

On Constitutions and Constitutionalism in Pakistan^{*}

*Syed Jaffar Ahmed^{**}*

Abstract

After differentiating between a constitution and the concept of constitutionalism, and their respective spheres, the paper seeks to look into these spheres with respect to the experience of Pakistan. As the three constitutions that Pakistan has worked with, had been subjected to violation to the extent of abrogation or suspension or having been put in abeyance, the article argues that a constitution no matter how carefully it is made, cannot by itself ensure its survival. The causes behind a constitution's failure in ensuring its sustainability lie in the society and the state that manages it. Here, the notion of constitutionalism comes into ones purview. The article seeks to see to what extent the spirit of, and adherence to, constitutionalism exists in the country, in its society and in its state.

Introduction

At the outset, it should be explained as to why in the title of this paper, constitution is identified separately from, and independent of, the notion of constitutionalism. A student of politics and history of Pakistan may have confronted, while visiting the various constitutional models implemented in the country and comparing them with those of other countries, the question that why the constitutions implemented in the country did not receive adherence from the rulers — the ruling elite and the state institutions — who on occasions either abrogated the constitution or suspended it in different names. Equally important is the question that on occasions when constitution was removed or sidelined why the people — the citizens — did not come out to defend it. An

^{*} This is the revised and enlarged paper presented as the key-note address in the international conference on 'The 1973 Constitution of Pakistan: The Role of Executive, Legislature and Judiciary', organized by the Department of History, University of Peshawar, at its summer campus in Bara Gali on 30-31 May 2016.

^{**} Prof. Dr Syed Jaffar Ahmed, Adjunct Professor, and former Director, Pakistan Study Centre, University of Karachi.

objective treatment of these questions leads one to the conclusion that the efficacy and merit of a constitution may not necessarily reside in the constitution itself. If one does not let oneself be influenced by conspiracy theories, even though at times one finds justification in speculating about the malafide intentions of some of those who played any role in the making and implementation of the constitution, and if one assumes that all constitutions experimented in Pakistan were made with good intention, and those who operationalized them either in the legislature or in the executive and the judiciary did not have motives other than the upholding of the constitution, one would have to face the challenge of answering the question as to why most of these texts proved so short-lived. Perhaps the long list of articles in the constitutions does not carry the answers. Searching for the constitutional viability, therefore, compels one to look beyond the provisions of the constitution and enter into another domain which to this writer is the domain of constitutionalism. If constitution is the body of guiding principles and a collection of basic laws, constitutionalism is a culture, a behavior and the dynamics of the operationalization of the constitution.

Here, it would be necessary to say a few words about the distinctiveness of, and correspondence between, the two. A constitution in the strict sense of the word is primarily a document, comprising a set of principles of statecraft, the directives delineating the respective roles of the institutions of the state and the citizens, and a scheme elaborating the relationship between the citizens. It can also be described as an outcome of a social contract between the state and the society, and between various segments of the society identified along regional, ethnic or social characteristics, preserved in a legal form and lexicon. A student of constitution looks into the merit of it usually making use of what the authorities of constitutional law have to say about various constitutional principles. While analyzing the position of constitution in the area of rights, for instance, one refers to the thinkers known for their philosophical insights into the issues of human rights and civil liberties. We, in such a case, begin from the Greek philosophers and come to our own times and take recourse to the Universal Declaration of Human Rights and try to see how much of this good stuff is accommodated in our constitution. Similarly, while looking into the parliamentary features of our constitution, or for ascertaining the sovereignty of parliament, we go back to A.V. Dicey,¹ Ivor Jennings,² Alexis de Tocqueville,³ or A.H.

¹ A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1973).

Birch⁴ and see what their recommendations for a good parliamentary system have been and do they, or do they not find a place in our constitution. Likewise, our analysis of our constitution with respect to its federal character takes us to the *Federalist Papers*,⁵ K.C. Wheare,⁶ W.H. Riker,⁷ G.F. Sawyer,⁸ and R.L. Watts.⁹ A study along these lines, at best, enables us to explain and interpret the provisions of the constitution, which, therefore, becomes a more understandable user manual. For its improvement the constitutionalists come up with more adequate and legally more refined recommendations presented in the shape of amendments, which can add to the refurbishment of the constitutional clauses. All this, however, keeps constitutions a restricted, though useful, domain for the constitutionalists, jurists and the practitioners of law.

However, while acknowledging this independent and distinct status of a constitution as a document, a number of issues pertaining to its efficacy and viability compel one to move a step ahead of the document and visit the society and the environment in which the constitution operates. Shifting the focus to the society is important because it is for its benefit that the constitution is made. This domain beyond the straitjacket of constitution itself is the domain of constitutionalism.

One may also say that while constitution is primarily an arena for constitutionalists and jurists to play their role in, constitutionalism is the area that is wide open for the social scientists and the diverse social groups, either the political parties and pressure groups or the civil society organisations, who can claim in it a role for themselves and play it as they deem fit. Here, it is also necessary to mention that while there is a

² W. Ivor Jennings, *Parliament* (Cambridge: Cambridge University Press, 1939).

³ Alexis de Tocqueville, *Democracy in America*, Historical-Critical Edition of *De la Démocratie en Amérique* (Indianapolis: Liberty, 2010).

⁴ A.H. Birch, *Representative and Responsible Government: An Essay on British Constitution* (London: George Allen and Unwin Ltd., 1964).

⁵ Alexander Hamilton, James Madison and John Jay, *The Federalist Papers* (New York: The New American Library, Inc., 1961).

⁶ K.C. Wheare, *Federal Government* (London: Oxford University Press, 1963).

⁷ W.H. Riker, *Federalism, Origin, Operation, Significance* (Boston: Little, Brown and Co. 1964).

⁸ C.F. Sawyer, *Modern Federalism* (London: C.A. Watts & Co. Ltd., 1969).

⁹ R.L. Watts, *New Federations: Experiments in the Common Wealth* (London: Oxford University Press, 1966).

legitimate justification for identifying constitution and constitutionalism distinctively, more often their boundaries are blurred. This is not only understandable but is also unavoidable. This is so because both, despite being separate entities, cohabitate with each other, and also fertilize each other. This state of cohabitation and cross-fertilization is all the more important for the enrichment of both constitution and constitutionalism.

In the subsequent sections one would like to look into the two domains and then see the nature and the state of the two bearing upon each other. In the concluding section it would be suggested that unfortunately there exists a wide gap between Pakistan's user manual, i.e., the constitution, and its society that exhibits, due to various reasons, a poor state of constitutionalism.

On constitutions

In the last almost seven decades, Pakistan has been governed under various constitutional or extra-constitutional devices. Beginning with the Government of India Act 1935, which served as interim constitution for nine long years after independence the country adopted its first constitution in March 1956. It did not survive beyond two and a half years and was wrapped up with the imposition of martial law on 7 October 1958. In the next four years the martial law regulations along with those laws which were made under the previous constitution but which did not impede the objectives of the martial law regime and which were given acceptance by the Laws Continuance in Force Order, governed the country. The 1962 constitution, given by Field Marshal Ayub Khan survived till his stay in office, and was abrogated by him, when he imposed martial law in 1969, and handed power to General Yahya Khan. Again martial law regulations along with the laws made under the abrogated constitution but acceptable for the regime, began to regulate the affairs of the state. After the separation of East Pakistan, another Interim Constitution came into force in April 1972, for the period until the permanent constitution was made and enforced. Made by the directly elected representatives of the people, and approved by all the parties having representation in the Constituent Assembly, the Constitution of 1973 came into force with the expectation that the country's long bewilderment on the constitutional path would now come to an end, but this did not happen, and in almost four years, the third martial law suspended the constitution. Again Provisional Constitution Orders came to govern the country. In 1985, the constitution was revived only after a whole lot of changes were introduced in it through the Eighth

Constitutional Amendment.¹⁰ Some of these changes were corrected and the original clauses were brought back through the 13th Amendment in 1997. But then the fourth military take-over put the constitution in abeyance, and once again Provisional Constitutional Orders started coming up. In 2002, the constitution was restored but with the 17th Amendment, which again, brought it to fulfil the requirements of the then military ruler. In 2010, the 18th Amendment restored the original constitution and drastically amended it, with the backing of a consensus among the political class. The 18th Amendment is also known for its devolution of powers and extension of the area of provincial autonomy.

The repeated making and the un-making of the constitution, and its abrogation under different names, and then its restoration, have made Pakistan's constitutional history a highly chequered one. During this long journey, the essential institutions of the state, and the principles which had been conceived as the foundational principles of statecraft before independence, continued to be distorted and hence the constitution did not emerge as a permanent guiding source.

With respect to the organisation of the state and the form of government, three principles were identified and were conceived for Pakistan even before its coming into existence. These were the principles of republicanism, parliamentary democracy and federalism. The principles of republicanism suggested that the country would ensure sovereignty of the people and all institutions would be established keeping this governing concept in view. The principle also entailed the concept of the equality of citizens, which was so forcefully reiterated by the founder of the nation, Quaid-i-Azam Mohammad Ali Jinnah at the historic occasion of the creation of the country, in his speech of 11 August 1947, in the Constituent Assembly of Pakistan. Much has been said to lessen the significance of this speech but a rational treatment of this and other speeches of the Quaid-i-Azam suggests that all his references to the principles of Islam as the guiding principles for the country should be interpreted in conjunction with the proclamation of 11th August 1947. Unfortunately, a narrative other than the one that

¹⁰ Before the 8th Amendment, General Zia-ul-Haq had issued the Revival of the Constitution of 1973 Order (RCO) on 2 March 1985. The RCO amended, substituted, added, modified, varied, deleted or omitted as many as sixty-five Articles of the Constitution. This RCO later became a part of the 8th Amendment. While incorporating the RCO in it the 8th Amendment amended, added, modified, varied or omitted eighteen Articles of the RCO. See for these details, Hamid Khan, *8th Amendment Constitutional and Political Crisis in Pakistan* (London: Wajidalis, 1994), pp.43 and 47.

should have flowed from Jinnah's above mentioned speech which could be regarded as the Magna Carta of Pakistan was introduced through the Objectives Resolution of March 1949. Apparently devised as a compromise between the liberal and orthodox elements in the Constituent Assembly,¹¹ the Objectives Resolution compromised the principle which the Quaid-i-Azam had professed. The confusion that the Objectives Resolution created cast its shadow on the subsequent constitutions, wherein the abstract ideas were allowed to make inroads into the fundamental law of the country, thus leaving the practitioners of the state power, as well as the citizens, tracing what the constitution actually stands for. The over-simplistic but contradictory position taken by the Objectives Resolution with respect to the notion of sovereignty, in fact, negatively affected the principles of parliamentary sovereignty. The confusion prevails even today as to where sovereignty is vested in our constitution.

The contradiction referred to above has made inroads in to the 1973 constitution as well, where, on the one hand, equality of the citizens is ensured, while, on the other, a clear distinction has been made between the religious majority and the religious minorities. On the one hand, citizens of the country are equal,¹² while on the other, only a Muslim can be made the president¹³ or the prime minister¹⁴ of the country. Though, with the passage of time, and particularly through the 18th Amendment, the scope of fundamental rights has increased, yet the contradictions in the constitution also continue.

The second principle highlighted during the freedom movement, that is the principle of parliamentary democracy, was also not upheld in a persistent manner. Therefore, Pakistan's political system has continuously oscillated between presidential and parliamentary forms of government. In the first nine years, the viceregal system allowed only a quasi-parliamentary arrangement the essentials of which were ensured to continue in the 1956 constitution because the last governor general, Iskander Mirza, had to become the first president after the promulgation of the constitution. The constitution, therefore, gave to him the powers that he had enjoyed as the governor general, for instance, he continued to

¹¹ See Manzooruddin Ahmed, *Pakistan: The Emerging Islamic State* (Karachi: Allies Book Corporation, 1966).

¹² *The Constitution of the Islamic Republic of Pakistan 1973, as Amended by the Constitution (Eighteenth Amdt.) Act, 2010* (Islamabad: Centre for Civic Education Pakistan, n.d.), Article 25(1); 27(1).

¹³ Article 42(2).

¹⁴ Article 91(3).

have the power to appoint and remove the prime minister. The 1962 constitution did not allow even a quasi-parliamentary arrangement and paved the way for a highly centralized presidential system. The 1973 constitution introduced the parliamentary form of government, but the two military regimes of General Zia-ul-Haq and General Pervez Musharraf made it a point to shift the system towards the presidential form. The shift towards the parliamentary form through the 18th Amendment was welcomed by the political class, but it has not called it a day for those who still argue in favour of the presidential form of government.

The third principle that was conceived as the core concept for Pakistan before independence was the concept of federalism. A federal system, enabling the establishment of a federal state is, in the words of A.V. Dicey, ‘a political contrivance intended to reconcile national unity and power with the maintenance of state “rights”’,¹⁵ and was conceived by the founding fathers as the most useful means for integrating Pakistan. Also implicit in this concept was, ‘a method of dividing power so that the general and regional governments are each within a sphere, coordinate and independent’, as enunciated by K.C. Wheare.¹⁶

The vision of federalism held by the founding fathers derived not as much from the literature on the subject, but from the historical and socio-political realities of the country. Like the idea of a parliamentary democracy the original seeds of federalism were also sowed during the colonial era, when the administrators of the Raj as well as the legislators, sitting in the parliament in London realized that in order to establish effective control on the Indian colony, they should not ignore the diverse character of its society. Thus right from the Minto-Morley reforms through the Montague-Chelmsford reforms and the Government of India Act 1935, elements of federalism were progressively incorporated in the governing statutes of India. Our freedom movement also was grafted

¹⁵ Dicey elaborates this point by bringing into focus the notion of sovereignty which is so important and central to the idea of the modern state. Employing the idea of sovereignty for the constitution of his scheme of federalism, he suggests that ‘for the method by which Federalism attempts to reconcile the apparently inconsistent claims of national sovereignty and the state sovereignty consists of the formation of a constitution under which the ordinary powers of sovereignty are elaborately divided between the common or national government and the separate states’. See A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* (London: English Language Book Society and Macmillan, 1973), p.143.

¹⁶ K.C. Wheare, *op.cit.*, p.10.

along the emerging federal arrangement. It is due to this reason that despite asserting their demands on the basis of Two Nation Theory, the real-politik of All India Muslim League centered on grafting Muslim separatist political platform on the federal matrix as it obtained at different points of time before 1947. This also explains why the creation of new Muslim majority provinces and the demand for similar quantum of autonomy for all the provinces had remained a persistent stance of All India Muslim League and the Quaid-i-Azam.

The rationale of federalism in Pakistan also came from the modalities through which the federation of Pakistan came into being. It was the Muslim majority provinces who decided to have a federation of their own and not join that of India. A third reason why Pakistan could not be anything except a federal country, was the character of its society which was highly diversified in culture, languages, historical experiences of people, and the tendency to project political aspirations through ethnic and nationalistic idioms. One should be mindful of the fact that while federal system is most suited for plural and diversified societies, which can also be described as ‘federal societies’, the choice of federalism involves numerous challenges. Wherein a federal system locates the sovereignty—at the centre or regions, or the both—how the disputes between the centre and regions or between the regions would be sorted out, and how the inter-governmental relations would be harmonized, these and other intricate issues make the realization of federalism a challenging task which compelled Sir Ivor Jennings to announce that ‘nobody would have a federal constitution if he could possibly avoid it’.¹⁷

The post-independence history of the country, however, by and large represents a denial of all these three factors. The country started its journey under a highly centralized viceregal system that permeated the body politik through the decision to have the Act of 1935 as its interim constitution. The decision was unavoidable at least for a brief period of time as the country had to have its own constitution that would have taken a couple of years to be formulated. However, it took nine long years to make the constitution. In these years the centralization and the authoritarian traits of the 1935 Act consolidated with the vested interests precipitating for the continuation of the same traits, thus the subsequent constitutions also could not deviate from the original philosophy of centralization and authoritarianism. The recuperation of the spirit of the

¹⁷ Sir Ivor Jennings, *Some Characteristics of the Indian Constitution* (India: Oxford University Press, 1953), p.55.

Act of 1935 in all the constitutions of Pakistan was described by Retired Justice Dorab Patel as 'Legal Fundamentalism'.¹⁸

Going by the yardstick of federalism as laid down by numerous constitutionalists, four principles are fundamental to any federal constitution. These are: supremacy of constitution; division of powers; a bicameral legislature; and, the role of the federal court as the guardian of the constitution.¹⁹ To this, one can also add the safeguards against the emergency provisions which in the absence of these safeguards may distort the federal compact.

A survey of Pakistan's various constitutions suggests that all of them on one or more counts fell short of meeting these criteria. All of these constitutions proved vulnerable to extra-constitutional pressures. The principle of the supremacy of constitution was ridiculed for the earlier two constitutions (of 1956 and 1962), were abrogated by martial laws, while the third (of 1973) was suspended (1977) and put in abeyance (1999), by the third and the fourth military rulers. That the constitution cannot protect itself, and that any penalty for its violation incorporated, even in the strongest of terms, in its articles may not ensure its survival is obvious from the fate of the 1973 constitution. Despite its Article 6 according to which the abrogation of constitution amounts to sedition which can be punished with the death penalty, two military rulers usurped power; what they only did was instead of using the term 'abrogation', they used the phrase of 'suspension' and 'putting in abeyance'. This clearly illustrates that the mechanism for assuring the constitution's survival may not be a function of the constitution itself; its forte lies somewhere outside the book that it is.

As regards the principle of division of powers all the three constitutions carried legislative lists which gave maximum powers to the centre, and only nominal residuary powers were left for the provinces. In fact, these constitutions went further than the 1935 Act with respect to the powers of the centre. It was only after the 18th Amendment that a major shift in the federal paradigm took place resulting in the abolition of the concurrent legislative list, enlargement of the arena of provincial competence, and in certain respects, enhancement of the financial status

¹⁸ See Justice Dorab Patel's interview in weekly *Viewpoint* (Lahore), 15 August 1985.

¹⁹ See for a detailed discussion of Pakistan's three constitutions promulgated in 1956, 1962 and 1973, along these four federal criteria, Syed Jaffar Ahmed, *Federalism in Pakistan: A Constitutional Study* (Karachi: Pakistan Study Centre, University of Karachi, 1990).

of the provinces. Keeping in view the typology of G.F. Sawyer, suggesting three forms a federal constitution can take; that is, coordinate federalism, cooperative federalism, and organic federalism,²⁰ one can say that after the 18th Amendment, at least on paper, Pakistan's federalism has moved from organic federalism to cooperative federalism. This has also been the view of a number of those legislators who played an important role in the preparation of the 18th Amendment including Raza Rabbani,²¹ who served as the chairman of the all-party parliamentary committee that prepared the jointly agreed and approved draft of the 18th Amendment.

The criterion of bicameralism is crucial in federal systems because it reconciles the principle of democracy with that of equality of the federating units. In a bicameral legislature, the upper house, representing the federating units, allows equal representation to all the units, thus satisfying their urge for equal status. On the other hand the lower house allows representation to the units on the basis of their population, thus giving credence to the democratic principle. In the case of Pakistan, the question of representation posed such a threat to our power elite in the first two decades, that they went out of their way to find artificial means to bypass this principle. In order to neutralize the numerical majority of East Bengal, all the provinces and states in the western part of the country were merged to create the One Unit. This was used to argue that with only two provinces in the country they should have equal representation even in the house that actually had to represent the democratic principle and, when this was done, there was no need to have the other house, which is created for equal representation of the federating units. So, bi-cameralism was replaced by uni-cameralism in the Constitution of 1956 and was continued in that of 1962 as well. Once East Pakistan was got rid of, the principle of numerical strength of respective provinces was accepted and the 1973 constitution allowed a bicameral legislature, with Senate representing the equality of the federating units and the National Assembly elected on the basis of 'one-

²⁰ G.F. Sawyer, *op.cit.*; see chapter VIII, 'The Stages of Federalism', pp.117-30.

²¹ Mian Raza Rabbani, 'The 18th Constitutional Amendment: A Paradigm Shift', *Pakistan Perspectives*, 16:1 (January-June 2011), p.10. In his book, the same author proclaims the 18th Amendment as being 'crucial in empowering provinces and building the foundation for a participatory federalism in Pakistan'. See Mian Raza Rabbani, *A Biography of Pakistani Federalism: Unity in Diversity* (Islamabad: Leo Books, 2012), p.143.

man one-vote', a principle which was never accepted while East Pakistan was part of the country.

As regards the role of the federal court, the unfortunate history of our judiciary tells a very dismal story. Instead of serving as the custodian of the constitution the federal court in 1958 gave legal sanction to the Martial Law and the abrogation of the constitution. The military take-over of 1977 and 1999 were also given legal covers by the Supreme Court. It was only the martial law of 1969 which was declared illegal and General Yahya Khan was charged with usurpation of power, but this was done in April 1972 when he had already been out of power. The judiciary on many occasions also declared the dissolution of the legislature as legal. The earliest of such decisions was made about the 1954 dissolution of the assembly by the Governor General Ghulam Mohammad. This assembly served not only as the legislature, but was also the Constituent Assembly.

The emergency provisions in the successive Pakistani constitutions have had the impact of distorting the constitutional edifice to a substantial level. The imposition of emergency meant undoing of the fundamental rights and almost total annihilation of whatever little powers the provinces had. A somewhat positive development in this area has taken place with the introduction of the 18th Amendment, which has laid down that in case of emergency imposed due to internal disturbances beyond the powers of the provincial governments to control, a resolution of the provincial assembly shall be required. Similarly, if the president, acting on his own, proclaims emergency in a province, the proclamation has to be placed before both houses of the parliament within ten days.²²

The Constitution of 1973, after having been mutilated and abused for more than three decades, eventually got properly restored with certain new and innovative clauses in 2010, when all the parties having representation in the National Assembly developed a consensus on constitutional reforms, thus giving way to the 18th Amendment. It is not that the constitution has become all that it should be; rather far from it; it has lacunae, contradictions and anomalies. There are also areas where it is silent, and this silence is over-bearing. But despite all this, it would not be wrong to say that in many areas, its clauses are better than these had ever been. The presidential powers have been re-adjusted and brought in congruence with what these should be in a parliamentary system. The position of the prime minister has also been restored. Provincial legislative powers and financial rights have been recognized

²² Article 232.

making the federal arrangement more devolved. These can also be described as achievements of the long struggle of the democratic forces of the country. Having said this, one should also not lose sight of the obstacles in the constitutional governance, the socio-political realities of the country, the imbalance of civil and military relations, and the weaknesses of the political class which together render the constitution, and whatever achievements there have been within its domain, practically ineffective. This leads us to the arena of constitutionalism and what operates against it by way of the social and political realities as they prevail in the country.

Constitutionalism

Constitutionalism represents a wider area encompassing the manner in which the constitution is accepted, implemented, responded to, and made use of in the society. While the merit of a constitution is adjudged by the degree of its appropriateness in recording and articulating what it stands for, the merit of constitutionalism lies in the level of its permeation in the culture and behavior of the people. I.A. Rehman defines constitutionalism as ‘a political creed voluntarily followed by the custodians of the state power, the parties/elements in opposition and active citizens in order to ensure that they not only act in accordance with the letter of the constitution but also continuously strive to promote its spirit’.²³ This societal aspect of a constitution becomes all the more significant in societies where social norms and practices do not subscribe to the imperatives of constitutionalism. This has been very aptly highlighted by a Sri Lankan expert in constitutional jurisprudence, Radhika Coomaraswamy, who while referring to another Sri Lankan scholar, Gananath Obeyesekere,²⁴ the Emeritus Professor of Anthropology at Princeton University, says that,

It is easy to engage in a sterile constitutional analysis of the words of constitutions, and their interpretations in different situations. But the more important question is: what are the cases which actually come before the courts? Is it not more likely that the average South Asian will go to the mediators in civil society from headman, priest to

²³ I.A. Rehman, ‘Of Culture of Constitutionalism’, in, Centre for Civic Education Pakistan, *Reader on Fundamental Rights* (Islamabad: Centre for Civic Education Pakistan, 2014), p.44.

²⁴ Gananath Obeyesekere, *The Goddess Pattini and the Parable on Justice Punitham Tiruchelvam Memorial Lecture* (Colombo: Tamil Womens Union, Kalalaya, 1983).

astrologer to resolve his conflict rather than in open court with procedures which are alien to him'.²⁵

This means that if constitutionalism is a culture, there also exists a counter-culture which can be identified as a culture of obscurantism, traditionalism and authoritarianism. In other words, it can be said that for creating and fostering constitutionalism in a country, there is need to transform 'primordial sentiments',²⁶ into civil sentiments which also realizes in the creation of a national identity out of parochial identities. What has transpired with the constitutions in Pakistan can be analyzed against this dichotomy of cultures.

Historically, one can realize a disconnect between our legal and constitutional development and the society at large. The correspondence between legal and constitutional institutions on the one hand, and the nature of social change on the other, as found in the history of some of the advanced westerns democracies was not there in our case. The British rule cultivated a vast landed aristocracy in India and also enunciated institutions which could be regarded as the preliminary forms of parliamentary and federal structures. The design implicit in this engineering was well-planned. It brought about the rural social elite which also served as the local political power-holders, who were ever-ready to serve in the colonial system of control as pliable functionaries. Missing in this arrangement was a progressive social transformation which would have involved the citizens and their rights as essential ingredients. So the socio-political structures were devoid of egalitarianism and liberties which are at the heart of a democratic polity. It would not be wrong to say that the concepts of rights, civil liberties, transparency and accountability, as well as secularism, ensuring the neutrality of state vis-à-vis its citizens, which formed the ideology of constitutionalism in modern western democracies, were absent in our

²⁵ Radhika Coomaraswamy, *Ideology and the Constitution Essays on Constitutional Jurisprudence* (Delhi: Konark Publishers Pvt. Ltd., 1997), p.4.

²⁶ Clifford Geertz, *Old Societies and New States, the Quest for Modernity in Asia and Africa* (New York: The Free Press of Glencoe, 1963), p.109. Geertz defines a primordial sentiment as 'one that stems from the givens of – or, more precisely, as culture is inevitably involved in such matters, the assumed givens of social existence: immediate contiguity and kin connections mainly, but beyond them the givenness that stems from being born into a particular religious community, speaking a particular language or even a dialect of a language, and following particular social practices', p.109.

case The post-colonial Pakistani state was as dissociated with the wider society as the colonial state was. There was a superstructure manned by civil and military bureaucracies, inherited from the Raj, and on the other side there was a big population of subjects who in this system of control could not enjoy the status of citizens. In between there were elites—essentially holders of economic power and privileges in the localities. They also became political power holders. The society in Pakistan, despite numerous changes in terms of urbanization and mobility, increase in literacy, and emergence of a consumer economy, still has strong archaic social institutions, practices and attitudes. Though it might appear to be a bit of a generalization, we have been trying to sow the seeds of democratic governance in a pre-democratic society. We are looking for constitutionalism in a society in which the culture of authoritarianism is rooted deeply. This authoritarianism can be seen in both rural and urban cultures, institutions, the religious organisations and the family dynamics. All of these are regulated within the command and obedience, and patron and client paradigms. This culture in which authoritarianism is actually structured is anathema to the culture of constitutionalism.

Keeping this prime fact in mind, one can look into various contradictions as they are found in Pakistan. There is civil-military imbalance rooted in the amassing of power by the military over the years and its success in acquiring the most pivotal and decisive place in the state structure. Authoritarianism also runs deep in the political institutions, where authority is accumulated in offices, which are in a position to do so. When we had a viceregal system, the centre as well as the provinces, were governed by the civil servants, who were directly responsible to the governor general. At one point when after Quaid-i-Azam's death, Liaquat Ali Khan was able to bring in a pliable Governor General in the form of Khawaja Nazimuddin, Liaquat Ali Khan himself began to show his muscles. He directly involved himself in provincial matters and at times chose the chief ministers of his own choice. Thus bypassing the decisions of the Muslim League Parliamentary Party in the provincial assembly of East Bengal, which had decided to appoint Hamid-ul-Haq Choudhury in place of Nazimuddin as the chief minister of the province, Liaquat Ali Khan imposed Nurul Amin on the provincial League.²⁷ Right from the beginning the cabinet system and its legal and political niceties were violated by the office of the governor general and

²⁷ Hamidul Haq Choudhury, *Memoirs*, quoted in, Dorab Patel, *Testament of a Liberal* (Karachi: Oxford University Press, 2000), p.4.

later President Iskander Mirza appointed and removed the prime ministers on his personal discretion. One can cite numerous incidents of violation of parliamentary spirit in the subsequent history of the country.

Added to this is the fact that parliamentary system flourishes on the active role of the political parties. The parties in Pakistan have historically been weak. They exhibit tendencies which do not correspond with the requirements of a genuine democratic system. The state of internal democracy in parties is extremely poor as has been recently researched and brought to the fore by two reports of the Pakistan Institute of Legislative Development and Transparency (PILDAT).²⁸ Generally the political parties' leadership and other office-bearers are nominated, instead of being elected; parties do not adhere to their own constitutions; their funding and financial matters are not even accessible to their members; decisions are taken at the top level; and even the allocation of party tickets is done by the selective few, without involving the local party bodies and cadres. There is a growing trend of nominating family members on important party posts and giving tickets to them for the national and provincial legislatures.

As far as the federal aspect of constitutionalism is concerned, from the society's point of view, the first major imperative is the recognition of the respective autonomy of different cultural and linguistic groups and regions. It is this autonomy that was denied to them by the centralist power-holders, to whom allowing spaces to the regional sentiments and initiatives could harm national integration which was sought through the use of a religious ideology. Therefore, while the centrist forces relied heavily on religion as a means to enforce centrist political and economic policies, regional forces took to more secular idioms for the realization of their demands. It should not be un-understandable as to why almost all regional parties standing for provincial autonomy had by and large been secular in their political programs and discourses.

The federal features of the constitution whether they were stronger or weak, were also not given due respect and often they remained un-implemented. The Constitution of 1973 created the National Finance Commission, the Council of Common Interests and the National Economic Council. These could be useful federal institutions which

²⁸ See, 'Assessing Internal Democracy of Major Political Parties of Pakistan', Lahore: Pakistan Institute of Legislative Development and Transparency (PILDAT), December 2014; and, 'Internal Democracy of Major Political Parties of Pakistan 2015', Lahore: PILDAT, February 2016.

could harmonize the interests of the provinces and bring about settlements between the centre and the provinces. The post-1973 record shows that none of these institutions was called on time. During the military rules of General Zia-ul-Haq and General Pervaiz Musharraf, which together accounts for 19 years, only one session of the Council of Common Interests was held.

After the 18th Amendment, too, the factors of centre's lethargy and the centrist mindset have not come to rest. In fact hurdles were created in the smooth transformation of the system by the bureaucracy as well as the technocrats, who showed complete distrust about the provincial competence. The traditional power-holders had also found accomplices in the political class.

The fact that the devolution plan has not moved down further from the provinces to the localities has also affected its utility. At best what has happened is that power and authority as well as the resources which were concentrated at the centre in the past, are now concentrated at the centre and in the provinces. The spirit of devolution that requires these things to be filtered down to local level for the common good of ordinary people has remained unsatisfied.

Here, the role of the provinces also needs to be examined. There has always been a strong demand for provincial autonomy, but now when a number of powers have been shifted to the provinces, one would be justified to know what the provincial regimes have been able to deliver to their people in the last seven years. Unfortunately, by and large, the provincial performance has remained dismal which is a major source of people's growing disappointment with even the idea of devolution. The lack of political will at the level of provincial leadership regarding the implementation of the devolution plan, their failure or a very slow pace in making new legislation in the context of new realities, are some of the facts which are adding to the growing frustration of the people.

While talking about constitutionalism or its opposite, that is, the culture of authoritarianism, one is naturally faced with the question as to how the latter can be replaced by the former. Crucial in this respect is the fact of how constitutional obligations are fulfilled, and to what extent the rights and powers promised to the people are realized. Moreover, in the case of 18th Amendment, it has yet to be seen as to what has been delivered to the common citizens of the country. As long as people's stakes in the constitutional provisions are not built, they would not come to uphold it. And without a social ownership no constitution can ensure its success. In his, 'Note on the Nature of Federalism', Professor W.S. Livingston had rightly observed that federalism has to be understood as a

‘sociological phenomenon’, that is, ‘a function not of constitutions but of societies’.²⁹

In order to ensure the creation of social ownership for the constitution, apart from the material gains that the people may get from the provisions of the constitution, constitutional literacy can also play an important part. The spirit of constitution and the values of constitutionalism can be induced through creative educational curricula in schools and college. But above all it is the role of the political leaders and the political elite which may or may not create social acceptance for the constitution and generate the ethos of constitutionalism among the people. Some 2,500 years ago Plato had written that: ‘states do not come of the oak trees; they are made by the character of the men’. This holds even today.

To conclude, one can say for sure, that one may have a good constitution, and can improve its clauses with the passage of time, but as long as a culture of constitutionalism does not consolidate, the constitution’s blessings for the society do not realize. If a constitution does not respond to the urges of the people, they do not relate to it. Similarly, if the constitution does not ensure a comfortable and pleasant life to the people and also does not console the grief of the people, it does not find place in their hearts and souls.

²⁹ W.S. Livingston, ‘A Note on the Nature of Federalism’, in Aaron Wildavsky, *American Federalism in Perspective* (Boston: Little Brown and Company, 1967), p.33.