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Constitutionalism: Theory and Issues from Pakistan's Perspective

Hina Khan*

Abstract

In a recent publication South Asian constitutionalism has been aptly described as 'unstable constitutionalism' wherein wide disagreements on a single institutional design often lead to 'recurring tensions that lie at the intersection of law and politics'. These disagreements seem to be more conspicuous in Pakistan with a wide variety of opinions but little interest regarding constitutional matters. While Article 5(2) of the constitution clearly establishes compulsory obedience to the constitution and law as 'inviolable obligation of every citizen', instances of indifference towards the sanctity of the constitution abound. Hence constitutionalism in its own right has been reduced to a subject of occasional judicial reviews. A large part of the recent South Asian literature seems to be focused on comparative constitutional studies which seldom tend to imply theoretical issues pertinent to the developing world whereas our legislators often seem to be preoccupied with day-to-day matters rather than theoretical underpinnings of the constitutional issues. Hence solemn parliamentary debates that shaped democratic discourse in the West are almost absent in our legislatures. In this context this paper aims at a theoretical overview of the major tenets of classical constitutionalism with an attempt to finding their implementation in Pakistan's constitutional issues. It also seeks to trace the extent and consequences of 'instability' in Pakistani constitutionalism.

The paper is divided into two main sections: the first overviews the theoretical aspects of the idea of constitutionalism and its major tenets as developed over the last few centuries. The second explores the relevance of those classical concepts of constitutionalism in the political setup of Pakistan, highlighting the issues and hurdles in the way. The paper depends on the existing literature on constitutionalism with particular reference to Pakistan along with interviews and discussions with relevant persons in Pakistan.

> *What is the Constitution? It is a booklet with ten or twelve pages. I can tear them up and say that from tomorrow, we shall live under a different system. Is there anybody to stop me?*
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> *(General Zia-ul-Haq)*[1]

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* Dr Hina Khan, Assistant Professor, Department of General History, University of Karachi, Karachi.

1 Reported by Kayhan International, Iran, 18th September 1977.

This is one classic case of 'unstable constitutionalism' or rather lack of it among the autocratic rulers in Pakistan and some other developing countries[2] which often leads to 'recurring tensions that lie at the intersection of law and politics'.[3] This syndrome becomes even more acute in Pakistan where the indifference to the sanctity of constitution is not just limited to the dictators but permeates the society at large. Article 5(2) of the Constitution of Pakistan (1973) clearly establishes that

> Obedience to the Constitution and law is the [inviolable][4] obligation of every citizen wherever he may be and of every other person for the time being within Pakistan.

Likewise, the oft-quoted Article 6(1) asserts:

> Any person who abrogates or subverts or suspends or holds in abeyance, or attempts or conspires to abrogate or subvert or suspend or hold in abeyance, the Constitution by use of force or show of force or by any other unconstitutional means shall be guilty of high treason.[5]

Nevertheless, the country's history is replete with the instances of what Mohammad Waseem calls 'extra-constitutionalism' i.e. a sheer disdain and disrespect of the constitution on the part of the rulers and an indifference on the part of people. In this context this paper aims at a theoretical overview of the major tenets of classical constitutionalism with an attempt to finding their implementation in Pakistan's constitutional issues. Why those tenets fail to form an essential part of Pakistan's half-hearted and unstable constitutionalism is the major question probed in this study. It also seeks to trace the extent and consequences of this 'instability' in Pakistani constitutionalism. For this purpose the study is divided in two major parts: the first, over-viewing the theoretical aspects of the idea of constitutionalism and its major tenets as developed in the western political discourse; the second, exploring the relevance of those classical concepts of constitutionalism in the political setup of Pakistan highlighting the issues and hurdles in the way. The first part heavily depends on the theoretical discourse that

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2 Surprisingly the US President George Bush in December 2007 is said to have spoken similar words for the American constitution.

3 Mark Tushnet and Madhav Khosla, *Unstable Constitutionalism – Law and Politics in South Asia* (New York: Cambridge, 2015), p.5.

4 Item 3 of the Schedule to P.O. No. 14 of 1985 substituted the said word, in place of the word 'basic' in clause (2) of Art. 5 (w.e.f. 2 March 1985) (original footnote from the Constitution).

5 As amended by the 18th Amendment (2010).

originated in the western political thought while the second is completed with the help of some existing Pakistani writings, online sources as well as an exchange of thoughts with some relevant persons in academia, media and civil society.

A conceptual overview of constitutionalism

In very simple but appropriate words, constitutionalism can be defined as 'a political creed, voluntarily followed by the custodians of state power, the parties or 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.[6] The idea is that constitution of the state is above and antecedent to the government and by virtue of the constitution 'government can and should be legally limited in its powers, and that its authority or legitimacy depends on its observing these limitations'.[7] Alexander Hamilton further elaborates the idea in the following words:

> In framing a government which is to be administered by men over men, the greatest difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on government; but experience has taught mankind the necessity of auxiliary precautions.[8]

Such 'auxiliary precautions' or restraints against absolutism of a government are best applicable when enshrined in a constitution. Hence a constitution consists of a set of rules, principles, values and conventions which create, structure and possibly define the limits of government power or authority. A democratic constitution includes norms which not only create legislative, executive and judicial powers but also enforce considerable limits on those powers.

Andrews points out two distinct roles of the constitution: libertarian and procedural. In its libertarian role a constitution sets limits

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6 I.A. Rehman, 'Of Culture of Constitutionalism' posted in a blog Citizen's Wire on 8 April 2014 http://www.citizenswire.com/of-culture-of-constitutionalism, accessed 12-10-2016.

7 Will Waluchow, 'Constitutionalism', *The Stanford Encyclopedia of Philosophy* (Spring 2014 Edition), Edward N. Zalta (ed.), URL = http://plato.stanford.edu/archives/spr2014/entries/constitutionalism/, accessed 12-10-2016.

8 Francis D. Wormuth, *The Origins of Modern Constitutionalism* (New York: Harper Brothers, 1949), p.3.

on the arbitrary powers of the state and likewise ensures the fundamental rights of the people and thus establishes a smooth relationship between the government and the governed. In the procedural role it provides the structural and procedural details of the operation and regulation of the government and its organs. It may also describe details of territory under a country's sovereign jurisdiction and delineate social economic and foreign policies of the state. In the words of Z.K. Maluka a constitution is a national manifesto, a statement of national ideals and aspirations, a fundamental law of the land, an abiding charter, a social contract, and above all, a written confession of the political faith of the state.[9]

Vivid instances of constitutionalism are available in history since the period of Athenian democracy wherein institutional arrangements to prevent a tyrant to overthrow democracy were duly established.[10] In 4th century BCE the juryman of the popular court *Heliaea* had to take an oath that 'I will give verdict in accordance with the statutes and decrees of the people of Athens and the Council of Five-hundred. I will not vote for tyranny or oligarchy. If any man try (tries) to subvert the Athenian democracy or make any speech or any proposal in contravention thereof, I will not comply'. On the other hand, every citizen had to swear that 'If it be in my power, I will slay by word and deed, by my vote and by my hand, whosoever shall suppress the democracy at Athens, whosoever shall hold any public office after its suppression, and whosoever shall attempt to become tyrant or shall help to install a tyrant.[11] According to Aeschines, 'Tyrannies and oligarchies are administered according to the temper of their lords, but democratic states according to their own established laws', i.e. the constitution.[12] Here a question arises whether that constitution is a good constitution? Good or bad are rather subjective terms but in the democratic discourse good laws are supposed to be those which ensure equality and impartiality otherwise these, as Plato asserts, do not deserve the name of 'laws'. Aristotle defines the good state not as a law-abiding state, but as one which has 'just laws' and 'serves the general good'.[13] The later Stoic thinkers further elaborated this notion. 'Law is ruler of all', said Chrysippus; and this law was an immutable and

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9 Zulfikar Khalid Maluka, *The Myth of Constitutionalism in Pakistan* (Karachi: Oxford University Press, 1995), p.18.

10 Draco (d. 600 BCE) is supposed to give the first constitution of ancient Greece. His constitution was improved by later legislators such as Solon, Cliesthenes etc.

11 Francis D. Wormuth, *op.cit*., p.4.

12 *Ibid*., p.10.

13 *Ibid.*

invariable system discovered by human reason. To Cicero, statutes which went contrary to this divine code are not more than the rules adopted by a band of robbers. An interesting debate between Perecles and Alcibiades is reported in which Pericles described law as: 'Whatever the ruling power of the state after deliberation enacts as our duty to do, goes by the name of law'. Alcibiades emphatically added that true laws make their way by persuasion, whereas the commands of a tyrant, imposed by force, are not laws.[14] Hence consultation was considered the means of establishing laws among citizens. Conversely, the Roman emperors were despots but at least verbally admitted the importance of the law. Severus and Antonius likewise declared: 'Although we are above the laws, yet we live in obedience to them'.[15] So Roman law developed the doctrine of the virtual subordination of the government to laws.[16] Gierke called this duality of power centers, the 'dual majesty'.[17] Bodin in 16th century highlighted royal absolutism yet recognizing the bonds certain contracts, public laws and the power of the Estates General (medieval French Assembly) in approving the taxation. This reflects the medieval pluralism of power centers established in the form of aristocracy, Church and the medieval assemblies such as the British Parliament or the French Estates General.[18]

It was only during and after the English Civil Wars (mid-17th century) that the major principles of constitutionalism viz. popular sovereignty, checks and balances on the government, written constitutions and separation of powers were enumerated and systematically entered the political discourse. The Enlightenment brought scientific revolution and the concept of natural laws and consequently the regularity of the universe enhanced the prestige of law. The challenge to the absolute monarchy came from the English Parliament and within a century the French philosophers were advocating constitutional monarchy theoretically following the British lines. The British thinker Hobbes had asserted that the people in order to end their natural miserable conditions enter into a social contract among themselves and accept the rule of a government (in this case an absolute king). As this government is not a party to the contract, it is not

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14 *Ibid*., p.11.
15 *Ibid*., p.27.
16 *Ibid*., p.29.
17 Ernst. Hartwig Kantorowicz, *The King's Two Bodies – A Study in Medieval Political Theology* (Princeton: Princeton University Press, 1957), p.20.
18 Francis D. Wormuth, *op.cit*., p.32.

answerable to the people and hence there can be no constitutional limits to the king and his sovereignty is unchallengeable. 'For to be subject to laws is to be subject to the commonwealth — that is to the sovereign — that is, to himself, which is not subjection but freedom from the laws' .[19] Similarly, to Austin the idea of limited sovereignty is as absurd as that of a 'square circle'.[20] On the contrary, Locke's social contract is established between the people and the ruler and since the ruler is a party to the contract he is answerable to them and thus is under the umbrella of the constitution.[21] Later, American and French revolutions endorsed Locke's ideas and the concept of constitutionalism. In France Voltaire and Montesque wanted a constitutional monarchy and the latter had further espoused the idea of a balance of power between the executive, legislative and judicial organs of the state to be entrenched in the constitution. Rousseau in his social contract had built upon Locke's thesis and clearly justified the right of the people to revolt in case of failure of the government to abide by the contract.[22] The idea of a liberal constitution was so highlighted that against all the wishes and measures of the conservative powers, it infiltrated the European societies. Demand for a constitution became a common slogan of scores of popular movements across Europe between 1818 and 1871.[23]

Understandably, the emerging discourse on constitutionalism also focused on the dichotomies between the sovereign and the government; written and unwritten constitutions, original and living constitutions, their interpretation and implementation, scope of authority between the federal and provincial governments and so on. The major tenets of constitutionalism thus evolved are discussed below:

Popular sovereignty: Sovereignty can be defined as the 'possession of supreme (and possibly unlimited) normative power and authority over

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19 Thomas Hobbes, *Leviathan*, Ch.29 https://www.gutenberg.org/files/3207/3207-h/3207-h.htm#link2HCH0029 accessed 20-4-2016.

20 See *Stanford Encyclopedia of Philosophy*, http://plato.stanford.edu/entries/constitutionalism/index.html#note-4 accessed 4-4-2016.

21 John Locke, *Two Treatises of the Government*, http://www.constitution.org/jl/2ndtr08.htm accessed 20-4-2016.

22 See Paul H. Meyer, 'The French Revolution and the Legacy of the Philosophes', *The French Review*, 30:6 (May 1957), pp.429-34.

23 Despite the conservative measures taken at the Congress of Vienna (1815), movements for constitution emerged in Netherlands, Spain, Italian and German states and some of them even succeeded in extracting liberal constitutions from their reactionary rulers.

some domain'.[24] Hence the absolute monarchs of the early modern period were themselves called 'sovereigns'. The debate that whether a sovereign (the king or the government) can be limited by a constitution has been mentioned above. Louise XIV's famous dictum, '*l'etat c' est moi*' (The state is myself) and Louise XVI's insistence that 'law is what I say it is' as supported by Bodin, Hobbes and Austin negate any such limitation. On the other hand, the supremacy of English Parliament had given the idea of a constitutionally unlimited parliament. American and French constitutions limited the power of the government to an extent where the executive had to answer for the every step taken. Austin (though with a different connotation) presented the idea of popular sovereignty i.e. the sovereignty resides in 'the people'. This idea formed the foundations of the American and French revolutions. Benjamin Franklin underscored the idea by asserting that 'In free government, the rulers are the servants and the people their superiors and sovereigns'[25] The distinction between the sovereign and the government was now more clear as the government being the group of people and institutions through which sovereignty is exercised by the sovereign i.e. the people. This explains the democratic notion of a limited government and unlimited sovereignty of the people 'who have the normative power to void the authority of their government (or some part thereof) if it exceeds its constitutional limitations'.[26] The first French constitution of 1791 declared that 'sovereignty is one, indivisible, unalienable and imprescriptible; it belongs to the Nation; no group can attribute sovereignty to itself nor can an individual arrogate it to himself'.[27] The idea of popular sovereignty hence got mixed with that of national sovereignty exercised not by an unorganized people in the state of nature, but by a nation embodied in an organized state. This synthesized idea later led to the freedom movements in Latin America, Africa and Asia including that in India.

Civil or fundamental rights: Major part of the limitations imposed by a constitution on the arbitrary rule comprises the basic rights of the citizens

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24 *Stanford Encyclopedia of Philosophy*, http://plato.stanford.edu/entries/constitutionalism/index.html#SovVerGov

25 Benjamin Franklin, Ralph Ketcham (ed.), *The Political Thought of Benjamin Franklin* (Indianapolis USA: Hackett Publishing, 1965 and 2003), p.398.

26 *Stanford Encyclopedia of Philosophy*, *op.cit.*

27 *Constitution of France, 1791*, www.isites.harvard.edu/FrenchRevolutionDocuments/constitution.

such as the right to life and property, right to vote, right to information, and right to fair trial, freedom of expression, association, religion, and equality before law. An Athenian law 'nomos' guaranteed that no law should be passed dealing with an individual, except the measures such as ostracism which required the concurrence of extraordinary majority of six thousand.[28] In Roman Republic and even the later Empire, most of the laws were general and implied equally on all citizens. Yet some special laws did exist as *'privilegia'*. These were private laws, or legislations exclusively dealing with particular individuals or groups. Ordinarily these granted a benefit or immunity to certain people but were not generally appreciated. The Twelve Tables of the Roman law forbade the passing of *privilegia* in favor of private persons to the injury of others, contrary to the laws common to all citizens regardless of their status. Protection of individual rights became a major tenet of constitutionalism since the 17th century. To Locke government was but a necessary evil formed against the natural equality of people and hence 'men would not quit the freedom of the state of Nature for, and tie themselves up under' a government, 'were it not to preserve their Lives, Liberties and Fortunes; and by *stated Rules* of Right and Property to secure their Peace and Quiet'.[29] The libertarian role of the constitution is to forbid the state to trespass the areas reserved for private activity.

Rule of law: According to Aristotle 'Law should govern'. No constitution can work without a rule of law wherein the laws of a country or region as a whole are respected by the government and the citizens and every citizen including the lawmakers themselves are subject to law. In Plato's words, 'mankind must have laws, and conform to them, or their life would be as bad as that of the most savage beast'.[30] The concept developed through the constitutional debates of 17th to 19th century particularly by Dicey who argued that twin pillars of the British constitution are parliamentary sovereignty and rule of law.[31] Presently the rule of law is understood as a system guaranteeing the principles of equal accountability of the government, its officials and the common individuals; clarity and publicity of the laws which are stable, just and

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28 Francis D. Wormuth, *op.cit.*

29 John Locke, *Two Treatises of Government*, edited by Peter Laslett (New York: Mentor Books, New American Library, 1965), Second Treatise, Constitutional Government, pp.134-42.

30 Plato, *The Dialogues of Plato*, Vol.4, Charles Scribner's Sons, 1907, p.388.

31 John Hostettler, *Champions of the Rule of Law* (Hampshire: Waterside Press, 2011), p.23.

evenly applied and protect fundamental rights; fair and efficient procedures for the enactment, administration and enforcement of the laws; and timely and efficient dispensation of justice by competent, honest and independent representatives and officials who are in sufficient number, have adequate resources, and reflect the communities they serve.[32] It is reflected in the extent to which citizens feel themselves to be safe and the trust they feel toward the government. Though the idea has seldom been challenged in constitutional debates, it carries a degree of ambiguity which has often been pointed out. First, there is a difference between the rule of law and rule by law. The latter is a situation in a state where legal statutes are simply the tools in the hands of a ruler who can change them anytime according to his own wish. However, according to the functionalist approach it can be a more efficient system as compared to the rule of law wherein the government is heavily restricted by its own laws.

Entrenchment: If rule of law is accepted as a must in constitutionalism the question arises that how the laws or the norms limiting the government are made stable, publicly known and safe from abuse and interference of the government? The answer of the theorists is first their entrenchment through a written statute or an unwritten convention and second making the process of amendment difficult and exhaustive.

Thomas Paine asserts that written constitutions are 'to liberty, what grammar is to language'. 'Writtenness' has been almost a universal trait of modern constitutions as Rubenfeld asserts that constitutional norms don't exist if they are unwritten.[33] Even the unwritten British constitution is a collection of age-old documents (starting from the *Magna Carta* -1215) which form the landmarks of the evolved democracy in Britain. However, for the sake of clarity and avoidance of misinterpretation and violation written constitutions are important particularly for states where democratic conventions are not deeply rooted in history.

The question of amendment is trickier. Constitutions are definitely not scriptures which cannot be altered. In fact it is sometimes imperative to mould a constitution according to the changing times. But the doctrine of rule of law requires that governments should not be

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[32] World Justice Project, 'What is the Rule of Law?', www.http://worldjusticeproject.org/, accessed 5-5-2016.

[33] J. Rubenfeld, 'Legitimacy and Interpretation' in L. Alexander (ed.), *Constitutionalism* (Cambridge: Cambridge University Press, 1998).

allowed to change the rules of the game or the very terms of their constitutional limitations at their pleasure. Written constitutions are generally provided with some procedure for necessary amendments. But such alterations are not invoked by regular methods such as a simple majority vote but usually require exhaustive procedures such as absolute majority votes (from both houses in case of a bicameral legislature), referendums, and ratification by constituent units in a federation. But if the people are sovereign are they free to change the constitution at their pleasure. This had been a source of disagreement in the constitutional debates in Britain and elsewhere. The supremacy of parliament in passing bills even if they were in conflict with some earlier conventions was upheld by British Parliament. Similarly the American founding fathers were also aware of the probability of future amendments to their beloved constitution. George Mason admitted that 'the plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. Amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular and Constitutional way than to trust to chance and violence'.[34] Here also the onus of amending the document was placed on the people: 'The People (for it is with them to Judge) can, as they will have the advantage of experience on their side, decide with as much propriety on the alterations and amendments which are necessary'.

Separation of Powers: Separation of powers is the division of government responsibilities into distinct branches to limit any one branch from dominating another. The intent is to prevent the concentration of power and provide for checks and balances. Legislative branch enacts the state laws and votes the money bills appropriating the expenditure necessary to operate the government; the executive implements and administer the public policy enacted by the legislature; while the judiciary interprets the constitution and laws and applies its interpretations to the controversies brought before it. It is generally understood that persons charged with the exercise of one power may not exercise either of the others except as permitted by the constitution.[35]

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[34] Sanford Levinson (ed.), *Responding to Imperfection – The Theory and Practice of Constitutional Amendment* (Princeton: Princeton University Press, 1995), p.3.

[35] http://www.ncsl.org/research/about-state-legislatures/separation-of-powers-an-overview.aspx accessed 1-4-16.

The English Civil Wars of 17th century brought forth the question of distinctiveness of the executive and legislative organs of the state and also the role of judiciary in this regard. As it is obvious that the executive (the king or government) also had a share in the legislative power as the government officials might also be a part of the legislature, the question of supremacy remained an enigma. Neither the parliament nor the king was considered competent to exercise the power of judiciary though there were arguments in favor of both. For instance, Blackstone wanted the judges to be independent but considered them a part of the executive. General understanding developed in favor of an independent body of judges nominated by the executive but not removable at pleasure. To Locke government resembled a board of trustees and the possible abuse of powers by the trustees could be avoided by separating the executive from the legislative. Montesquieu in *Esprit des Lois* explains that in order to prevent the abuse of power one branch of government must have a check on the other. When the legislative, executive and judicial powers are not separated from each other, 'there can be no liberty' and hence a recurrence of tyranny and arbitrary rule as later endorsed by the American federalists.[36]

Originalism and living constitutionalism: There have always been disagreements on the understanding of a constitution and the parliamentary debates of the West have contributed substantially to enrich the democratic discourse. Such disagreements became more evident when referred for judicial reviews as judiciary is the organ formed for the interpretation of laws and to settle disputes over them. Constitutional interpretation usually depends on various theories which study key-factors such as semantic understanding, socio-political and historical background, legal precedence, and so on. In this context two major theories can be identified: 'Originalist' or the 'fixed view' theory of constitutional interpretation seeks the original intentions and understanding of those who formulated the constitution and also the public understanding and significance (at the time of promulgation) of the words chosen by the framers. The idea is to reconstruct something that existed at the time of authorship so as to come nearest to the original understanding and intentions behind a particular article or clause of the constitution and if possible hypothetically deduce the intentions or

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36 Terence Ball (ed.), *Hamilton, Madison and Jay, The Federalist (with letters of Brutus) Essay 47 (Madison)* (Cambridge: Cambridge University Press, 2003), pp.234-35.

actions of the framers in response to an emergent crisis. On the contrary, the living constitutionalist view appreciates more the changing trends and circumstances and new and hopefully better moral and political beliefs. Living constitutionalists view originalists as reactionary theorists who close their eyes to the new ideas while the latter blame the former to threaten the age old and long cherished values including the rule of law and separation of power. To them the living constitutionalists allow the contemporary judges to alter the constitution to suit their own political and moral predilections. However, the living constitutionalism is based on the premise that constitutions can grow and adapt to ever changing conditions without losing their identity or legitimacy and hence can direct the moral choices of new generations. To them constitutional interpreters can be innovative but usually avoid interpreting according to their own wishes.

Devolution of power: Though devolution of power is a later addition to the tenets of modern constitutionalism it has been of immense importance in the constitutional debates in USA, USSR and later in many newly independent multinational states such as India and Pakistan. In order to check the centralizing tendencies of the governments it is desirable that its powers and functions are devolved to the constituent units and further to the district and village levels. Devolution is understood as a means of enacting self-governance, and having an efficient and effective government responsive to the needs of local communities. Second, devolution is also viewed as a means of democratizing governance and accommodating diverse ethnic, linguistic and religious identities. To these premises add the prospect of self-rule, public participation, accountability, good governance and equitable development.

Theoretically, dualism in the bicameral system is also justified as an application of the principle of checks and balances. A bicameral system is desirable, it has been argued, to avoid hasty and harsh legislation, limit democracy, and secure deliberation. Although the bicameral system remained prevalent in the 20th century, there were reactions against it. Unicameral councils or commissions came to predominate in American cities, which had often been organized along bicameral patterns in the 19th century.[37]

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[37] Bicameralism, *Encyclopedia Britanica.*

Relevance of constitutional principles for Pakistan

Twenty years back Zulfiqar Khalid Maluka has comprehensively highlighted the 'Myth of Constitutionalism in Pakistan and proclaimed 'if we are to survive as a nation, a great creative effort is required to evolve an innovative consensus on the perennial political contentions in the domain of Pakistan's constitutional jurisprudence'. This section aims at reviewing the situation as it now exists in Pakistan with particular reference to the major tenets of constitutionalism as discussed in the first section.

Notwithstanding the fact that the movement for Pakistan was for the most part a constitutional struggle and notwithstanding the apparently democratic inclinations of the founder, governments of Pakistan have shown a tilt towards a strong and unchallenged executive. Jinnah was well aware of the libertarian role of a constitution as a limiting force on the government and a protector of the fundamental rights of the governed. Safeguards of rights and interests of Muslim minority in the subcontinent was the major aim of the freedom movement. Yet the insecurities of the 'truncated and moth-eaten' nascent state led to a state-building project before a nation-building process could even start. Being rather disillusioned and distrustful of some of his colleagues and alarmed by the external conditions he chose for himself the role of an exceptionally strong governor general.[38] Some of his decisions such as the dismissal of two popular chief ministers and an assertive accession of Kalat state to Pakistan have been questioned as detrimental to constitutionalism.[39] Further, the Provisional Constitution (Act of 1935) enacted by the Indian Independence Act 1947, though called for a federal polity, had a colonial authoritarian streak. Constitution of the independent Pakistan was delayed while the executive office gained prominence at the cost of legislative and the judiciary. Jinnah had already given a blueprint of his idea of a democratic Pakistan on 11 August 1947 but his life did not allow him to materialize that dream. Hence the basic requirement for constitutionalism i.e. a constitution remained absent for nine years. While a substitute was found in emotional slogans, ideological clichés and an Objective Resolution which generated more questions than it answered.

Further dichotomies emerged with the passage of time. On the one hand, Hamilton's prescription of 'auxiliary measures' to limit the

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38 See Khalid Bin Saeed, Pakistan the Formative Phase, Lahore: Pakistan Publishing House, 1960.

39 I.A. Rehman in conversation with the author, 12 September 2015.

government could not be attained, and on the other, the existing feudal and pre-feudal interests and the emerging dominance of non-elected institutions reflected the medieval pluralism of power centers. The emerging elite coalitions had little love for a constitution or democracy. In the following paragraphs the development or lack of constitutionalism in Pakistan's history will be assessed in the light of the major principles enumerated in the first section:

Popular sovereignty: The question of sovereignty in Pakistan was trickier than elsewhere. In Jinnah's mind 'the new state would be a modern democratic state with sovereignty resting in the people and the members of the new nation having equal rights of citizenship regardless of their religion, caste or creed'.[40] But according to Dr. Mubarak Ali, Jinnah became irrelevant in Pakistan after the Objective Resolution.[41] On the strong insistence of the religious elite who twisted the purely religious sense in which the Quran speaks of God as 'sovereign of heavens and earth' into a modern political sense' in order to get the Sovereignty of Allah recognized by the constitution as the preamble starts:

> Whereas sovereignty over the entire Universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan, within the limits prescribed by Him, is a sacred trust.[42]

Fazlur Rahman has very interestingly commented that 'the Modernists should have stood firm on the principle of the political sovereignty of the people, because otherwise one would have to admit the ludicrous conclusion that in officially atheist countries God had set up governments-in-exile!' Fazlur Rahman futher enquires 'One would like to know how and through which instrument God had delegated this trust to the people of Pakistan'.[43]

Further, there have always been questions on the locale of sovereignty due to the multiple power centers within the state of Pakistan. If people of Pakistan have derived their sovereignty from Allah

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40 See Jinnah's speech to the Constituent Assembly of Pakistan, 11 August 1947, http://www.na.gov.pk/en/content.php?id=74 accessed 20 June 2016.

41 Interview with Mubarak Ali by Mazhar Khan Jadoon, *The News*, 29 August 2010.

42 Preamble of the Constitution of Pakistan, 1973.

43 Fazlur Rahman, 'Islam and the New Constitution of Pakistan', in J. Henry Korson (ed.), *Contemporary Problems of Pakistan* (Leidon: E.J. Brill, 1974), p.39.

and exercise it through their 'chosen representatives', why at different intervals of time the supreme authority is exercised by some non-elective institutions of state including the civil and military bureaucracy and even judiciary as demonstrated during the recent period of judicial activism. Similarly, the actions of extremist elements as well as American anti-terrorist machinery within Pakistan both challenge the popular sovereignty of the people of Pakistan.

Civil or fundamental rights: Articles 8 to 28 of the Constitution of Pakistan clearly provide safeguards to the fundamental rights of the citizens for which basically the constitutions are formulated. Article 8 declares all laws inconsistent with fundamental rights to be void. Unfortunately, periodic interventions into the constitution by military dictators and also some civilian governments either falling a prey to the power politics or dealing with an extraordinary condition, have changed the spirit of the constitution by usurping some of the fundamental rights. For instance, through Ordinance XX in 1984 Article 2A was introduced in the constitution making the Objective Resolution an integral part of the constitution but erasing the word 'freely' from its original injunction: 'Wherein adequate provision shall be made for the minorities to (freely) profess and practice their religions and develop their cultures;' This little alteration made a sea change in the status of the religious minorities who became hostage to the considerations of the majority's faith. Through this the religious practices of Ahmedi community were outlawed 'in so far these resembled the Muslim modes of practice'. Religious freedom was qualified by 'considerations of public order and law'.[44] The word 'freely' has been thankfully reincorporated into the constitution through the 18th Amendment (2010).

The 18th Amendment also introduced Article 10A which states: 'For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process'. The lawyers and human rights activists hail this change as 'the surest safeguard against totalitarianism of the state', which protects civil rights 'void arbitrary limitations on freedom of action'.[45] Similarly,

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[44] Zaheeruddin V. the State case (1984) against the Ordinance XX wherein the state's stand was upheld 'all but abolished religious freedom in Pakistan or at best left it to the mercy and whims of the majority'. Yasser Latif Hamdani, 'Constitution of Pakistan and Civil Rights', *Criterion Quarterly*, www.criterian-quaterly.com/ accessed 10-5-2016.

[45] *Ibid*.

the right to information introduced through Article 19A promotes transparency and accountability of public administration by empowering any citizen or civil society at large to seek information from public institutions. Article 25A holds the state responsible to provide free and compulsory education to all children (not just Pakistani children) of age 5 to 16.

Nevertheless, much more desires to be done to ensure the implementation of fundamental rights. Annual reports of Human Rights Commission of Pakistan show a miserable condition of the state of human rights in Pakistan. The traditional religious, feudal and pre-feudal power structures lingering in the country are obstacles to be eliminated if the country desires to achieve progress in this context.

Further, the controversial 21st Amendment, though adopted in an unusual manner to cope with the monster of terrorism, raises questions on the safeguard of civil rights of some marginalized sections, political parties, and minority groups.

Rule of law: In absolute monarchies the king is law while in democracies law is king. This dictum often challenges the so-called democratic countries of the developing world. In Pakistan laws including the constitutional and common laws are a matter of interest only for the students of law or those who happen to be personally aggrieved and rich enough to explore solutions through courts. Unlike USA it is not a lawsuit-happy society. Whether the country is run according to the prescribed laws is a question left to politicians, intellectuals or recently the media anchors. On the other hand judicial wisdom through decades has been overshadowed by the infamous but compelling doctrine of necessity which since the Moulvi Tamizuddin and Dosso Cases (1955 and 1958) and late Nusrat Bhutto Case (1977) etc. has justified authoritarian regimes and their despotic actions. Further, Article 58-2b of the Eighth Amendment to the constitution introduced by General Zia in the name of 'institutional checks and balances', wrecked havoc against the political governments between 1985 and 1997 and later kept a puppet government completely subordinate to the president between 2004 and 2010 when it was finally removed by a rare consensus of political parties in the legislatures on the 18th Amendment.[46] The said amendment, in order to prevent future military manipulations also made Article 6 (high

[46] 18th Amendment to the Constitution of the Islamic Republic of Pakistan, 1973.

treason) stronger by adding holding the constitution in abeyance or conspiring to do so as an act of 'high treason'.

Equal accountability of the rulers and the ruled remained a dream. During the political interludes in Pakistan's history, it seems that the legislators are only free to do one thing i.e. corruption. And when their misdemeanors become public, the people are further disillusioned from democracy and constitutionalism. But more than the elected governments, the non-elective institutions enjoy immunity against general law. The virtual and invisible existence of *'privilegia'* particularly enjoyed by military dictators and officers also remained an irritant in civil military relations and a hurdle in the way of constitutionalism.

The condition of fundamental rights has been discussed above. The content and procedure for enactment and enforcement of various laws are not known to majority of citizens. But at least in this case ignorance is not a blessing. To the ignorant and the helpless justice is often delayed and denied and hence a feeling of insecurity and lack of trust towards legal system and the government itself is a common sign.

A research report in 2009[47] highlighted that recurrent martial laws and abrogation, suspension and holding in abeyance of the successive constitutions of the country by military dictators is the major source of de-politicization and disinterest of people. Acts of laws promulgated through proper parliamentary procedures and those introduced by dictators through rubber-stamp legislatures create immense confusion in the minds unless one is abreast with the history of constitutional manipulation in Pakistan which shows evidence of 'rule by law' rather than 'rule of law'. As a pluralist narrative has not been built in the country, legitimacy of most of the laws and the constitution itself in the eyes of masses is said to suffer due to their apparent concurrence with the colonial laws and remoteness from Islamic law. Further, in many areas tribal and feudal justice enjoys more legitimacy as a source of perpetuation of tradition despite the evidences of so-called honor-related crimes and brutality therein.

Moreover, the Islamization drive of General Zia evident more in penal codes rather than societal milieu have raised serious questions regarding the sanctity of human rights and spirit of justice in the implementation of those laws on the marginalized sections of the society.

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47 Management Systems International, Pakistan Rule of Law Assessment-Final Report (prepared for USAID), 2009.

The purposeful manipulation of laws by a dictator has virtually become a part of religious doctrine and hence almost impossible to undo.

It is clear that 'rule of law' depends on an efficient judiciary to interpret the laws and to timely dispense justice according to them. Since 2005, Iftikhar Muhammad Chaudhry, the then Chief Justice of Pakistan, began to exercise the court's *suo moto* judicial review powers so much so that the term *'suo moto'* entered household usage. This created a question of separation of powers of state organs discussed ahead.

Entrenchment: The question of flexibility or rigidity of the constitution is astounding due to authoritarian tendencies in the country. In principle, the procedure to pass an amendment is two pronged according to Articles 238 and 239: For amendments which do not involve an alteration in provincial boundaries a bill initiated in either house of the parliament needs to be passed by two-third majority in both houses and a formal consent of the president; for amendments concerned with provincial boundaries after passing through both houses with two-third majority, the bill has to be passed in the concerned Provincial Assembly by two-third majority and then presented to the president for approval. Hence the procedure is a mixture of flexibility and rigidity. The creator of the constitution, Prime Minister Z.A. Bhutto, could easily manipulate to get seven amendments passed of which six were controversial. For later political governments in an era of split mandates and coalition governments introduction and success of an amendment bill became extremely difficult. Examples abound. In both incomplete tenures of the late Prime Minister Benazir Bhutto (1988-90, 1993-96), despite the wishes of the government no such bill as to create a balance between powers of the president and the premier could even be introduced. The 11th Amendment Bill for a revision of reserved seats for women in the assemblies could not pass and was withdrawn by the next government. Whereas the second tenure of Prime Minister Nawaz Sharif was marked as a period of hasty legislation; thanks to the support of coalition partners, five amendment bills were introduced of which four (12th, 13th, 14th and 16th Amendments) were successful and enacted after due process while one (15th Amendment) could not pass through the upper house. These amendments, however, shifted the balance of power back to the office of prime minister. On the other hand, it has been very convenient for the dictators not only to suspend the constitution with impunity but also to alter the constitution anytime according to their own whims with the blind support of their handpicked cronies in the assemblies. General Zia's 8th Amendment and General Musharaf's 17th Amendment are evident instances. One should not fail to appreciate the

last government (2008-13) which, amidst stormy upheavals challenging its own existence, have been able to successfully enact three amendments (18th, 19th and 20th) which reset the balance and made progressive reforms in judicial and electoral systems through broad-based consensus. Under the present government until now two amendments have been passed of which the 21st creating military courts etc. to curb rising terrorism was perhaps 'a necessary evil' while the recent one (22nd) is a continuation of electoral reform.

The debate on 'Originalism and Living Constitutionalism' is yet to begin in Pakistan. Nevertheless, the controversies attached to the debate are already evident. Many democrats, including the Peoples' Party stalwarts, who take the credit of making of the constitution, are in favor of retention of the originality in its letter and spirit which according to their interpretation was progressive and democratic. On the contrary, the conservative right, including General Zia and his followers, often insisted on a reinterpretation and redirection of the constitution in the light of the Objective Resolution (1949) and the rising consensus of dominant sections in favor of more Islamist hue. This led to the amendments such as the Eighth and the 15th which claimed to mould the constitution according the popular sentiment. Similarly, both generals Zia, and Musharaf, in order to remain in power got the Eighth and the 17th amendments passed which favored an exceptionally strong president – an anomaly within a parliamentary system. Hence, unlike USA, the conservatives and dictators in Pakistan seem to favor the living constitutionalism claiming to represent the will of the people. However, in reality power-politics rather than constitutionalism reigned supreme. Positively though, there is an emerging consensus in favor of the introduction of necessary amendments through a democratic opinion building within and outside the legislatures. The 'Charter of Democracy' signed in 2006 reflected the resolve of two major parties to cooperate for the supremacy of the constitution and democracy. With the passage of time some more issues may arise. There are already questions regarding a considerable want of plurality in the constitution which alienates some sections, particularly the religious minorities. Still missing is a theory of constitutional interpretation which could provide a direction to future revisions and avoid 'recurring tensions that lie at the intersection of law and politics'.

Separation of powers: The apex position in the power triangle in Pakistan, despite being a parliamentary polity following Westminster style, has always been occupied by the executive who at times happened to be the president and a serving general. The perpetual tension between

civil and military rulers has resulted in the debate for a strong premier or a strong president but the accountability of executive to the legislature and existence of an independent judiciary remained a dream until recently. Part II Chapter 2, Articles 50 to 89 of the Constitution comprehensively delineate the jurisdiction, powers and procedures of the parliament. However, the bicameral legislature suffered extensive encroachments on its jurisdiction at the hands of dictators. At times it was dismissed out rightly while at other times reduced to a rubber-stamp saying yes to all dictatorial laws. During Zia's period, political parties, their leadership as well as democracy stood defunct until, in a party-less parliament in 1985, a state party with the name of Muslim League was crafted out of loyalists. Similarly, under Musharaf, a new Muslim League was created to serve the dictator in the assembly. Under Article 58-2b, the president gained the right to dissolve the parliament also on the pretext that the government of the federation cannot be carried on 'in accordance with the provisions of the Constitution'. The presidents used this prerogative once in 1980s and thrice in 1990s to dismiss the political governments and the elected assemblies. The first peaceful transfer of power from one constitutional government to the other, in 2013, has instilled hope for supremacy of constitutionalism but the extra constitutional threats remain lingering in the background.

The judicial power to interpret the constitution and other laws is a gift of the constitution and a part of check and balance system on the government. Conversely, in the long battle between the parliament and the extra parliamentary forces, judiciary's role is rather unenviable. Existence of an independent judiciary also remained vulnerable and dependent from the beginning on the whims of the executive and the former remained loyal by providing justification to the dictators. The situation only changed in 2007 with the unconstitutional suspension of the chief justice of Pakistan which triggered country-wide lawyers' and civil society movement for the restoration of the chief justice who had posed a challenge to the government by questioning some of its decisions through *'suo moto'* actions. The pressure of the civil resistance led to a temporary restoration of the judge but later imposition of emergency resulted in dismissal of the chief justice and other top judges. The judiciary finally restored to its position after a bloody movement and a long march against the new and reluctant political government in March 2009. The successful movement provided the judiciary with a legitimacy and vigor which it had never enjoyed before in Pakistan. But it also transformed the superior judiciary to a hyper-active state. This time the executive and legislature complained of an encroachment of their jurisdiction by the Supreme Court. Dr. Hasan Askari Rizvi warned that

'The superior judiciary needs to examine if it is not entering the domain of the elected executive and elected parliament by its actions like fixation of sugar price (September 2009) or lifting price ceiling for samosa (July 2012) and transfer of officials'. Recently, judicial activism has given way to judicial restraint now but its muscle to uphold democratic values in the face of extra-constitutional forces is yet to be tested.

Devolution of power: The framers of the constitution were facing the post-dismemberment dilemma whether to go for a strong or a weak center. The centrist tendencies prevailed on the pretext of a war-torn and shattered Pakistan which needed a long period of reconstruction and solidarity, hence a federal state with a strong center. Part V (Articles 141 -159) defines the parameters of federalism in Pakistan's constitution. The original constitution could at best be called 'quasi federal' in the presence of overwhelming powers of the center and a long federal and a relatively long concurrent list. Cry for provincial autonomy went stronger in smaller provinces and the veteran politicians such as Khan Abdul Wali Khan warned against repeating the errors of East Pakistan particularly in Balochistan. The errors were repeated and resulted in the rise of centrifugal forces in smaller provinces. Subsequently, the martial rule and the Afghan war smothered the demands for provincial autonomy and centralization became complete. State-building continue to overshadow nation-building and hence a common stake in a federal Pakistan could not develop. It was only in the post-Musharaf era when the old promises of augmentation of federal principle were fulfilled by the 18th amendment. However, this has also led to the demands for new provinces on which a theoretical consensus has yet to be achieved.

In addition, devolution of power to the third tier i.e. local governments still needs a lot to be done. Article 32 stipulates the state to encourage local governments while Article 140A specifically requires provinces to 'by law, establish a Local Government system and devolve political, administrative and financial responsibility and authority to the elected representatives of the Local Governments'. Lack of a stable and regular system of local governments has further disillusioned the masses from constitutionalism as they do not see their own basic local problems addressed.

Conclusion

George Bidault, a former French Prime Minister, once remarked that 'good or bad fortune of a nation depends on three factors: its constitution, the way the constitution is made to work and the respect it inspires'. Pakistan's record of constitutionalism is fraught with extra-

constitutional measures by the authoritarian regimes, weak legislatures and submissive judiciary. Lack of consensus on a single institutional design has rendered Pakistani constitutionalism at best half-hearted and unstable with recurring tensions between civilian governments, non-elective institutions and the people at large. In fact, the term 'people' also denotes a wide variety of groups who are still unable to develop common national stakes and hence the marginalized groups often challenge the notion of the 'popular sovereignty', one basic injunction of constitutionalism. The constitution, has failed to overcome the cleavages in Pakistani society due to divergent ends and self interest of power elite and authoritarian streaks in governments which often preferred extra-constitutional solutions to the problems faced by the country. The idea of a government limited by a constitution which in turn reflects the general values and aspirations of the people, therefore, seems to be missing in Pakistan.

Regular elections may be the minimal requirement for a democracy to work but the real test lies in the degree of constitutionalism prevalent in the state institutions and enshrined in the people's hearts. Constitutionalism in Pakistan faces grave challenges from the multiple power centers existing parallel in the country and affecting the constitutional procedures according to their own interests. On the other hand, the stark differences in the living standards and availing of fundamental rights have resulted in a sort of indifference towards the constitutional matters and a virtual delegitimization of the constitution itself.

Having said that, let's not forget to appreciate the slowly but surely changing conditions particularly after the 'Charter of Democracy' and later the consensus developed in context of the recent amendments to the constitution. The major political parties seem to arrive at an understanding that their mutual tussles should remain within constitutional limits so that the 'extra-constitutional forces' do not use them to derail the political system once again. This is a lesson learned through a struggle of decades and the new parties should also learn it. At the level of superior judiciary some extremely enlightened reviews and rulings are a part of Pakistan's history.[48] A vigilant but restrained judiciary is part and parcel of constitutionalism.

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[48] For instance, the famous Asma Jilani Case (1971) which delegitimized the martial law and the Munir-Kyani Report (1954) which advocated for a pluralist approach to religion.

On the people's front a continuous conceptual education at all levels is required. Civil society is already playing a role in this direction but a sincere effort on the part of media is yet desirable. Further, local governments should be allowed and empowered to function with popular accountability. When the legislators will be relieved of the petty problems of their constituencies, they would be more interested in lawmaking and the constitutional debates which are absent from our legislatures. When people will see their immediate problems solved by their local governments, only would they then be able to afford the luxury of constitutionalism.