One system, not four

By Khalid Anwer

FOR the past several months the media has been carrying reports about an emerging consensus between the major political parties and the federal and the provincial governments to carry out a major constitutional change which entails the abolition of the concurrent list. This is supposed to be a `reform` to enhance the quantum of provincial autonomy.

Let us begin with first principles. Should provincial autonomy be increased? Indubitably. Is abolishing the concurrent list the correct way to do so? Emphatically not, unless we believe that the governmental legal structure needs to be further fractured. The concurrent list is that list of legislative subjects which appears in the Fourth Schedule to the constitution and mandates that the subjects mentioned therein can be legislated on by both the federal and the provincial legislatures.

Why is the concurrent legislative list so important? The answer requires knowledge of our constitutional history going back to the Government of India Act 1935. The constitution of Pakistan, like most other constitutional documents elsewhere is drafted in deceptively simple language. This simplicity, however, masks profound ambiguities. Understanding the constitution requires an informed endeavour to understand the evolutionary process which ultimately led to the drafting of the constitution in its present shape.

Going back into the historical perspective, the drafting of the concurrent legislative list in the 1930s formed the subject matter of a serious and prolonged debate which was trilateral in nature and comprehended the major ethno-religious communities as well as the colonial power. The concurrent list was retained in the 1956 constitution, arbitrarily dropped in the 1962 constitution so as to enhance federal power and reintroduced in the 1973 constitution by consensus.

What is the driving force behind the proposal to abolish it and what are its likely consequences? The answer lies on two planes firstly, there is an attempt, based on an understanding between the major political parties to create the impression that provincial autonomy is being enhanced.

The cynical response to this would be that it is perhaps driven more by the desire to create this impression, in the (unfounded) hope of gaining popular support from the minority provinces while leaving matters substantially unaltered. Secondly, apparently the other driving force behind the proposal is the federal finance ministry.

Why should the finance ministry be interested in a constitutional matter about which its lack of expertise is as vast as the Pacific Ocean?

The answer is simple. The apparent desire is to reduce the future responsibilities of the finance ministry to finance critically important areas which lie at the heart of the concept of good governance and the development of society by transferring a number of legislative subjects to the provinces (along with the funds currently allocated to them) with the proviso that hence forward the provincial governments, which are already badly strapped for financial resources, would be responsible for incurring expenditures which at present the federal government is bearing.

In other words, for the finance ministry it is a far-sighted economy measure in which the responsibility for future spending increases in areas vital to social development and welfare is transferred to the provinces. What is emphatically clear is that good governance is not on the agenda either of the major political parties or the federal finance ministry.

The proposal apparently envisages that Rs28bn which are currently being incurred by the federal government on certain vitally important subjects (such as medicines, environmental protection, social welfare, etc) should now be handed over to the provinces. Thus the provinces receive circa Rs28bn and in return the responsibility for all further enhancement of these vitally important sectors of the economy will rest on them, and on them alone.

Such a proposal has only to be set out in stark terms for the fundamental objections to become immediately apparent firstly, none of the provincial governments has so far shown a sense of responsibility for incurring expenditures related to enhanced social welfare, provision of essential facilities to the poorest segments of the population, increasing levels of efficiency, or reducing levels of graft etc.

Secondly, it seems a reasonable assumption that even the existing level of financing for different projects in the above-mentioned areas will actually decline with resources being transferred to more lucrative areas.

In addition, there will be a major collapse in lawmaking and enforcement since critically important subjects which today form the subject matter of federal legislation will be fractured in disparate ways under the new proposal.

For example, criminal law falls within the ambit of the concurrent list. This means that the basic criminal law applies nationwide with permission to the provinces to fine-tune matters relating to a particular topic, provided there is no infraction of the federal law. This will now change.

There will no more be any concept of a future anti-terrorism law and there will no longer be a new nationwide accountability law. Each province can make its own separate provisions to ensure that the political parties operating there are exempted, as far as possible, from the provisions relating to the curbing of corruption.

There will no longer be nationwide legislation to ensure that high-quality and safe drugs and medicines are prescribed. Each province will be on its own. The question of environmental pollution and ecology which is vital to the development of a green economy will also be decimated and the shards distributed amongst the provincial governments.

The finance ministry if it is indeed interested in simply transferring the flow of certain funds to the provincial governments can do so through an alternative route without driving a stake through the concept of good governance. All it has to do is to examine the provisions of Article 146 of the constitution which permits the federal government to transfer any functions and responsibilities falling within its purview to the provincial governments and also transfer the resources necessary for this purpose to the provinces.

The advantage of this route is that it will not permanently denude the federal parliament of its power to enact social welfare legislation, as well as legislation to curb economic excesses by big business.

It is a matter of profound regret that even a military dictator, who otherwise caused untold harm to the republic, transferred powers of local government to the elected representatives of the people while at this very moment the major political parties are seriously engaged in an endeavour to claw back these powers and place them in the hands of the provincial bureaucracy. Since this is an indicator of the sincerity underlying the ostensible enhancement of provincial autonomy the consequences flowing from the abolition of the concurrent list, when levels of good governance decline across the board, can easily be envisaged. Pakistan is one country — it needs one legal system and not four.

There is still time for the political leadership to pause, reflect and retract before leading this already badly divided country further down the pathway to national disintegration. The electoral plaudits they fondly anticipate will prove transitory and evanescent — the loss to the country will be permanent. But is anyone listening? Carpe diem.

The writer was formerly federal law minister.