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Concurrent List: Some Issues

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ATTENTION must be drawn to a legal issue that may have international ramifications in the event that several items from the Concurrent Legislative List are deleted pursuant to the constitutional package being put together by the committee headed by Senator Raza Rabbani.

The package will be a milestone in Pakistan's constitutional history, and in case the committee members have not already taken care of this point, this article should serve as a basis to register the concern.

The Concurrent Legislative List basically gives powers to legislate to the federal government and the provincial governments. Once some of the items are deleted as part of the 18th Amendment package, the federal government will obviously not be in a position to legislate on any matter that is currently mentioned in the Concurrent Legislative List; the power of legislation shall devolve exclusively to the provinces.

The federal government is already party to several international treaties and conventions. Pakistan will continue to consider ratifications and treaty commitments in the future as well. Let us assume that Pakistan ratifies a treaty which relates to any item in the present Concurrent Legislative List. This means that after ratification, Pakistan will have an obligation to implement the said treaty through domestic legislation or national law, which is called the 'implementing legislation' of a treaty.

With the deletion of certain items from the Concurrent Legislative List, the federal government will lose its power to legislate for the entire country as the said powers would have devolved to the provinces. This will leave the federation in an awkward position. It will need to advise all the provinces to simultaneously adopt uniform and identical legislation through their respective legislative assemblies. This is going to be extremely difficult, since the executive part of the government cannot dictate the legislative functions of the provinces. In this scenario, where the federal government cannot legislate for the entire country, Pakistan will be viewed as a non-compliant country of the given treaty — certainly not a good position to be in.

Therefore, it may be useful for the constitutional amendment committee to consider incorporating a new provision in the constitution which empowers the federal government or the

National Assembly to enact legislation referring to an international treaty or a convention for all of Pakistan's territories, even if the matter of the treaty relates to an item in the Concurrent Legislative List that will eventually be deleted.

In other words, the power to legislate as per the constitutional package in all matters of all legislative list items shall devolve to the provincial assemblies/provinces except where the federal legislature (parliament) reserves for itself the right to evolve countrywide legislation to implement a treaty or any other international law obligation.

Such a new constitutional provision should be part of the constitutional package or the proposed 18th Amendment. It will enable the federal legislature to make an implementing legislation applicable to Punjab, Sindh, the NWFP and other territories, even if the matter falls in the legislative domain of the provinces on account of the deletion of items from the Concurrent Legislative List. In this regard, a precedent exists in the Indian constitution which in Article 253 states:

“Notwithstanding anything in the foregoing provisions of this chapter, parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.”

Such a provision in Pakistan's case will not be an abduction of legislative powers but a technical requirement that the state will have to undertake to fulfill and implement international commitments. Furthermore, as a responsible state, Pakistan cannot hide behind the lack of constitutional competence to enact federal law because when viewed from the outside, the recognised principle is that the state cannot raise an alibi through its lack of legislative competence of not fulfilling its international commitments.

Let us assume that the deletion of items such as ‘arbitration’, ‘preventive detention’, ‘fire arms’, ‘environmental ecology’, ‘trade unions’ and ‘newspapers’ is proposed from the Concurrent Legislative List. In each of these areas there are international conventions and treaties to which Pakistan is a party.

In the area of arbitration, Pakistan has ratified the 1958 New York Convention for the Enforcement of Arbitral Awards. An implementing legislation has been made, yet there may be a need to further amend or upgrade it. With the deletion of this item, the federal legislature or the federal government will lose the competence to do so. Similarly, there are conventions that restrict the movement of arms and others relating to environment, environmental protection and ILO conventions for trade unions.

With the deletion of the Concurrent Legislative List, or items from it, the federal government will no longer be able to amend their respective implementing legislation and may thus be handicapped in implementing these conventions through further amendments.

Likewise, freedom of expression is guaranteed under international covenants relating to human rights and the relevant items in the present Concurrent Legislative List — books, newspapers and printing presses — will when deleted render the federal government unable to guarantee the freedom of expression and implement it through countrywide, uniform legislation. Furthermore, existing laws implementing international law obligations that have already been enacted by the federal legislature need to be saved through a saving clause.

I am quite certain that this would be part of the amendment package since otherwise, existing legislation implementing international treaties related to deleted items of the Concurrent Legislative List will lose constitutional validity. It is hoped that these issues are considered by the amendment committee as it gets ready to table the draft.

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