
FROM DEMOCRACY TO GOOD GOVERNANCE

CONSTITUTIONAL CHALLENGES AND OPPORTUNITIES

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Introduction

Good governance is an ancillary consequence of just and fair legal and constitutional order and the fairness of a legal order has to be judged independently of its content. Hence, there can be good or bad constitutional amendment in accordance with whether it is just and whether it is resulting in good governance. The content of the legal order is the key here and in that sense, there is a lot wrong with our laws. The purpose of this writing is to point out a few of them.

Constitution as a Document: Inferences for Good Governance in Pakistan

The constitution is a political document. Hence, it is a consequence of political compromises in any given society and any debate on this document will naturally invoke political controversies. While there is nothing wrong in developing constitution based on political compromises, the problem arises when power relations in a society creates a gap between the law and its implementation. Hence, there are many laws in Pakistan that have never been implemented, or have been implemented only against a selected target. The reference against Justice Qazi Faez Isa is a prime example where a law has been used against one man and not against other judges, bureaucrats, or anyone else.

The constitution is also an evolving narrative. It is going to continue to change. The principles might stay the same but the applied standards to gauge these principles will keep changing. For instance, the concept of equality was present hundred years back in societies prior to the onset of democracy. In today's democratized society, however, the concept of one-person-one-vote has redefined the appraising standard for equality.

This standardization of principles comes either through the constitution itself or through the interpretation of the constitution. In case of latter, the role of judiciary is critical that defines the meaning of the constitution. However, the interpretation of constitution by judiciary also changes over time. Therefore, in the famous case of *Plessy v. Ferguson*, the U.S. Supreme Court constitutionalizes separate education institutions for blacks and whites. Sixty years later, in *Brown v. Board of Education* the Supreme Court ruled against racial segregation in education. Hence, as the concept of equality changed, the judges changed their mind as well.

The constitution is a text and hence, is subject to human interpretation. It cannot speak for itself; humans are to interpret it according to their own sociopolitical understanding of the world. For this reason, no part of constitution can be

sacrosanct, including the Objective Resolution in the constitution of Pakistan. Since it is the outcome of political compromises to address the issues in a society, it must evolve with the society. If people change their minds about a particular subject, the constitution must revise to resonate with the change.

Furthermore, text are vague and there can be multiple definitions of a single concept. Because of this vagueness in the constitution, one can read things into it or can read things out of it. If you can read the right things into it, that will provide more good governance. And if you read things out of it, that will render law, the constitution, and its provision meaningless.

Flaws in the Constitutional Practices of Pakistan

In order to have democracy in its truest context, the country needs self-sustaining institutions; elections are not just enough. Pakistan needs continuous processes in the context of political governance and local bodies. Furthermore, the country needs political ethos driven by principles in order to differentiate between right and wrong rather than depending on the likes and dislikes of people in power. Political ethos, continuous processes and self-sustaining structures are the most important elements of democracy and not just one of them is enough. Pakistan, at present, lacks each of them and that is the central problem. Most importantly, it is a macro-structural issue with lack of consensus on how to solve our problems in a constitutional context.

Still after 70 years, Pakistan has not yet build a constitutional mechanism of good governance. The saying of Lord Acton “Power tends to corrupt and absolute power corrupts absolutely” still applies in our case. Ideally, there is vertical separation of power in terms of federal, provincial and local government and horizontal separation of power between the parliament, executive and judiciary. All liberal democracies follow this constitutional model for distribution and division of state power and function successfully. The objective of laws is to limit the power of government because it cannot be trusted with absolute power. Laws and constitution are made to ensure that the citizens are protected against the state. Hence, the laws of a state are based on the principle that citizens are free to do whatever the laws does not prohibit and state is bound to only do the things allowed under law. This is precisely what is stated in Article 4 of the 1973 Constitution of Pakistan.

Our constitution is a procedural document. The fundamental principles are superimposed on these procedural laws and judiciary is tasked to ensure that the fundamental rights are being upheld. In this regard, the job of judiciary is limited to interpretation of laws made by the parliament and judicial review of the government action, rather than interfering in what the government is doing. In

Pakistan, a major issue is that the judicial interventions are outcome-driven not process-driven. There is no check and balance on whether the means to achieve the desired end are fair or not. This is exactly where the judiciary has failed to perform its job. In addition to judiciary, there are other check and balance system in a liberal democracy such as free media, local government, student unions, labour unions, etc. which are not in place in Pakistan.

The Two Fault Lines in Pakistan's System:

Central to all these issues is the rift between the de-facto and de-jure system of governance and between center and provinces. The de jure system based on the vertical and horizontal distribution of power clashes with the de facto system where certain institutions have hold of power. This civil-military divide is a constant phenomenon of our constitutional history. While the constitution say that military is under civil control, in practice, military is the most powerful institution of the country. The constitutional amendments have paved way for further growth of power of both the judiciary and military, the unelected and unrepresentative institutions, over elected and representative institutions.

In parallel to this fault line in our system, there is a second fault line between center and provinces. There is a lack of consensus on federalist character of constitution because power elites prefer a centralist system. This is because it is easy to control one central power instead of controlling four or five power centers distributed across the country. If they allow further devolution of power from provinces to local governments, it would become even further difficult to keep control. This mindset of keeping control, as opposed to let processes run and produce outcome, is a major impediment to good governance.

The similar centralization of power is present in the judiciary. While a federal system is in place with power divided among Supreme Court, high courts and district courts, Chief Justice is practically the center of power having control over appointment and removal of judiciary. The Supreme Court has not taken away the supervisory role from high court in Panama Case, it has used article 183-4 to summon key cases from high court and to constitute high court benches. Overall, this has transformed the judiciary from federal to unitary model. The judiciary has failed in expansion and protection of fundamental rights of citizens of Pakistan, as well.

Conclusion

The constitutional amendments in Pakistan are the product of the power rifts. 8th and 17th amendments were brought by military and 13th and 18th amendments undid them. Judiciary dictated the 19th amendment to revise their appointment

procedure in accordance to their wishes. Military have their wishes fulfilled through the 21st and 23rd amendments that allows military courts to run in parallel to civil courts. The unintended consequences of the constitutional evolution is lack of accountability that ultimately lead to bad governance. Therefore, the bottom line is there is no consensus over the fundamental foundational principles. This is a big structural macro problem, unless we solve this constitutional tweaking.

Notes

¹Haseeb Bhatti, Supreme Judicial Council issues notice to govt. over references against judges. The Dawn, May 30, 2019.

²163 U.S. 537 (1896)

³347 U.S. 483 (1954)

⁴The Constitutional of the Islamic Republic of Pakistan. Art. 4 Last Updated: 28 February 2012. http://www.na.gov.pk/uploads/documents/1333523681_951.pdf

⁵Ibid, Art. 243-245.

⁶Hence, the power elites, irrespective of who we are talking about, do not support the 18th amendment for it restores the federalist character of constitution.



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