



## Azad Jammu and Kashmir in Pakistan's Post Eighteenth Amendment Scenario: A Critical Analysis for the Constitutional Reforms

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### Abstract

*This paper aims at critically analyzing the existing constitutional framework in AJK. AJK is administered by Pakistan as a disputed territory. The 18th amendment brought provincial autonomy and decentralization of powers for the provinces of Pakistan. The same principle and constitutional reforms may be introduced in AJK for its constitutional empowerment. This research aims to review the existing constitutional relationships between Pakistan and AJK in the backdrop of relevant resolutions of the UN. The findings of this study are based upon the review of the existing literature and documents as well as qualitative methods based on the Laws, statutory sources, eminent works of the jurists compiled in the books, research papers & articles, and the research-based reports on the constitutional development in AJK. This study suggests concrete reforms in the Legislature, executive, and judiciary of AJK. This study can be very useful and relevant in future deliberations.*

**Key Words:** Constitutional Empowerment, Conflict of J&K, 18th Amendment of Pakistan, Constitutional Reforms, 13th Amendment in AJK

### Introduction

Azad Jammu and Kashmir (AJK) is a territory that is part of the erstwhile state of J&K and was liberated on October 24, 1947. This new territory had started its functions as war council for the liberation of the entire erstwhile state of J&K. (Saraf, M.Y., 2015) As this part of the territory is the subject matter of the UN, and the matter is pending before the UN for its final settlement; therefore, the term "Interim" (Gillani, M.H., 2008) is incorporated in the nomenclature and constitutional provisions to harmonize working in legal and constitutional matters. These territories are recognized as "local authority" (Gillani, M.H., 2008) by the resolutions of the UN. Although the interim term is included in the AJK Interim Constitution, 1974, and this territory is recognized as Local Authority in the resolutions of the UN, even then, this territory has been developed like a state with a President, Prime Minister, and Cabinet, Legislature and Superior Judiciary.

AJK does not have any status under International Law as well as under the Constitution of Pakistan, 1973. Under International Law, such kind of states is termed as Vassal states or Protectorate states. (Starke, J.G., 1947) This state is still has a disputed status under the resolutions of the UNSC and UNCIP. According to the Constitution of Pakistan, 1973 (Constitution of Pakistan, 1973) AJK is not the constitutional part of Pakistan. The present setup of AJK is being run by the AJK Interim Constitution, 1974 (AJK Interim Constitution, 1974), which has certain loopholes and flaws. The Executive, Legislature, and Judicature of the AJK are not constitutionally and legally empowered. The existing constitutional relationship between the Pakistan and AJK does not ensure empowerment of AJK like the empowerment of the provinces of Pakistan guaranteed through the 18<sup>th</sup> constitutional amendment. There have been demands from the successive governments and the civil society of the AJK for constitutional empowerment, but no action has been taken by the constituent Assembly yet.

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AJK has its own constitution called the AJK Interim Constitution, 1974, which exclusively vests 32 subjects to the Government of Pakistan under Part – A of the Third Schedule. Under the Part -B of the third schedule, the other 22 subjects are also vested with Pakistan, but the Legislature of AJK can make laws on these 22 subjects with the prior permission of the Government of Pakistan. All the remaining subjects (Residue subjects) are exclusively within the domain of the Legislature of AJK. The AJK Council has no legislative and executive powers on any subject after the 13<sup>th</sup> amendment in the AJK Interim Constitution, 1974. (AJK Interim Constitution, 1974) Thus, this law does not provide any autonomy to AJK, and most of the powers are not within the realm of the elected representatives of AJK. The 18<sup>th</sup> amendment in the Constitution of Pakistan, 1973 has been proven as the great impetus for the journey of the constitutional evolution in Pakistan through which powers were devolved upon the Federating units to ensure Provincial Autonomy and true spirit of Federation. ([Shah, S. H., 1994](#)) The division of the legislative powers between the central and the federating units is the most important prerequisite of a federal constitution. In spite of the 18<sup>th</sup> Constitutional Amendment of Pakistan, 2010, so far no effective and broad-based constitutional reforms have been introduced in AJK. Although the 13<sup>th</sup> amendment has been made in the AJK Interim Constitution, 1974, that has directly surrendered more subjects to the Government of Pakistan, the objectives of constitutional empowerment and devolution of powers could not be attained yet.

The future of AJK has a direct link with the conflict of J&K, and this conflict is to be resolved under International law. ([Shah, S. H., 1994](#)) Pending the final and permanent settlement of the conflict of J&K, AJK Interim Constitution, 1974 was enforced in 1974 to ensure better Government and administration in the territory of AJK. This Interim setup could not achieve its main aims and objectives in AJK. Now keeping in view the constitutional development in Pakistan, particularly in the post 18<sup>th</sup> constitutional amendment's scenario, it has become imperative to introduce effective and broad-based constitutional reforms in AJK.

The constitutional reforms should be introduced in AJK to further strengthen the harmony and goodwill between the people of AJK and Pakistan. ([Gardezi, S.M., and others, 2015](#)) This research work will identify the loopholes in the Interim Constitutional setup of AJK and will also suggest reforms to improve the governance and the rule of law. In 2011, a detailed research-based discussion was started by the CPDR, a Think Tank based in Islamabad, followed by a report in which they had highlighted the flaws and loopholes in the existing ties between the Government of Pakistan and AJK and recommended a number of suggestions for the constitutional reforms in AJK. ([CPDR, 2011](#))

On June 02, 2018, the 13<sup>th</sup> amendment in the AJK Interim Constitution, 1974, was made through which the 52 subjects were taken from Azad Jammu and Council and have been given directly to the Government of Pakistan. Although it has given powers of collecting taxes to the Government of AJK but apart from that, no significant measures have been introduced in the 13<sup>th</sup> constitutional amendment for constitutional empowerment, strengthening local Government, devolution of powers, and independence of the judiciary.

## **Status of AJK**

AJK was liberated on October 24, 1947. The name of AJK has been given to this liberated part by the local people after their successful rebellion against the Maharaja Dynasty. AJK is part of the larger conflict of the erstwhile state of J&K. The Supreme Court of AJK made an observation in the *Ali Shah v Iftikhar Ahmed* case (2015 PLD 17 S.C. AJK) that laJK is not the foreign country for the AJK as the status of laJK is also yet to be determined under International Law. AJK is not a sovereign state under International Law because it does not fulfill the most important ingredient of sovereignty necessary for statehood. ([L.N Tandon and S.K Kapoor, 2002](#)) As far as the four ingredients or attributes of the statehood are concerned, the AJK has the population, territory, and the Government, but it lacks

sovereignty which is the most important ingredient for the statehood. (Montevideo Convention on the rights and duties of the states 1933) According to the principles and the theories of International law related to the recognition of the state and the ingredients of the statehood, AJK is a vassal state under the protecting state of Pakistan or under its suzerainty. ([Starke, J.G., 1947](#)) According to the AJK Interim Constitution, 1974, AJK is not a state; rather, it is the name of the region that had secured independence from the Maharaja dynasty in 1947. (AJK Interim Constitution, 1974) On the other hand, the Government of AJK was recognized by the UN as the

local authority. (Resolution of United Nations Commission on India and Pakistan 1948). It has been observed by the Islamabad High Court in the Islamabad Electric Supply Company Limited v Deputy Commissioner Inland Revenue, Audit – II, LTV, Islamabad (2016 PTD 2685) that AJK is not the constitutional part of Pakistan and is foreign territory. AJK is not a sovereign state or a distinct country under international law.

### **18<sup>th</sup> Constitutional Amendment of Pakistan**

The present Constitution of Pakistan was introduced in 1973, and it was the landmark achievement in the constitutional history of Pakistan. In spite of this democratic constitution, Pakistan was not an ideal federal state, and most of the powers were vested with the central Government, and the decentralization and the provincial autonomy could not be made in Pakistan till the 18<sup>th</sup> constitutional amendment. Among many other reforms, the 18<sup>th</sup> constitutional amendment omitted the concurrent legislative list and made the provision of greater provincial autonomy in line with the long-standing demand of the provinces of Pakistan. This amendment has greatly changed and transformed the relationships between the Federation and the Federating Units (Provinces). This historical amendment took place in 2010 with the consensus of the Parliament of Pakistan. ([Shaukat, N, 2012](#))

Following significant changes have been made in the Constitution of Pakistan through the 18<sup>th</sup> Constitutional amendment in 2010: Renaming NWFP, Expanding the definition of High Treason, increase in number of Fundamental Rights including the right to education, right of Fair Trial and right to information, intra - political party election, safeguards against discrimination, enhancement of the role of the senate, change in the Presidential power to make the ordinances, reduction in the powers of the President, change in the executive authority of the Federation, removal of bar on the third term of the Prime Minister and the Chief Ministers, change in the size of the cabinet, change in the qualification for election to the Parliament, devolution of the powers to the local governments and elections of the local governments under the election commission of Pakistan, constitutional four year term for the Auditor General of Pakistan, establishment of the Islamabad High Court, appointment of the five permanent election commissioners and change in the constitutional role of the election commission, establishment of the Judicial commission and the Parliamentary committee for the appointment of the judges, provision of caretaker governments, provision of the imposition of the emergency, provision of the compulsory retirement of the judges of the high courts, omission of the sixth and seventh schedules, changes to the objective resolution, new entries to the Federal Legislative List, repeal of 17<sup>th</sup> amendment and related orders, abolition of the Concurrent list, greater role of the Council of Common Interests (CCI), transfer of number of responsibilities to the Provinces and last but not the least the change in the nature and share of the National Finance Commission Award (NFC Award).([PILDAT, 2010](#)) The Parliamentary Committee on the Constitutional Reforms that proposed the 18<sup>th</sup> amendment in the constitution of Pakistan, 1973 had kept the various significant objectives/targets in its mandate for the effective and meaningful constitutional reforms. ([PILDAT, 2010](#))

### **Constitutional Setup in AJK before 13<sup>th</sup> Constitutional Amendment**

The existing constitutional setup in AJK is being managed and supervised by the AJK Interim Constitution Act, 1974. This existing constitutional arrangement is provisional and interim as it is also reflected by the name of the constitution due to the conflict of the J&K and the fact that the AJK is part of the larger conflict. It is mentioned in the preamble of the AJK Interim Constitution Act, 1974, that the primary objective of this Act is to provide better administration for the territory of AJK. (AJK Interim Constitution, 1974) The AJK Interim Constitution Act, 1974 comprises of 59 sections and a detailed preamble determining the objectives and aims of the introduction of this Act. This constitution established three organs in the territories of AJK: Executive, Judiciary, and Legislature, like other constitutions of the world.

The executive organ of the AJK consists of the Azad Government of the state of Jammu and Kashmir and the AJK Council. The AJK Council has executive powers over the 52 subjects through the Council Legislative List in accordance with the Section No 31 of the AJK Interim Constitution Act, 1974. There is a parliamentary form of Government in AJK, so all the executive powers in AJK are vested in the Prime Minister and his cabinet collectively responsible to AJK Legislative Assembly. As far as the provision of legislative powers in AJK is concerned, there are two parallel legislative bodies that make laws for the state subjects and territory of AJK. Section 31 determines and distributes the legislative powers and functions between the AJK Council and the AJK

Legislative Assembly through Council Legislative List. Judicature of AJK comprises of Supreme Court and High Court. As AJK is neither the constitutional part of Pakistan nor the province of Pakistan, therefore, the jurisdiction of AJK cannot be extended to AJK. The judges of the Supreme Court and the High court are appointed by the President of AJK as per the procedure laid down in AJK Interim Constitution Act, 1974.

### **Constitutional Setup in Azad Jammu and Kashmir in Post 13<sup>th</sup> Constitutional Amendment of AJK's Scenario**

The 13<sup>th</sup> constitutional amendment was made in the AJK Interim Constitution, 1974, on June 02, 1974. This constitutional amendment brought certain changes in the AJK Interim Constitution, 1974. Following are the significant changes made in the AJK Interim Constitution, 1974:

- a) This amendment changed the nomenclature of the constitution from "AJK Interim Constitution Act, 1974" to "AJK Interim Constitution, 1974".
- b) The nomenclatures of the "Section and subsection" converted into "article and sub-articles".
- c) The concept of Joint Sitting of AJK Legislative Assembly and AJK Council is also omitted from the AJK Interim constitution, 1974.
- d) The first time, Principles of Policy have been included in the AJK Interim Constitution, 1974, like that of the Constitution of Pakistan, 1973.
- e) The important fundamental rights, including the right to education, right to information and right to a fair trial, etc. have been incorporated in the AJK Interim Constitution, 1974.
- f) According to article 19 of the AJK Interim Constitution, 1974, the executive authority of the Government of AJK shall extend to all the matters with respect to which the Assembly has the power to make laws, including the part B of the third schedule and legislative authority of the AJK Legislative Assembly.
- g) According to Article 31 of the AJK Interim Constitution, 1974, AJK Legislative Assembly shall have powers to make laws on any matter not enumerated in Part – A of the third schedule and the AJK Legislative Assembly also has the power to make laws on 22 subjects of the part – B of the third schedule with the consent of the Government of Pakistan.
- h) The Government of Pakistan shall have exclusive legislative and executive powers on 32 subjects of Part – A of the third schedule.
- i) After the 13<sup>th</sup> Constitutional amendment of AJK, AJK Council has no legislative, executive, or financial powers at all, and the institution of joint sitting has also been abolished through this amendment. Now, AJK Council links as a coordinating forum between Pakistan and AJK and Chairman, AJK Council (PM of Pakistan is the ex- officio Chairman of AJK Council) still has powers to give advice for the appointment of the judges in the superior judiciary.

### **Critical and Comparative Analysis of the Existing Constitutional Setup in AJK in the Backdrop of 18<sup>th</sup> Constitutional Amendment of Pakistan**

The setup of AJK was established on October 24, 1947. Since then, there has been a direct impact of constitutional development in Pakistan on the constitutional development in AJK. Different Rules of Businesses and the AJK Government Acts have been introduced from time to time in AJK in line with the parallel constitutional and legal development in Pakistan. The constitutional and legal development in AJK largely depends upon the following important factors, inter alia:

- a) The form of Government in Pakistan,
- b) The level and stage of the constitutional development in Pakistan,
- c) Nature and extent of the cordial relationship of the political leadership of AJK with the ruling political parties of Pakistan.
- d) Response on the conflict of Jammu and Kashmir by the UN, International Community, and India.

That is why, when Ayub Khan came in Pakistan and introduced the concept of Basic Democracy, the same law and same Presidential form of Government with the provision of the indirect election was introduced in AJK. In 1969, when General Yahya came in power in Pakistan, he gave the AJK Government Act, 1970 in AJK. Later, with the emergence of Zulfikar Ali Bhutto and the introduction of the Constitution of Pakistan, 1973 in Pakistan,

a new constitution was introduced in AJK with the name of AJK Interim Constitution Act, 1974 as a result of the Islamabad Conference held in Islamabad in 1974. This Act is still enforced in AJK with certain changes and modifications introduced through thirteen amendments made from time to time, and the last amendment was made in June 2018.

The AJK Interim Constitution Act, 1974 introduced three very important and new features in the political system of AJK as follows:

- a) Institution of AJK Council.
- b) Provision of Joint sitting for amendment of the constitution (abolished in 13<sup>th</sup> constitutional amendment of AJK in 2018)
- c) Parliamentary Form of Government. ([Gillani, S.M., 2008](#))

There is a parliamentary form of Government in Pakistan. There is a three tier executive governance model applicable in Pakistan, and all are working vertically under the provisions of the Constitution of Pakistan, 1973 in their respective spheres defined and delimited by the constitution through different provisions and constitutional protection. These tiers are Federal, Provincial, and Local governments. There is provincial autonomy, and in the light of the 18<sup>th</sup> amendment of the constitution, most of the powers have been devolved upon the provinces in line with the policy of the decentralization of powers from Centre to grass root levels. The 18<sup>th</sup> amendment to the constitution of Pakistan comprised a total of 102 amendments to various articles of the constitution. ([LUMS, 2012](#)) There is a Prime Minister and the cabinet at the federal level, Chief Minister and its cabinet at the provincial levels, and the local governments at the district levels throughout Pakistan, including the four provinces and Islamabad Capital Territory. No effective and broad-based constitutional reforms have been introduced in AJK yet as it is not the constitutional part of Pakistan. However, the 13<sup>th</sup> amendment was made in the AJK Interim Constitution, 1974, but that also failed to give constitutional empowerment, devolution of powers, and independence of Judiciary to AJK.

In Pakistan, through the 18<sup>th</sup> constitutional amendment, most of the executive powers have been devolved upon the provinces, and then, through the concept of Local Government, executive powers were further devolved upon the local bodies. So 18<sup>th</sup> amendment had led to the devolution of the executive powers at the grass-root level in Pakistan and had made provincial autonomy possible for all the provinces. Whereas, on the other side, in AJK, before the 13<sup>th</sup> constitutional amendment, there were three tiers of the executive powers, where four (04) important subjects of Foreign Affairs, Defense, Currency, and the Responsibilities under UNCIP Resolutions are exclusively vested with Pakistan. This was the first tier of the executive powers being exercised in relation to the affairs of AJK. The second tier of the executive powers was vested with the AJK Council, which enjoyed exclusive powers on the fifty-two (52) subjects without any accountability and check and balance by the democratic and the judicial bodies of AJK in its true letter and spirit. In AJK Council, six (06) members are indirectly elected by the members of the Legislative Assembly of AJK on the basis of the proportional representation, and the five (05) members are nominated by the Chairman of the AJK Council from amongst the members of the Parliament of Pakistan. Prime Minister of Pakistan is the ex- Officio Chairman of the AJK Council, and the President of AJK is the ex – officio Vice Chairman of the AJK Council. Prime Minister of AJK or his nominee and the Federal Minister for Kashmir Affairs are also members of the AJK Council. (AJK Interim Constitution, 1974) The nature of the AJK is non representative and non-democratic, and all the important subjects were given to the AJK council before the 13<sup>th</sup> constitutional amendment, which had deprived the Government of AJK of all the important subjects. The Government of AJK had the executive powers on the remaining subjects other than above mentioned 56 subjects. Thus, the political system laid down in AJK was highly centralized, and there were very few subjects at the level of the Government of AJK, which is contrary to the principle of devolution of the powers at the grass-root level applied in Pakistan through the 18<sup>th</sup> constitutional amendment. Lastly, there was no presence of the elected local government system in AJK, which is also ultra vires to the spirit of the 18<sup>th</sup> constitutional amendment of Pakistan.

However, in 2018, the 13<sup>th</sup> constitutional amendment has been made by the AJK Legislative Assembly with the prior approval of the Government of Pakistan, and the distribution of powers among the Government of Pakistan, AJK Council, and Azad Jammu and Kashmir have been readjusted. So in the 13<sup>th</sup> constitutional amendment, the Government of Pakistan has been given exclusive legislative and executive powers on 32 subjects in part – A of the third schedule and 22 subjects have also been given to the Government of Pakistan, but AJK

Legislative Assembly can make laws on those subjects and Government of AJK also can exercise executive powers on those 22 subjects with the permission of Government of Pakistan. Except these 54 subjects, all the residue subjects have been exclusively given to the AJK Legislative Assembly for legislation and Azad Government of the state of Jammu and Kashmir for executive powers. On the other hand, all the 52 subjects of the AJK Council have been taken in the 13<sup>th</sup> Constitutional amendment and have been given directly to the Government of Pakistan. So the political system of AJK is still highly centralized, and there has not been made a devolution of powers at the level of AJK in its true letter and spirit. Moreover, the local government elections could not be held in AJK since a long time so this situation has further made the entire political milieu of AJK very central and less democratic and to a great extent, this is against the true spirit of the 18<sup>th</sup> constitutional amendment of Pakistan.

According to the Constitution of Pakistan, 1973, the Legislature of the Federation is called as Parliament (Majlis – e - Shoora) ([Shaukat, N., 2012](#)) and it comprises of the President, Senate, and the National Assembly. On the other hand, the Legislature of the provinces comprises of the Governor and the Provincial Assemblies. After the 18<sup>th</sup> constitutional amendment, most of the legislative powers have been devolved upon the Provinces in order to uphold the provincial autonomy in all the provinces of Pakistan. ([PILDAT, 2010](#)) The concurrent legislative list was also abolished, and now there is only a legislative list in Pakistan that is called the Federal Legislative List. The Parliament of Pakistan has the exclusive powers to make legislation on the subjects enumerated on the Federal legislative list (FLL), and Provincial Legislatures can make laws on the subjects not enumerated on the Federal Legislative List (FLL). Thus, the 18<sup>th</sup> amendment has led to provincial autonomy and the devolution of all powers, including the legislative powers, to provinces.

On the other hand, in AJK, before the 13<sup>th</sup> constitutional amendment, the four (04) subjects of Foreign Affairs, Defense, Currency, and Responsibilities under UNCIP Resolutions are exclusively vested with Pakistan. The fifty-two (52) subjects are vested with AJK Council, and the Council issued the laws called as the Council Acts in accordance with the subjects mentioned in the Council legislative List. The AJK Legislative Assembly has the exclusive powers to make legislation on the subjects not enumerated on the Council Legislative List and also not vested with Pakistan. This is also against the basic spirit of democracy and not in line with the basic objectives of the 18<sup>th</sup> amendment of the Constitution of Pakistan. However, the 13<sup>th</sup> constitutional amendment was passed in 2018, and the distribution of legislative powers have been changed drastically. Now there is a Third schedule in the AJK Interim Constitution, 1974 with Part – A and Part – B. Part – A of the AJK Interim Constitution, 1974 comprises of 32 subjects that are exclusively vested with the Government of Pakistan. Part – B of the AJK Interim Constitution, 1974 comprises 22 subjects which are vested with the Government of Pakistan, but AJK Legislative Assembly can make laws on these subjects with permission of the Government of Pakistan. In the post 13<sup>th</sup> amendment scenario, AJK Council has only an advisory role with respect to sub-article 3 of Article 31 and responsibilities of the Government of Pakistan under the UNSCIP Resolutions and has no legislative and executive powers at all.

According to the Constitution of Pakistan 1973, the Judicature comprises of the Supreme Court and the High Courts of the provinces and Islamabad. ([Shaukat, N., 2012](#)) The 18<sup>th</sup> amendment and post 18<sup>th</sup> amendment constitutional development in Pakistan has established the independence of the Judiciary in Pakistan. The powers to appoint the Judges of the superior courts were taken away from the executive, and a special parliamentary committee and the judicial commission were finally established; only the institution of the judicial commission was strengthened and developed for the formal appointment of the judges of the superior courts. This opened a new era of the superior role of the judiciary in Pakistan for promoting rule of law and the administration of the judiciary without any interference of the executive. The most important aspects are the jurisdiction, powers, formal and institutional appointment of the judges of the superior courts, and financial independence. In the *Al – Jihad Trust vs Federation of Pakistan (Judges Case)*, the Supreme Court of Pakistan maintained that the appointment of the judges should be made through a transparent and proper manner. (PLD 1996 S.C. 324)

On the other hand, the judiciary in AJK comprises of the Supreme Court and a High Court. (AJK Interim Constitution, 1974) The powers, functions, and jurisdiction of the superior courts in AJK is far less than the superior judiciary of Pakistan. The Supreme Court of AJK has no original jurisdiction and no cognizance similar to the cognizance of the Supreme Court under Article 184 (03) of the Constitution of Pakistan, 1973. (The Constitution of Pakistan, 1973) Moreover, the appointment of the Judges in the superior judiciary of AJK is still

in the hands of the executive of AJK and the Prime Minister of Pakistan as the ex – officio chairman of AJK Council. (Gillani, M.H., 2008) The appointment of the judges of the superior courts of AJK on the wishes and directions of the executive organs and the political elements are the greatest hurdles in the independence of the Judiciary in AJK.

Apart from the Legislature, Executive, and Judicature, there are also different other aspects of the AJK Interim Constitution, 1974, which are required to be amended in the light of the provisions of the Constitution of Pakistan, 1973 in post 18<sup>th</sup> constitutional amendment's scenario. These aspects, inter alia, includes nature of the fundamental rights, powers, functions, and nature of the institution of the Election Commission, provision regarding the intraparty elections and the defections from the political party, limitations on the powers of the President to promulgate the ordinance, creation of an institution in AJK like Senate of Pakistan and its enhanced role, qualifications, and disqualifications of the members of the Legislative and its supervisory control over reservoirs and provision of imposition of emergency in AJK.

### **Proposed Changes in the AJK Interim Constitution, 1974 and Recommendations**

The AJK Interim Constitution, 1974 needs constitutional amendments in order to bring the constitutional framework of AJK in parity with the constitutional framework of Pakistan in post 18<sup>th</sup> amendment's milieu. The 18<sup>th</sup> amendment of Pakistan has established the basis and foundation for the flourishing of real democracy in Pakistan by enabling provincial autonomy and the devolution of the powers at the grass-root level. The AJK Interim Constitution, 1974 was approved and enforced in 1974 and since then four decades have been passed, and no concrete and broad-based changes could be brought in this document. After the 18<sup>th</sup> amendment of Pakistan and in post 18<sup>th</sup> amendment constitutional development in Pakistan, the people of AJK have been demanding constitutional reforms in AJK for promoting and ensuring the proper administration of justice and good governance in the AJK in parity with the salient features of the 18<sup>th</sup> amendment introduced in Pakistan particularly the provincial autonomy and the devolution plan. The constitutional reforms in AJK will have a positive impact on the political economy and social life of the people of AJK and will also positively affect the principled stand of Pakistan on the issue of Jammu and Kashmir in the International Institutions and the comity of nations. Although the 13<sup>th</sup> constitutional amendment was introduced in AJK on June 02, 2018, but could not reflect the spirit and scheme of the 18<sup>th</sup> constitutional amendment in its true spirit in AJK, keeping in view the disputed status of AJK as well.

Following are the important recommendations for the constitutional reforms in the AJK on the basis of the provisions and the features of the 18<sup>th</sup> Constitutional amendment in the Constitution of Pakistan, 1973:

- i) The third schedule distributing legislative subjects between Government of Pakistan and AJK should be abolished and except four subjects of Defense, Foreign Affairs, Communications and Responsibilities of Government of Pakistan under UNSCIP Resolutions, other fifty ( 50) subjects of part – A and part – B of the third schedule should be exclusively vested with AJK Legislative Assembly . All the executive, legislative, financial and related powers on the said 50 subjects of Part A and Part B of Third Schedule except already stated four subjects should be devolved upon the concerned corresponding institutions of AJK: AJK Legislative Assembly and the Government of AJK.
- ii) The AJK Council should be made a coordinating institution and advisory body between the AJK and Pakistan only on the four subjects vested with Pakistan: Defense, Currency, Foreign Affairs and responsibilities of Pakistan under UNCIP Resolutions. The 13<sup>th</sup> constitutional amendment has made AJK Council as Advisory body on the 32 subjects of Government of Pakistan under Part – A of the Third schedule. The composition of the AJK Council should be changed, and an equal number of representations of members from Pakistan and AJK should be ensured through the constitutional amendment in the AJK Interim Constitution, 1974, which among others should also include the Prime Ministers and Leader of opposition of both sides. The AJK Council should not exercise any sort of powers and should only play its effective role of coordination and advising on the issues vested with Pakistan.
- iii) Except the four subjects vested with Pakistan, the executive powers on all the remaining subjects should exclusively be exercised by the Government of AJK having Parliamentary Form of Government.

Moreover, in accordance with the 18<sup>th</sup> amendment of Pakistan, the size of the cabinet should be restricted to eleven percent of the total members of the AJK Legislative Assembly.

- iv) In the light of the post 18<sup>th</sup> amendment's scenario of Pakistan, the powers to appoint the judges should be entrusted to an appropriate institution without any interference of executive or political elements. An independent and powerful Judicial Commission can take the lead in AJK in attaining the Independence of Judiciary and for promotion of rule of law.
- v) The superior judiciary should be given all necessary jurisdictions and powers in the light of the jurisdictions and powers of the superior judiciary of Pakistan for the proper dispensation of justice and protecting the rights of the people in AJK. Most importantly, the supreme court of AJK should be given original jurisdiction and *Suo motu* powers.
- vi) For the accountability of the superior judiciary and to ensure the supremacy of justice and rule of law in the conduct of judges of the superior judiciary, it is necessary to constitute an effective and sustainable mechanism like Supreme Judicial Council to ensure check and balance and oversight as well as proper exercise of powers.
- vii) In line with the 18<sup>th</sup> amendment of Pakistan, an independent, powerful and effective Election Commission should be constituted in AJK for the smooth, fair and impartial elections. Moreover, in parity with the constitutional amendments in Pakistan, the appointment of the Chief Election Commissioner of AJK should be regularized through a parliamentary committee from both the benches. Besides, the election for the 12 seats of the refugees settled in Pakistan should be made through a system of proportional representation in order to avoid inconvenience and difficulty in managing and supervising the elections throughout the territory of Pakistan without any neutral and directly controlled administrative machinery.
- viii) Special provisions should be added in the AJK Interim Constitution, 1974 regarding the intraparty elections and defections from the political parties in the light of Article 63 –A and Article 17 of the Constitution of Pakistan, 1973 as amended in the 18<sup>th</sup> Constitutional amendment. Since AJK is a developing democracy, therefore, these measures would definitely strengthen the values of democracy in the future.
- ix) A change should be brought in the AJK Interim Constitution, 1974 to put limitations on the powers of the President to promulgate ordinance and other related powers so that a pure parliamentary form of Government can be attained with supremacy of the Legislature. Therefore, a constitutional amendment should be made so that President can issue an ordinance only once and only when the Legislature is not in session. Besides, only one extension should be possible through the resolution of the Legislature. This amendment is very important to place a check on the unfettered powers of the President to make laws in the form of the ordinances and then to extend the same for unjustified reasons and circumstances. Moreover, a constitutional amendment should also be made requiring the President to act on the advice of the Prime Minister/Cabinet within a period of fifteen days, and in case of the failure of the President to take any decision within fifteen days, then the assent should be deemed to be given by the President.
- x) An upper house like that of the senate in Pakistan should also be established in the AJK for effective legislative process and mutual check and balance between the two houses of bicameral Legislature.
- xi) The provisions of Article 62 and Article 63 as amended through the 18<sup>th</sup> constitutional amendment of Pakistan should also be incorporated in the AJK Interim Constitution Act, 1974 for having detailed criteria for the qualifications and disqualifications of the members of the Legislature of AJK.
- xii) In order to strengthen the supremacy of the Legislature in AJK, a constitutional change should be made in the AJK Interim Constitution, 1974 to make it mandatory to not impose any emergency in AJK without the prior resolution of the Legislature of AJK.
- xiii) Special provisions should be introduced in the AJK Interim Constitution, 1974 with corresponding provisions in the Constitution of Pakistan, 1973 for observer status of AJK in Council of Common Interest (CCI), National Finance Commission (NFC) and Indus River System Authority (IRSA) of Pakistan to protect and promote the interests of AJK with respect to natural resources, reservoirs, hydel power stations, water use charges and net hydel profits and other related matters.

- xiv) The appointments of the lent officers should be made on deputation in the AJK with some special deputation policy, and in this regard, a constitutional provision should be introduced in the AJK Interim Constitution, 1974 to regularize the relationship between Pakistan and AJK.
- xv) A special provision should be made regarding the establishment of the caretaker governments in consultation with the outgoing Prime Minister and the Leader of the Opposition of AJK for ensuring the transparency of the elections and to neutralize the effect of the outgoing Government on the process of the elections.
- xvi) The institution of AJK council is very important as far as coordination and liaison between Pakistan and AJK is concerned. It is pertinent and necessary to devolve all the subjects of the AJK Council to the institutions of AJK and keep this body as a symbolical link between the Pakistan and AJK. This body of the council should be utilized effectively for the promotion of the Kashmir cause and a common and diverse platform should be developed in the form of the AJK council for the respective governments of Pakistan and AJK to discuss and resolve the issues pertaining to the jurisdictions of both Pakistan and AJK. Presently, there is no effective body to resolve the Pakistan and AJK inter se issues, so this can be an effective forum for coordination and resolution of the issues but without any legislative and executive powers.

## **Conclusion**

It is concluded from this study that AJK needs drastic reforms in its constitution in order to bring it in line with the features and objectives of the 18<sup>th</sup> constitutional amendment of Pakistan, 1973, which brought the provincial autonomy and devolution of powers at the grass-root level. From its inception to date, no concrete and effective constitutional reforms could be introduced and enforced in AJK. The constitutional development in AJK was under direct effect of the constitutional development of Pakistan. One can easily find out the cause and effect relationship between the constitutional development of Pakistan and the constitutional development in AJK. Recently, 13<sup>th</sup> constitutional amendment was introduced in AJK but that could not reflect the spirit of 18<sup>th</sup> constitutional amendment in AJK. The constitutional framework of Pakistan was completely overhauled by Parliament through the 18<sup>th</sup> constitutional amendment of Pakistan in 2010. Unfortunately, during this period, no constitutional reforms could be introduced in AJK in parity with constitutional reforms introduced in Pakistan in the backdrop of 18<sup>th</sup> amendment and post 18<sup>th</sup> amendment constitutional development of Pakistan. It is the dire need to constitutionally empower the AJK Legislative Assembly and the Government of AJK to make sure the principle of the autonomy of AJK in the light of 18<sup>th</sup> amendment of the Constitution of Pakistan, 1973 and in accordance with the requirements of the disputed status of AJK being the part of the larger conflict of Jammu and Kashmir.

## References

- CPDR. (2011). An Appraisal of Constitutional, Financial and Administrative Arrangements between the Governments of Pakistan and Azad Jammu and Kashmir.
- Gardezi, S. M., Rehman, A., Awan, A., Khalique, S., & Shafique, Z. (2015). 'National Integration and Cohesion in Pakistan: Voices from AJK. *Journal of Contemporary Studies*. 4(1),
- Gillani, M. H. (2008). *The Constitution of Azad Jammu and Kashmir*. National Book Foundation.
- LUMS. (2012). Supporting Transparency, Accountability and Electoral Processes in Pakistan Program (STAEP), 'Research Report on the 18Th Amendment - Opportunities and Challenges of Devolution in Pakistan.
- PILDAT. (2010). Impact Of 18th Constitutional Amendment on Federation - Province Relations. PLD 1996 S.C. 324\
- Resolution of United Nations Commission on India and Pakistan 1948.
- Saraf, M. Y. (2015). Kashmiris Fight for Freedom. National Institute of Kashmir Studies.
- Shah, S. H. (1994). Federalism in Pakistan, Theory and Practice. National Institute of Pakistan Studies.
- Shaukat, N. (2012). The Constitution of the Islamic Republic Of Pakistan, 1973. Legal Research Centre.
- Starke, J. G. (1947). An Introduction to International Law. Butterworth's.
- Tandon, L. N., & Kapoor, S. K. (2002). *International Law*. Mansoor Book House. 2015 PLD 17 S.C. AJK
- 2016 PTD 2685 (Islamabad High Court)
- Azad Jammu and Kashmir Interim Constitution Act, 1974.