution obliges the State, which includes the Federal Government, to take steps to "provide for all citizens, within the available resources of the country, facilities for work and adequate livelihood with reasonable rest and leisure", and further, "provide for all persons employed in the service of Pakistan or otherwise, social security by compulsory social insurance or other means." Given that this is an obligation imposed on the Federation by the Constitution itself, it is arguable that the Parliament remains competent to legislate in relation to these obligations pursuant to items 58 and 59 of Part I of the Federal Legislative List, read together with Articles 38, 4 and 25 of the Constitution.

d. Section 3 of the EOB Act provides for compulsory insurance of all employees covered under the EOB Act, which is within the realm of Item 29 of the Federal Legislative List.

The Parliament can therefore continue to amend, alter and repeal the EOB Act, for it is still competent to do so under items 3, 12, 29, 37, 47, 54, 58 and 59 of Part I of the Federal Legislative List read together with Articles 4, 25 and 38 of the Constitution. In any event, the Constitution, as amended through the 18th Constitutional Amendment, creates no obligation for the Federal Government to devolve EOBI to the provinces as this would amount to (i) giving retrospective effect to omission of the Concurrent Legislative List, and (ii) unauthorized transfer of such assets and funds as validly generated and owned by the Federal Government.

**WWF**

The Workers Welfare Fund ("WWF") is a statutory institution created under the Workers Welfare Fund Ordinance, 1971 ("WWF Ordinance"), and cannot be devolved to the provincial governments as a consequence of the amendment of the Constitution, through the 18th Constitutional Amendment, for the following reasons, in addition to the reasons elaborated in relation to EOBI above:

a. Through the WWF Ordinance, the Parliament has imposed a levy on the income of industrial establishments across Pakistan that it is competent to impose under items 47 and 54 of Part I of the Federal Legislative List. Such levy is collected by the income tax department under the supervision of the Federal Board of Revenue and used for purposes enumerated in Section 6 of the WWF Ordinance. And the Parliament is competent to legislate for such purposes pursuant to Items 12, 58 and 59 of the Federal Legislative List, read together with Articles 25 and 38 of the Constitution.

b. The WWF was raised through (i) "an initial contribution of ten crores of rupees" made by the Federal Government under sub-clause 2(a) of Section 3 of the WWF Ordinance, and (ii) monies paid by industrial establishments, as required through exercise of the tax and fee imposing authority of the Parliament under items 47 and 54 of Part I of the Federal Legislative List. Thus this Fund belongs to the Federal Government and as reiterated above, the Constitution, as amended through the 18th Constitutional Amendment, does not require the Federal Government to devolve its funds and assets to the provincial governments.

c. Further, pursuant to Item 3 of Part II of the Federal Legislative List, the Parliament is competent to retain control over and legislate in relation to "institutions, establishments, bodies and corporations administered or managed by the Federal Government immediately before the commencing day of the Constitution of 1973" and "all undertakings, projects and schemes of such institutions, establishments, bodies and corporations, industries, projects and undertakings owned wholly or partially by the
that fall within the Federal Legislative List. This is a consequence of the Constitution of 1973, and consequently remains within the permanent legislative and administrative control of the Parliament and the Federal Government, respectively, by virtue of Item 3 of Part II of the Federal Legislative List, that has not been amended through the 18th Constitutional Amendment.

In view of the aforesaid, it is evident that the EOBI and WWF remain valid and functional Federal institutions. Under the Constitution, as amended through the 18th Constitutional Amendment, the Federal Government retains the authority to continue to control and operate them and the Parliament retains the ability to legislate in relation to them in accordance with the provisions of the Constitution and the Federal Legislative List. It goes without saying that the provincial assemblies are also competent to legislate and establish new provincial bodies and institutions for purposes of labor and social welfare if they so wish.

Given that the continuity of EOBI and WWF as statutory bodies has been explicitly protected by the 18th Amendment under sub-clause (6) of Article 270AA of the Constitution, any decision regarding their reorganization can only be taken by the Parliament for Federal purposes, and a provincial assembly to the extent of the territorial limit of such province. Given that the Implementation Commission has been created pursuant to sub-clause (9) of Article 270AA of the Constitution for the exclusive purpose of giving effect to sub-clause (6) of Article 270AA, while it can determine the scope and functioning of the Federal Ministry of Labour and Manpower, it has no jurisdiction to consider the reorganization of statutory bodies such as EOBI and WWF, that exist under valid Federal statutes duly protected under sub-clause (6) of Article 270AA of the Constitution as aforesaid. While the Implementation Commission can determine that another Federal ministry will oversee matters related to EOBI and WWF for administrative purposes, any attempt to reorganize and devolve the EOBI and WWF clearly falls beyond the scope of its authority.

The Parliament can take the position that it still retains the authority to legislate in relation to the subject matter of EOBI, WWF and industrial relations, given various items that fall within the Federal Legislative List. This is a legitimate position given that legislative entries within the Federal Legislative List and the erstwhile Concurrent List do overlap and continuing to exercise such power will be in consonance with the concept of cooperative federalism. Alternatively the Parliament can take a position that it no longer possesses the legislative authority to alter, amend or repeal the EOB Act and the WWF Ordinance, in which case the provincial assemblies will be the only authorities ‘competent’ for purposes of sub-clause (6) of Article 270AA to amend or repeal the EOBI Act and the WWF Ordinance.

But in such case, the competence of provincial legislatures will be limited to amending and repealing the relevant statutes to the extent of the territorial boundaries of their respective provinces. Thus, even if all the four provinces pass amending legislation, (i) the EOBI Act and the WWF Ordinance will still remain in force to the extent of Federal territories, including the Federal capital, and (ii) through such legislation the provinces will be unable to appropriate or annex any portion of the funds raised and retained under valid Federal laws, which will continue to be held by the EOBI and the WWF that will still be operational within Federal areas.

Even in the event that the Federation, in consultation with the provinces, determines that as a legal and policy matter, all labour, pension and social security matters are to be dealt with exclusively by the provinces, such decision will need to be given effect through Federal legislation coupled with mirror provincial legislation, after giving due thought to transitional issues and putting in place appropriate subset clauses to facilitate the transition. And that, in turn, will require the Parliament to take the position that it is still competent, in the aftermath of the 18th Constitutional Amendment, to legislate in relation to subject matters that comprise the EOBI Act and the WWF Ordinance.

**Conclusion and Recommendations**

The 18th Amendment and abolition of the erstwhile Concurrent List has not given rise to a legal or constitutional requirement to devolve the EOBI or the WWF. Apart from being explicitly protected under sub-clause (6) of Article 270AA(6) of the Constitution promulgated through the 18th Amendment, there also remains overlap of legislative competence between the Parliament and provincial assemblies in many areas including pensions, enforcement of fundamental rights, enforcement of international obligations and inter-provincial matters to the extent that they relate to labour rights and social welfare.
The provinces never were and are not presently barred from creating their own institutions of social welfare. But such institutions will be new institutions and will neither be successors to EOBI or WWF nor can appropriate assets owned, controlled and managed by the EOBI or the WWF. If either the EOB Act or the WWF Ordinance is to be amended or repealed, it is still Parliament (and not provincial assemblies) that is the authority competent to do so.

EOBI and WWF have extremely limited coverage and offer subsistence benefits only to employees who work for registered organizations in the formal economy that hire more than five employees. Why should employees from the informal sector – which includes a majority of the working citizens of the country – be left out of a social insurance scheme? What we need is a universal financial security and pension program for all citizens of Pakistan. We need consolidation of the EOBI and the WWF at the Federal level in order to create a Federal Pension Authority that is modeled to give effect to the ILO's flagship covenant: the Social Security (Minimum Standards) Convention, 1952.

This Convention sets minimum standards for the nine classical branches of social security: medical care, sickness benefit, unemployment benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit and survivors' benefit. Devolution of legislative authority must not be used as an argument by the Federal government and the Parliament to renege on binding Constitutional obligations of the State. Federal pensions remain within the legislative competence of Parliament, and it is about time the Federal government established a defined contributions universal pension scheme for all citizens of Pakistan.

Pension benefits partly funded by the Federal Government through the Federal Consolidated Fund and partly funded by contributions from employers, employees and the self-employed can form subject of Federal legislation under Item 12 in Part I of the Federal Legislative List, which retains the Parliament's exclusive role in legislating upon "Federal pensions, that is to say pensions payable by the Federation or out of the Federal Consolidated Fund". A Federal Pension Act – a successor law to the EOB Act – could be promulgated by the Parliament for this purpose.

Finally, whatever the choice of legislative form, the State should endeavor to put in motion a meaningful consultative process of engagement and discussions on any proposed law in order to preempt the familiar complaint of stakeholders regarding an ineffective implementation of the tripartite consultation framework in the country and enhance ownership of the adopted policies among the stakeholders i.e. labor, employers and government and to promote economic progress of the country in the long run.
International Legislative Trends Related to Labour Matters

**United States**

1. In the United States, as is the case of all large federations, the great number of lawmaking bodies (Congress and forty-eight state legislatures) makes uniform legislation impossible. Consequently, in practice each state legislature hesitates to enact any labor law that might drive the state labour into some other state. (A state law, for example, which would set the age limit of children permitted to work in cotton factories at a higher point than some neighboring state had set it, would run the risk of losing some of its cotton factories.) As a result most labour matters, in the interest of uniformity, are legislated upon federally.

2. For provisions of pensions and social security benefits, there is a single federal code called the Employee Retirement Income Security Act (ERISA) that regulates pension plans.

**India**

3. Under the Constitution of India, labour is a subject in the concurrent legislative list where both the Central and State Governments are competent to enact laws. As a result, a large number of labour laws have been enacted at both levels, catering to different aspects of labour, namely, occupational health safety, employment, minimum wages, workmen compensation, bonded labour, child labour, industrial relations and social security (including provident fund, employees’ state insurance, gratuity etc.). There are over fifty national laws and many more state-level laws.

4. The large volume of Indian labour legislation, most of which traces its roots to the British colonial era, can be divided into four categories in terms of the Central and State level division of legislative role on labour matters. Firstly, there are laws that are enacted by the Central Government, and in respect of which the Central Government has the sole responsibility for enforcement. This category includes, most importantly among other laws, the Employees’ State Insurance Act, 1948 and the Employees’ Provident Fund and Miscellaneous Provisions Act, 1952 – the principal social security legislative instrument of India.

5. The second category is of laws enacted by the Central Government that may be enforced by both Central and State Governments, and includes the Industrial Disputes Act, 1947. Additionally, other important labor matters including issues of child labour, contract labor, minimum wages, equal remuneration etc. are also enacted by the Central Government. Thirdly, almost twelve separate laws have been enacted by the Central Government, with only the State Governments being responsible for their enforcement. A final category of laws includes those which are enacted as well as enforced by various State Governments and apply to the respective States.

6. Both Central and State Governments have formulated rules to facilitate implementation of these laws. However, as the foregoing scheme of labour legislation in India indicates, minimum labour standards on key labour issues, including provident funds and social insurance, child labour, minimum wages, working conditions of labour, resolution of industrial disputes etc., are set by the Central Government, with the State Governments cooperating in and facilitating their enforcement.

**Canada**

7. Canada is a federal state like the United States. Both the federal and provincial levels of government have jurisdiction over employment and labour matters for certain types of employers. The level of government that has jurisdiction is determined by the industry in which an employer operates. Industries that are inter-provincial by nature – such as airlines, telecommunications and railways – are regulated by the federal government. Most other industries – which account for the majority of employers in Canada – fall under provincial jurisdiction.

8. Like Canada’s general labour regime, the pensions and benefits regime is varied and complex. The federal jurisdiction and each of the nine provincial jurisdictions have their own minimum standards legislation applicable to registered pension plans, in addition to the federally imposed requirements of the Income Tax Act. The lack of uniform legislation across the country has a significant impact on how pensions are managed in Canada.

9. Where members are employed in more than one Canadian jurisdiction, laws of multiple jurisdictions may apply with respect to a single registered pension plan. Although employers are permitted to offer pension plans that are more advantageous to employees, each registered pension plan must meet the minimum standards of the applicable jurisdiction(s) to obtain and maintain its registered status. Generally, the province of employment of a pension plan member will determine which minimum standards apply; however, federal minimum standards legislation will apply to members of a plan employed in a federally-regulated industry (i.e.,
banking, railways, broadcasting, etc.) regardless of the plan member's province of employment.

10. While such legislation is not identical and important differences do exist, minimum standards legislation imposes similar requirements in respect of some matters. The constant change associated with employment and labour law in Canada poses a significant challenge for businesses there. That challenge is compounded by the fact that employers with operations across Canada may be subject to differing employment laws in each province.

Germany

11. Germany is a federal state made up of 16 states that are guaranteed self-government, except as otherwise provided by the Basic Law. The States have the right to legislate, except on subjects for which the federal state enjoys exclusive legislative power.

12. Civil law, law of association and labor law are inter alia matters that the Basic Law has left under the concurrent legislative power of the federal and state legislatures. The States thus have law making power to the extent that the federal legislature has not exercised its right to legislate.

13. In Practice, civil law, law of association and other labor laws are entirely governed by Federal Law. The States nevertheless influence the adoption and amendment of the above-mentioned Acts, because they take part in the legislative procedure.

Australia

14. Under section 51(xxxv) of the Australian Commonwealth Constitution, the Federal government has the power to make laws with respect to “conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State”. In addition, the Commonwealth has chosen to regulate labor-related matters using legislative powers concerning the federal public service, “constitutional corporations”, interstate and international trade and commerce, and “external affairs”. As federal laws in all of these areas will override inconsistent State laws, the Commonwealth in practice has utilized these powers to assume a substantial regulatory responsibility for most of the labour law system. The Workplace Relations Act 2006 gave effective control of 85% of the Australian labor law system to the federal government.

15. Outside the areas outlined in the Commonwealth Constitution, the States have generally retained responsibility for the regulation of labor-related matters including occupational health.