

**The Devolution of Power in Pakistan: A Historical, Critical and Comparative Analysis of the Existing Local Government Statutes of Pakistan in Context of the Constitution of Pakistan with Prospective Reforms**

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**ABSTRACT**

*Article 140A of the Constitution of Pakistan 1973 as re-enforced by the Constitution (Eighteenth Amendment) Act 2010 provides for a tripartite mandatory obligation upon each of the provinces to provide for a system of local government and to devolve political, administrative and financial responsibility and authority to elected representatives of local governments. Notwithstanding this constitutional imperative, there is systematic non-compliance by all the existing local government statutory laws in all provinces and territories within Pakistan representing a national deficit of devolution constitutional proportions. This paper has been written as a four dimensional doctrinal, historical and comparative legal analysis of 5 Statutory frameworks -- The Punjab Local Government Act 2022 (as amended), The Sindh Local Government Act 2013 (as amended), the Khyber Pakhtunkhwa Local Government Act 2013 (as amended), the Balochistan Local Government Act 2010 (as amended) and the Islamabad Capital Territory Local Government Act 2015 (as amended) -- against a formally derived Minimum Content Standard of Three mechanisms of recentralisation, including a loophole in the administrative provisions, a non-binding Provincial Finance Commission and parallel architecture of authority, are common to all five jurisdictions. The paper proposes three integrated Reform Instruments namely, Proposed Constitutional Amendment to Article 140A, Model Provincial Local Government Act and Parallel Authority Reform Framework.*

**Keywords:** Article 140A; constitutional compliance; devolution; Eighteenth Amendment; fiscal federalism; local government; Minimum Content Standard; Pakistan

**INTRODUCTION**

Pakistan has a constitutional anomaly of singular doctrinal importance: The elected local government system created under the mandatory command of Article 140A of the Constitution of Pakistan 1973 [1] meets demonstrably lower devolutionary compliance than the military era Local Government Ordinance 2001 (hereinafter "LGO 2001") [2], which was promulgated without any constitutional mandate through military executive power. This Inter-Era Paradox -- in which constitutional obligation leads to inferior results in comparison to the non-constitutional source -- is the principle intellectual problem of this paper. The paradox is not a mere historical phenomenon, but it is structural drawback in the constitutional structure of the devolution that still leaves millions of Pakistani citizens without the access to meaningful local self-governance as per the Constitution.

Article 140A was first introduced in the Constitution by the Legal Framework Order 2002 (henceforth "LFO 2002") [3] and was validated through the Constitution (Seventeenth Amendment) Act 2003 [4]. It was strengthened and given its fullest constitutional expression by the Constitution (Eighteenth Amendment) Act 2010 [5] that transformed it from a nominal provision into a substantive constitutional command. The text of Article 140A (1) is clear: "Each Province shall, by law, establish a local government system and devolve political, administrative and financial responsibility and authority to the elected representatives of the local governments" [1]. The peremptory word "shall" is used to make establishment and empowerment of local governments a non-discretionary constitutional duty. Article 140A(2) gives the Election Commission of Pakistan an exclusive electoral management authority insulating the local continuity of democratic management from provincial executive manipulation. The Supreme Court of Pakistan held in 2014 SCMR 1 [6] on the scope of Article 140A that there is no scope for any negotiations regarding the strict adherence to Article 140A. The Lahore High Court in PLD 2024 Lahore 238 [7] explicitly held that Article 140A requires true and irreversible constitutional devolution and not revocable administrative delegation which directly codified the tripartite analytical distinction between deconcentration, delegation and devolution which is the governing analytical framework of this paper.

The historical development of local government legislation shows that there is a deeply rooted pattern of cyclical statutory subordination. The Government of India Act 1935 [8], which was adopted as the interim constitutional instrument of Pakistan, listed local government as an exclusively provincial subject under the Seventh Schedule (Provincial List), and the precedent of administrative subordination without constitutional protection was therefore established. The Basic Democracies Order 1959 [9] established four levels of local councils under Field Marshal Ayub Khan which were more of a presidential electoral college than actual organs of community rule. The Provincial Local Government Ordinances 1979 [10], issued under the martial law government of General Zia ul-Haq in all four provinces, continued the supremacy of Deputy Commissioners but a Provincial Finance Commission (PFC) mechanism of non-binding advisory character was introduced for the first time ever. The LGO 2001 which was promulgated as a single federal ordinance under the military executive authority of General Musharraf, transferred eighteen provincial departments to elected District Governments, constituting the most ambitious devolutionary experiment in the legislative history of Pakistan. Following the 2008 restoration of democratic government all four provinces repealed the LGO 2001 to create a long governance vacuum before introducing their respective Local Government Acts between 2010 and 2013, followed by the ICT Local Government Act 2015.

The five existing statutory frameworks, namely the Punjab local government Act 2022 [11], Sindh local government Act 2013 (as amended) [12], Khyber Pakhtunkhwa local government Act 2013 (as amended) [13], Balochistan local government Act 2010 (as amended) [14] and Islamabad capital territory local government Act 2015 [15] are characterised by systematic non-compliance with Article 140A through the Second, the non-binding Provincial Finance Commission (All PFCs) mechanisms in each statute are consultative institutions whose recommendations are not binding on the provincial government, and whose recommendations are rejected by the government with legal impunity thus creating institutionalised fiscal dependency instead of genuine fiscal devolution. Third, the parallel authority architecture: development authorities, water and sewerage boards, building control agencies and waste management bodies established under separate provincial statutes perform municipal functions which are constitutionally obliged to be discharged by elected local governments and this effectively displaces elected councils from performing the very functions that Article 140A requires them to discharge.

The Primary Research Question addressed by this paper is - to what extent do the existing local government statutory frameworks comply with the tripartite constitutional obligation of Article 140A? Secondary Research Question One is: does the Musharraf-era LGO 2001, enacted without constitutional mandate, confer more substantive devolutionary authority than the post-Eighteenth Amendment provincial statutes passed under the mandatory command of Article 140A - the Inter-Era Paradox? Secondary Research

Question Two asks: what is the Minimum Content of the tripartite obligation imposed by Article 140A in the form of a formally derivable and judicially-enforceable Minimum Content Standard? The structure of the paper is as follows: Section II relates the relevant literature; Section III explains the methodology; Section IV relates the four dimensional findings including the constitutionality compliance matrix; Section V analyses the Inter-Era Paradox and the structural recentralisation mechanisms; Section VI recommends three integrated Reform Instruments; Section VII concludes.

## **LITERATURE REVIEW**

### *A. Conceptual Literature: Devolution, Delegation, and Deconcentration*

The conceptual architecture which governs this paper is based on the tripartite analytical distinction between deconcentration, delegation and devolution as formally distinct categories of decentralisation. Deconcentration is the process of spatial redistribution of governmental functions to field officers of the same level of government, without the transfer of the decision-making authority to self-governing structures. Delegation is revocable conferment of designated function to inferior agents at the will of the principal. Devolution as per Article 140A [1] of constitution of Pakistan means irrevocable constitutional transfer of political, administrative and fiscal powers to separately elected institutions with mandate derived from popular election and not that of executive appointment. This tripartite distinction comes from the legal positivist tradition established by H.L.A. Hart (The Concept of Law) [16] and Hans Kelsen (Pure Theory of Law) [17]. Hart's conceptualisation of law as a union of primary rules imposing duties and secondary rules conferring legislative powers applies directly to Article 140A [1], which functions as a supreme secondary rule which sets the framework of mandatory rules within which provincial assemblies will exercise their legislative powers over the governance of municipalities. Kelsen's concept of the Grundnorm -- the basic norm from which all the lower norms are valid [17] -- states that any statute in a province which formally creates a system of local government but which substantively denies it tripartite devolutionary authority is constitutionally invalid no matter how democratically enacted. The Lahore High Court in the case of PLD 2024 Lahore 238 [7] confirmed this positivist hierarchy and specifically ruled that real constitutional devolution was impossible to be substituted with administrative delegation.

### *B. Constitutional and Statutory Scholarship: The Minimum Content Gap*

Existing doctrinal scholarship on Article 140A has been able to progressively identify the structural tension existing between the constitutional mandate of devolution, and provincial legislative reluctance to implement the same. Scholars have written at length about the statutory design by which the provincial assemblies wish to invoke the language of devolution and yet substantively recentralize authority -- through the appointment of administrators, the use of non-binding PFC mechanisms and parallel authority frameworks -- in a manner that is directly contrary to the spirit, and arguably the letter, of Article 140A [1]. The Eighteenth amendment [5] took provincial autonomy a long step forward by abolishing the Concurrent Legislative List and devolving residuary legislative competence to provincial assemblies but such an increase exposed a structural tension: provinces were given broad legislative autonomy in just that area -- local government -- in which Article 140A simultaneously imposed a mandatory constitutional floor. One deficiency in the existing scholarship was glaring in the sense that there was no formally articulated Minimum Content Standard of what that irreducible constitutional floor of Article 140A compliance is. While it is common for scholars to bemoan the interference of provincial interference, few have been vocal about the proposition of an all encompassing and justiciable standard for the doctrinal definition of the absolute legislative boundaries of political, administrative and fiscal devolution - which is the gap this paper's Minimum Content Standard is designed to fill.

*C. Historical Literature: The Inter-Era Paradox*

Scholarship on Pakistan's four devolutionary regimes - the Ayub era Basic Democracies Order 1959 [9], the Zia era Provincial Local Government Ordinances 1979, the Musharraf era LGO 2001 [2] and the post-Eighteenth Amendment provincial statutes - has established the cyclical pattern of centralization, but has neither formally postulated nor rigorously tested the Inter-Era Paradox: the proposition that a pre-constitutional military ordinance brought greater substantive devolutionary authority than the constitutionally mandated post-2010. The absence of such a systematic quantification through the eras is an important gap in the legal scholarship, one which the Tripartite Model of Devolution as it is applied in this paper is intended to address. The LGO 2001's transfer of eighteen provincial departments to elected District Governments under Schedule II [2] - the transfer has no equivalent in any post-2010 provincial statute - is the primary piece of statutory evidence for the Inter-Era Paradox that the historical literature has undertheorised.

*D. Judicial Jurisprudence: The Transformative Trajectory and its Limitations*

Superior court jurisprudence of local government has moved away from institutional restrictions and towards progressive constitutional activism during the past decade. The Supreme Court in the year 2014 SCMR 1 [6] affirmed that Constitution is an instrument of the people which obligate them to themselves and that there is non-negotiability of strict adherence to Article 140A -- laying the foundation pronouncement of the Supreme Court. In PLD 2021 SC 770 [18] (Asad Ali Khan v. Province of Punjab), the Court laid down that administrator rule without the order for election and the fixing of dates for such election was prima facie unconstitutional, the most explicit judicial restriction of the administrator loophole to date. In PLD 2022 SC 439 [19] (MQM Pakistan v. Province of Sindh) in which a part of the Sindh local government Act 2013 which empowered the provincial government to deprive elected local councils of meaningful authority was struck down by the court in which it held that the mandatory obligation laid down in Article 140A to establish local government with meaningful authority in all three dimensions. In PLD 2023 SC 56 [20], the Court held the exclusive electoral management mandate of ECP. PLD 2024 Lahore 238 [7] the differentiation between deconcentration-delegation-devolution was last codified and made judicially applicable analytical framework. Nevertheless, judicial enforcement as a separate remedy is limited in its scope by four structural problems: the persistence of the gap between judicial declaration and legislative compliance; lack of institutional monitoring capacity; inability of any one case to tackle all twelve Minimum Content elements simultaneously; and doctrinal inconsistency caused by 2015 SCMR 1739 [21], which partially legitimates the parallel architecture of authority, which is at odds with devolutionary jurisprudence of the Court overall.

*E. Comparative International Literature*

The comparative study of local governments on constitutional minimum content standards shows that there are four transplantable models, which have a direct bearing on the Pakistani reform agenda. India's Seventy third and Seventy fourth Constitutional Amendments 1992 [22] added Eleventh and Twelfth Schedules listing functions constitutionally guaranteed to Panchayats and Municipalities which provide the precedent of a constitutionally binding functional floor against which legislative departures are judicially measured. South Africa's Chapter 7 of the Constitution 1996 [23], which characterised local government as a constitutionally protected sphere with original powers & a guaranteed existence, goes some way to providing the doctrinal authority for treating the parallel authority displacement as unconstitutional encroachment in the protected sphere. Germany's Selbstverwaltungsgarantie as provided for in Article 28 of the Grundgesetz upholds in a parliamentary constitutional system that the constitutional guarantee of local self-government is judicially enforceable without enumerated functional lists. Provisions for municipal fiscal autonomy in the 1988 Constitution of Brazil provide the structural model for the binding

minimum fiscal floor level that provincial governments are not entitled to lawfully reduce below a constitutionally specified level -- directly analogous to the binding PFC mechanism proposed in Reform Instrument One.

*F. Gap Statement*

The extant literature does not refer to quantified compliance, multi-dimensional constitutionality compliance assessment of all five Pakistani statutory frameworks against a formally derived Minimum Content Standard, and systematic comparison of devolutional compliance across four legislative eras in Pakistan through a consistent analytical matrix. This paper addresses the aforementioned two gaps at the same time, producing the first formally quantified characterisation of Inter-Era Paradox, and the second Five-jurisdiction Five-Parameter Matrix compliance score table, to collectively form an original empirical contribution to the constitutional law scholarship on devolution in Pakistan.

**RESEARCH METHODOLOGY**

*A. Philosophical Foundation: Legal Positivism and Doctrinal Method*

The philosophy behind this research is well based on the tradition of legal positivism as formulated by Hart [15] and Kelsen [17]. Legal positivism maintains that the existence and contents of the law is dependent upon social facts and institutional recognition - the formal enactment of rules through constitutionally recognised processes - and not on the inherent moral merit of the rules [15]. This philosophic commitment takes with it, the analytical discipline to consider provincial statutes against the norms of the Constitution without dragging along with it extraneous political or sociological considerations. The doctrinal legal research methodology which has been adopted consists of the systematic identification, analysis, organization and synthesis of the substantive law as it exists in primary authoritative sources: constitutional texts, statutory enactments and appellate judicial decisions. The methodology is an internal, participant-oriented perspective, which views the legal system as a normative self-contained structure, where internal consistency or contradiction is the chief research object, the subject of analysis for the researcher.

*B. Four-Dimensional Analytical Framework*

So the analytical framework is four dimension in nature. The first dimension is historical, and uses the Tripartite Model of Devolution to consider four distinct legislative periods (BDO 1959, LGOs 1979, LGO 2001, post-Eighteenth Amendment) to create a record of comparative compliance throughout Pakistan's legislative history. The second dimension is inter-jurisdictional, also using the Five-Parameter Constitutionality Compliance Matrix to apply to each of the 5 current statutory frameworks creating quantified, cross-compared compliance scores. The third dimension is normative in nature - the formal derivation from the text of Article 140A [1], as well as from the principle of subsidiarity as constitutionalized by the Lahore High Court in PLD 2015 Lahore 522 [24], and international comparative constitutional doctrine of the Minimum Content Standard formed by twelve non-derogable elements across three constitutional floors - is formally derived from the text of Article 140A [1], as well as from the principle of subsidiarity as constitutionalized by the Lahore High Court in PLD 2015 Lahore 5 The fourth dimension is contextual in the way that Pakistan's devolution architecture is located in a 9-jurisdiction international comparative framework in the superior court jurisprudential trajectory.

*C. The Tripartite Model of Devolution*

The Tripartite Model scores each of the legislative eras against three dimensions -- Political Devolution, Administrative Devolution and Fiscal Devolution -- which are exactly like the tripartite constitutional

language of Article 140A(1). Each dimension is marked out of 30 marks on 6 sub criteria for a maximum total aggregate score of 90. The scoring scale runs from 0 (a total lack of compliance or the overt violation of statute) to 5 (absolute and unambiguous compliance, enforceable by the courts). The aggregate percentage of compliance is then computed as  $(\text{aggregate score}/90)*100$ . This model is then used retroactively for pre-constitutional instruments for the analytically purposive -- rather than anachronistically normative -- purpose of creating an equivalent benchmark across legislative eras, for the formal quantification of the Inter-Era Paradox.

#### *D. The Five-Parameter Constitutionality Compliance Matrix*

The Five-Parameter Constitutionality Compliance Matrix uses a more granular assessment instrument to apply to the five current statutory frameworks. Evaluating five parameters -- Political Devolution, Administrative Devolution, Fiscal Deviation, Electoral Integrity, and Parallel Authority Architecture -- each with a score on four sub-criteria on a scale of 0-5, the highest score is 20 for each parameter and 100 for the entire index. The numerical results of the five parameters instrument of the Tripartite Model are different because of a different but complementary scoring architecture with individual arithmetic verification. Every quantitative finding produced by either of the matrices is offered as an indicative analytical tool based on primary statutory analysis, rather than as a legislative determination or judicial adjudication. The choice of the primary statutory sources is based on the civilian approach of source hierarchy of a positivist methodology: constitutional text, federal and provincial statutes, subordinate legislative instruments, and decisions of superior courts, in that normative order of primary sources.

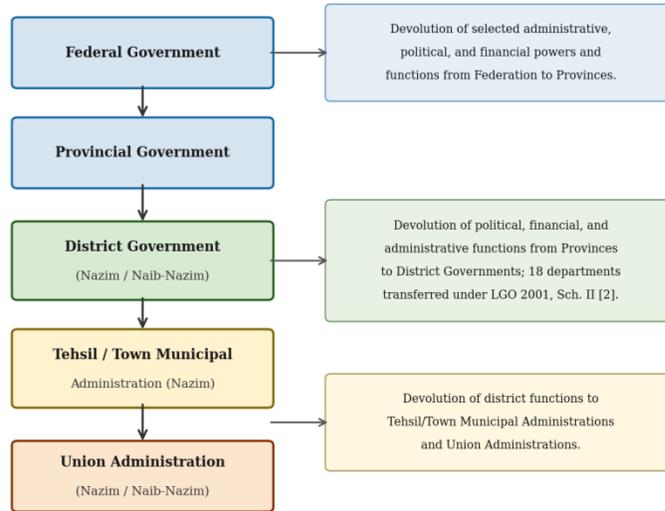
### **FINDINGS: FOUR-DIMENSIONAL ANALYSIS**

#### *A. Stream One: Inter-Era Comparative Analysis*

Stream One picks up the four discrete periods of legislation and puts them through a systematic doctrinal analysis in terms of the Tripartite Model of Devolution. Era One -- the Basic Democracies Order 1959 [9] -- scores for Tripartite Model - around 13% (aggregate score of 12/90). The defining characteristic of the BDO was the structural subordination of local government to presidential legitimation: section 20 3 gave the provincial government wide latitude for dissolution without cause or judicial overlook; District Magistrates were given independent command power over revenue, law and order, and coordination of districts; there was no binding mechanism for fiscal transfer. Era Two -- the Provincial Local Government Ordinances 1979 [4][7] -- achieving about 28% (aggregate 25/90) The era brought big the PFC mechanism as its most institutionally significant innovation -- section 114 of the Punjab LGO 1979 set up the first provincial finance commission for local government but section 115(4) made PFC recommendations non-binding and reduced the mechanism to institutionalized consultation without fiscal entitlement. The de facto veto the DC held over resolutions of the council under sections 50 to 52 maintained the principle-agent inversion that was so characteristic of the BDO era.

Era Three -- the LGO 2001 [2] -- has about 75% under the Tripartite Model which the highest scoring of devolutional compliance of the legislative history of Pakistan. Schedule II of the LGO 2001 devolved eighteen provincial departments -- including Education, Health, Agriculture, Public works and Municipal Services -- to elected District Governments, the first time in the legislative history of Pakistan that a statute devolved substantive departmental authority including budgeting, personnel and policy to elected District level institutions. Section 20 (1) provided for a four year term for all the directly elected Nazimeen, section 21 (1) restricted the situations under which a dissolution could be made under certain reasons where formal inquiry was necessary and elections were held under the supervision of the ECP pursuant to Article 140A (2) as inserted by the LFO 2002[3]. The score of the LGO 2001's Tripartite Model against the post-Eighteenth Amendment provincial average of approximately 36% - 75% - makes the Inter-Era Paradox

differential of approximately 39 percentage points -- the central empirical paradox of this research. Era Four -- the post-Eighteenth Amendment provincial statutes (2010-2024) -- makes an average score of about 36% Under the Tripartite Model, the universal mechanisms of recentralization identified in Stream Three.



*Fig. 1. Local Government System under the Local Government Ordinance 2001 [2].*

**B. Stream Two: The Minimum Content Standard**

Stream Two is to take the Minimum Content Standard formally from Article 140A [1] principle of subsidiarity that it being constitutionalized in PLD 2015 Lahore 522 [24]. The Standard is comprised of twelve non-derogable elements of Constitution organised in three Floors. The Political Floor mandates are: P1.1 -- free and direct elections with exclusive administration of the ECP P1.2 -- fixed term for not less than 4 years P1.3 -- power of recall or dissolution only by judicial order or two third vote of no-confidence of council P1.4 -- guaranteed reserved seats for women and minorities. The administrative floor requires: A2.1 -- an exclusive catalogue of inherently municipal functions which cannot be transferred to the parallel authorities. A2.2 -- own local government civil service powers of appointment and dismissing vested in elected bodies. A2.3 -- statutory subordination of District Collector/DDO formally to the elected one, for the functions of the local governments. A2.4 -- prohibition against parallel authorities for exercise of municipal functions constitutionally mandated to elected local governments. The Fiscal Floor mandates: F3.1 -- own taxing power to be used without confirmation of the provincial executive; F3.2 -- binding PFC allocation formula guaranteed minimum percentage constitutionally; F3.3 -- dedicated, provincially ring fenced own local government fund; F3.4 -- independent audit authority accountable to the local council & not the provincial auditor general exclusive.

**C. Stream Three: Five-Parameter Constitutionality Compliance Matrix**

Stream Three uses the Five-Parameter Constitutionality Compliance Matrix against each of the five extant statutory frameworks, and those scores for each jurisdiction appear in TABLE I. The matrix affirms that there is no existing statute that gets full compliance with the constitution. KPK has the best score with 62% due to the more substantive devolution of administrative functions and stronger provisions of PFC in KPK Local Government Act 2013 compared to other provinces (though the administrator loophole and non-

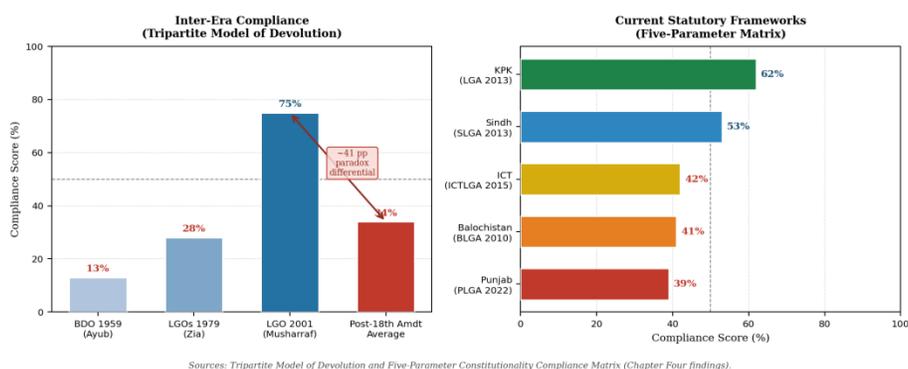
binding PFC provisions remain). Sindh strikes 53% with PLD 2022 SC 439 [19] having struck down the worst offending sections of the Sindh statute, marginal improvement is brought about. ICT scores 42% and Balochistan 41%, both of which are manifestations of poor fiscal devolution and well-entrenching administrator mechanisms. Punjab receives the worst score of 39% with Section 112 MPA Advisory committee mechanism - under which developmental spending authority is allocated to individual Members of Provincial Assembly as opposed to elected council bodies - identified as the single most constitutionally objectionable provision in any exemption statute in place today, and in direct contradiction to the Article 140A mandate to a council-controlled budgetary authority.

**Table I**

**Constitutionality Compliance Matrix: Five-Parameter Assessment across Five Jurisdictions**

Jurisdiction	Political (P1)	Administrative (A2)	Fiscal (F3)	Electoral Integrity	Parallel Authority	Total (%)
KPK (LGA 2013, as amended 2024)	14/20	13/20	11/20	14/20	10/20	<b>62%</b>
Sindh (SLGA 2013, amended)	12/20	11/20	10/20	12/20	8/20	<b>53%</b>
ICT (ICTLGA 2015)	10/20	9/20	8/20	10/20	5/20	<b>42%</b>
Balochistan (BLGA 2010, amended 2023)	9/20	9/20	8/20	10/20	5/20	<b>41%</b>
Punjab (PLGA 2022)	8/20	8/20	7/20	9/20	7/20	<b>39%</b>

*Note: Scores are indicative analytical findings derived from primary statutory analysis; not legislative determinations.*



*Fig. 2. Constitutional Compliance Scores: Tripartite Model (inter-era) vs. Five-Parameter Matrix (current frameworks).*

*D. Stream Four: Structural Recentralization Mechanisms*

Stream Four identifies and analyses the three mechanisms of recentralization which are found universally present in all 5 jurisdictions with no exception. The administrator loophole gets a rating of 0/5, in all jurisdictions, in accordance with the Five-Parameter Matrix. Every statute in existence authorizes the provincial government to make an appointment of an unelected administrator in lieu of an elected council on expiry, dissolution or vacancy with no constitutionally adequate temporal limitation. The Punjab Local Government Act 2022 [11] has no mandatory elections - within-period after appointment of administrator, the Balochistan Local Government Act 2010 [14] provides for administrator rule for periods which have in practice exceeded one year without judicial challenge. The PLD 2021 SC 770 [18] restriction -- that administrator rule is unconstitutional unless elections are ordered and scheduled -- wasn't put into statutory form in any jurisdiction, and so the loophole stands structurally intact.

The mechanism for the non-binding PFC is 1-2/5 in all the Jurisdictions. In spite of [5] fiscal transformation Eighteenth Amendment on the federal - provincial level, no one provincial legislature has replicated the binding National Finance Commission formula on provinces - local level. Every provincial PFC statute retains executive discretion to accept, amend or reject PFC recommendations duplicating structural deficiency first discovered on the 1979 ordinances. [4][7] The third universal mechanism -- the parallel authority architecture -- may be found in all jurisdictions in the form of Category I development authorities (Lahore Development Authority, Karachi Development Authority, Hyderabad Development Authority, Capital Development Authority) and Category II water and sewerage boards (KWSB, WASA Lahore, WASA Faisalabad, Islamabad Water and Sanitation Agency). These authorities carry out statutory mandates which overlap and displace the inherently municipal functions constitutionally mandated to the elected local governments. The 2015 SCMR 1739 [21] partial legitimization of parallel authorities which ended the Province constitutionally proscribed from having statutory bodies alongside local elected governments, created a doctrinal tension with the devolutionary jurisprudence more generally to which the proposed constitutional amendment directly addresses.

*E. Stream Five: International Comparative Analysis*

The nine-jurisdiction of India, South Africa, Germany, Brazil, United Kingdom, Indonesia, Kenya, Bangladesh and Nigeria -- identifying two structural variables which are determinative of genuine devolution of powers: constitutional entrenchment of a minimum functional floor; and existence of a binding fiscal transfer formula with judicially-enforceable minimum percentage. So the post-1992 constitutional structure of India is that the materially greater local government functional autonomy is the result of a constitutionally enumerated functional list - even subject to enabling legislation - and not of constitutional silence of functions. South Africa's Chapter 7 model [23] shows that the doctrine of local government as a constitutionally protected sphere of original powers gives the doctrinal basis for the treatment of functional displacement by parallel authorities as unconstitutional encroachment, which comes directly into play in Pakistan with respect to its parallel authority problem. Germany's the confirmation of judicial enforceability in habeas parliament system. Kenya's 2010 Constitution with its provision for at least 15% of national revenue to be devolved to the county governments is the closest to the binding PFC minimum floor in Reform Instrument One that can be transplanted.

*F. Stream Six: Path Dependency Analysis*

Stream Six is the reference to two structural mechanisms that make up the Inter-Era Paradox in the form of path dependency. First, the inherited administrative law system: the West Pakistan Land Revenue Act 1967 [25], the Civil Services Act 1973 [26], give default administrative control over the districts to the provincial civil service officers in the absence of an express local government Act providing for the subordination of

the provincial civil services to local government. Every post 2010 provincial statute has failed to provide for such a provision as regards more than one department and therefore default reversion of administrative authority to the DC under the 1967 and 1973 Acts. Second the patronage network of Members of Provincial Assembly (MPAs): in the structural financial interest of Member of Provincial Assembly (MPAs) in maintaining developmental spending authority at the constituency level create a direct legislative incentive against real fiscal devolution. This incentive structure is made most nakedly, in Section 112 of the Punjab Local Government Act 2022[11] which provides for an MPA Advisory Committee with formal developmental resource allocation authority which replaces constituency level patronage distribution for elected council budgetary authority -- a provision that is prima facie inconsistent with the mandate of council-controlled fiscal governance in Article 140A

### **ANALYSIS: THE DEVOLUTION DEFICIT AND ITS CONSTITUTIONAL CAUSES**

#### *A. The Inter-Era Paradox as Constitutional Failure*

The Inter-Era Paradox formally measured, LGO 2001 [2] of about 75 percent under the Tripartite Model, compared to the provincial average of about 36 percent under the post-Eighteenth Amendment, a difference of about 39 percentage points, cannot be explained by the fact that the political will under military government was the better of the two. Two particular features of constitutional design are what create the paradox. On the one hand, the LGO 2001 came into force as one federal ordinance with a single executive martial law, which allowed the structural uniformity of all four provinces at the same time. The post-2010 architecture of article 140A confers provincial legislative competence over the local government to four constitutionally autonomous provincial assemblies with structures of political incentive whose formal mechanisms of recentralising legislative outputs, notwithstanding the mandatory constitutional direction, are the MPA patronage network. Second, the LGO 2001 contained a comprehensive displacement clause in Schedule II [2] migration of eighteen provincial departments to elected District Governments and explicitly displacing any conflicting provincial legislation, pre-empting the mechanism of default reversion in the West Pakistan Land Revenue Act 1967 [25] and the Civil Services Act 1973 [26]. None of the provincial laws in place after 2010 contain a similar wholesale displacement clause, generating partial functional transfer models with holes filled in with override provisions.

#### *B. The Absence of a Constitutional Floor as Structural Cause*

The basic constitutional reason of devolution deficit is the absence of constitutionally laid down Minimum Content Standard for the compliance of Article 140A. Article 140A as it presently stands requires devolution in tripartite terms without providing any idea of what constitutes devolution in terms of political, administrative or fiscal power. This has the indecision of allowing provincial legislatures to preach the language of devolution without making any real progress towards recentralising power by the three universal mechanisms identified in Stream Four. The superior court jurisprudence, while a progressive transformation, cannot displace a legislatively or constitutionally defined minimum content: distance of judicial declaration from legislative compliance; absence of institutional monitoring; inability of any one individual case to capture all twelve minimum content elements at once and the 2015 SCMR 1739 [21] doctrinal inconsistency - mean judicial enforcement without a constitutional floor is insufficient to accomplish the goal of systemic compliance. The universality of the three mechanisms of recentralisation in four constitutionally autonomous provincial legislatures which should otherwise generate divergent legislative responses is empirical confirmation of the claim that non-compliance is structurally generated by constitutional indeterminacy, and not simply by political bad faith

## **REFORM INSTRUMENTS**

### *A. Reform Instrument One: Proposed Constitutional Amendment to Article 140A*

Reform Instrument One is a Model Constitutional Amendment Bill -- which will be called the Constitution (Amendment) Bill, -- which, by attaining four structural interventions, it does as follows: First, substitution of the text of Article 140A by an expanded text -- which specifies the Political, Administrative and Fiscal Minimum Content Standards as constitutionally non-derogable floors. Second, insertion of a new Eighth Schedule which enumerates the Guaranteed Function List - consisting of the inherently municipal functions to which no state or federal legislature may transfer and which the states may not reserve for themselves in parallel function - which was modelled on India's Eleventh and Twelfth Schedules [22]. Third it is amendment of Article 160 to extend the application of binding formula mechanism of National Finance Commission to Provincial-local fiscal relations whereby each province is to transfer to local governments a constitutionally specified minimum percentage of its own revenue on the basis of a binding PFC on the analogy of similar Kenya 2010. Fourth, insertion of a new Article 184A which makes a Local Government Compliance Bench with express jurisdiction for adjudicating claims under Article 140A for compliance and therefore addressing the institutional monitoring gap which was noted in Stream Four.

Proposed Article 140A(2) expressly provides for any provision of provincial law authorizing administrator rule for exceeding 90 days without order and scheduling of elections shall be void -- directly codifying the ratio decidendi of PLD 2021 SC 770[18] as a constitutional prohibition and not just a judicial interpretation. The proposed Article 140A (4) has prohibition of any provincial or federal body, distributing local government developmental resources to individual legislators, in lieu of elected council budgetary authority and it is aimed at Section 112 of the Punjab Local Government Act 2022 [11], amongst others. The comparative constitutional base is based on four transplantable models of constitutional foundations - the functional floor of India [22]; the protected sphere doctrine of South Africa [23]; the Selbstverwaltungsgarantie of Germany and the binding municipal fiscal autonomy provisions of Brazil which have been discovered to be transplantable to the Pakistani constitutional situation without upsetting the parliamentary constitutional system of the 1973 Constitution in the context of Stream Five comparative analysis.

### *B. Reform Instrument Two: Proposed Model Provincial Local Government Bill*

Reform Instrument Two is Proposed Model Provincial Local Government Bill which is designed in fourteen Parts and provide a structure for a constitutionally compliant legislative model ready for tabling in any provincial assembly. The fourteen Parts deal with: Preliminary and Interpretation; Establishment and Tiering of Local Governments; functions, Powers and Guaranteed Function List; Local Government Service and Personnel; Electoral Provisions and ECP Administration; Council Procedures and Quorum; Executive Authority of Elected Heads and Accountability of Administrative Officers; Provincial Finance Commission and Binding Fiscal Transfer; Own-Source Revenue and Taxing Powers; Local Government Fund and Budget; Audit and Accounts; Relationship and Parallel Authorities and Integration Protocol; Enforcement and Judicial Review and Transitional and Repealing Provisions. Model Bill has express displacement provision subordination of all inconsistent provisions of West Pakistan Land Revenue Act 1967 [25] and Civil Services Act 1973 [26] as regards local government functions, closing the default reversion mechanism highlighted in Stream Six as one of the principal means by which administration reverts to the DC. A dedicated Part on Parallel Authorities provide for statutory integration of the executive control of the executive functions of Category I and II municipal functions by elected local governments to be transferred by development authorities and water and sewerage boards within a specified transitional period with judicial oversight provided by the Local Government Compliance Bench proposed in Reform Instrument One.

*C. Reform Instrument Three: Proposed Parallel Authority Reform Framework*

Reform Instrument Three is aimed at the architecture of parallel authority that Stream Four relates as a mechanism of recentralisation that is universal in all. The framework advocates the concept that there are in fact two classifications of parallel authorities. Category I is development authorities -- these are the Lahore Development Authority, Karachi Development Authority, Hyderabad Development Authority and Islamabad's Capital Development Authority [14] -- exercising planning and development functions which constitute inherently municipal functions under the proposed Eighth Schedule. Category II are boards and bodies of utility management on water and sewerage. For Category I authorities the Reform Framework is a proposal for statutory integration: transfer of planning and development functions to elected local governments within the period of 5 years and reconstitution of the development authority as a technical execution arm of the elected council. For Category II authorities it makes a phased transfer of accountability proposal: establishment of a Joint Oversight Board with a majority elected council membership in Year One, full transfer of board appointment authority to elected councils in Year Three and full statutory subordination in Year Five. The doctrinal authorities for these interventions is from South Africa's Chapter 7 [23] protected sphere doctrine as applied for the functional displacement analysis of Stream Six and further, the progressive devolutionary jurisprudence of the Supreme Court PLD 2022 SC 439 [19] and PLD 2023 SC 56 [20]. The three Reform Instruments form an integrated constitutional reform architecture with none of the instruments being sufficient in itself. Constitutional amendment without the benefit of a model statute leaves the provincial legislatures at liberty to exercise drafting discretion. A model statute without the constitutional amendment is not safe from repeal by the ordinary legislative majority. Both without parallel authority reform both leaves the functional displacement architecture through which recentralization is operationalized in practice completely untouched.

## CONCLUSION

This paper has been able to prove with the aid of four dimensional doctrinal, historical and comparative law analysis that all of the existing local government statutes in Pakistan have a pattern of systematic non-compliance with the tripartite constitutional obligation of Article 140A [1]. The inter-Era Paradox -- formally quantified finding of the Musharraf era LGO 2001 [2] passed without constitutional mandate achieves approximately 75% compliance of the Tripartite Model of Devolution while the post-Eighteenth Amendment provincial average of approximately 34% represent 39 percentage points of regression -- constitutes the central empirical paradox of the Pakistani constitutional devolution law. The Five-Parameter Matrix scores of current frameworks -- KPK 62%; Sindh 53%; ICT 42%; Balochistan 41%; Punjab 39% - confirm not isolated jurisdictional failures but the national pattern of non-compliance. Three recentralisation mechanisms are present universally in all five jurisdictions: the administrator loophole, which scores 0/5 in all jurisdictions, the non-binding PFC, 1-2/5 in all jurisdictions or the parallel authority architecture, driving elected local governments out of municipal functions which they are required to exert by the Constitution.

The paper has gone on to prove that this non-compliance is structurally occasioned by the absence of a constitutionally specified Minimum Content Standard - a constitutional floor that defines the minimum quantum of political, administrative and fiscal authority that every provincial local government statute must confer. Judicial enforcement though gradually transformative in 2014 SCMR 1 [6], PLD 2021 SC 770 [18], PLD 2022 SC 439 [19], PLD 2023 SC 56 [20], PLD 2024 Lahore 238 [7] gets no substitute with this floor of the constitution. Three integrated Reform Instruments are being proposed: proposed constitutional amendment to Article 140A providing for Minimum Content Standard; To insert Guaranteed Function List as a new Eighth Schedule; To extend NFC formula mechanism to provincial-local fiscal relations as well as provide for a Local Government Compliance Bench; proposed model provincial local government bill providing for constitutionally compliant fourteen Part legislative model; proposed parallel authority reform

framework providing for five year integration protocol for development authorities and utility boards. These instruments are not independent prescriptions but are part of an integrated architecture of constitutional reform where each of them tackle a different dimension of devolution deficit this paper has diagnosed. Until all three are put in place, Pakistan's constitutional promise of true local self-governance to its citizens will remain structurally unrealisable.

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