**Constitutionalism: the missing links**

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This April marks the golden jubilee of the adoption of the 1973 constitution. The last 50 years have been a bumpy ride for the basic law of the land. Three times it was subverted (1977, 1999, 2007), and on quite a few occasions it was defaced through amendments that had the effect of emaciating the parliamentary system that it puts in place.

Notwithstanding all such obstacles, the constitution has shown remarkable resilience in its journey.

Not only does a constitution provide for distribution of powers between different state organs (legislature, executive, judiciary) and tiers (central and local) of the government, it also, as Aristotle once said, represents a way of life for a political society. It is the constitution which defines whether the government is to be carried out in the interest of one (tyranny), a few (oligarchy), or many (democracy); whether the government is based on the will and consent of the people; or whether the citizens are merely passive spectators of the game of politics.

The constitution may also be seen as a compact between the governors and the governed in which the powers of the former are defined and thus limited. These limitations take the form of civil and political rights of the citizens. The legitimacy of the government is contingent upon observing these limitations.

Not only that, by defining the scope and limits of the powers of different institutions and providing a method for conflict resolution, the constitution provides for stability and predictability, which is vital to the orderly economic life of a country.

The golden jubilee celebrations are meant to reiterate the great significance of constitutionalism for the society, polity, and economy of Pakistan, and to pledge all-out efforts for the supremacy of the basic law of the land. At the same time, the golden jubilee provides a sombre occasion for reflecting on why, despite the passage of 50 years, the constitution remains vulnerable to shocks and even susceptible to a sudden death.

As recent events unmistakably point out, this vulnerability is becoming more, rather than less, pronounced. Are there any missing links owing to which constitutionalism still remains at best an aspiration?

The gravest threat constitutionalism faces anywhere in the world is the possible chasm between what a constitution is on paper and how it actually works, between the interests it is meant to serve and those it ends up serving. What prevents the government (all the three organs taken together) – being the framer, custodian and enforcer of the constitution – from arrogating to itself more powers at the expense of the citizens or otherwise acting arbitrarily in exercise of the powers it already has? Likewise, what may prevent one of the organs or institutions from riding roughshod over others or drawing upon the space of others?

The wider the chasm between a constitution in theory and in practice, the greater are the prospects that the social contract that it represents will fall apart.

Constitutional provisions may themselves serve as a bulwark against deviation from the constitution, but not always. At times, the text may be ambiguous and thus liable to divergent interpretations. At times, two or more provisions may be mutually conflicting. At times, a stakeholder may be on a firmer ground in principle but weaker in fact. At times, politics may stump the law, making for a deliberately faulty reading or application of the constitution. Cases such as these put constitutionalism at risk.

According to English jurist Dicey, the author of one of the best-known treatises on constitutional law, behind the written provisions of the constitution stand constitutional conventions. It is these conventions which underwrite that constitutionalism will be upheld even in the absence of legal limits on the powers of the government.

These conventions represent social norms arising out of the practices of the given political society. Though these norms do not have the force of law – and therefore aren’t justiciable – they are invariably followed as if they expressed the collective conscience of society.

For instance, in the United Kingdom, conventions, and not the law, stipulate that the monarch may not turn down a bill passed by parliament and that he may not sack the popularly elected House of Commons, which may be dissolved only on the advice of the prime minister. The underlying notion is that the king is only a figurehead and the real powers rest with the cabinet representing the will of the people.

In Pakistan, the most obvious of the missing links is lack of constitutional conventions corresponding to the written provisions of the constitution. To cite an example, let’s go back no more than one year. In April 2022, a no-confidence motion was tabled against the then prime minister, Imran Khan. The motion was consistent with both the letter and spirit of the constitution, which prescribes that at all times the PM must enjoy the confidence of the majority of the members of the National Assembly.

As most of his coalition partners parted ways with him, it was evident that Khan no longer commanded the support of the majority. But instead of the PM facing the National Assembly or resigning in a dignified manner, the ruling party got the no-confidence motion declared unconstitutional by the speaker, whose office is supposed to be bipartisan, knowing well that his ruling is final – no remedy is available against it within the house.

Although the Supreme Court intervened to have the motion voted upon – and that too after a nerve-shattering drama in the house – the matter should not have landed in the court. Instead, the speaker should have allowed the motion to run its course. However, absence of conventions nullified the relevant unequivocal constitutional provisions.

The failure to evolve healthy constitutional conventions brings us to two other missing links, viz public ethics and culture. Political structure including the constitution is one part of the political system; the other is political culture. It is the political culture which largely defines how the political system will actually work. Political culture is a subculture within the broader culture. Hence, most of the ills that afflict a given culture also bear upon its political subculture. Here three of those interconnected ills with reference to our society may be mentioned.

The first is the cult of the personality – whether of a spiritual or worldly leader or of a hybrid one. A cult leader is regarded by the followers as an epitome of virtue and wisdom and thus a complete stranger to the intellectual or moral lapses which the ordinary mortals are subject to.

His words and deeds become the criteria for judging right and wrong, good and evil, and in a more technical sense, constitutional and unconstitutional. Nothing is as lethal to the growth of institutions as a powerful personality cult. Not only that, cults preclude a fundamental consensus on what is appropriate political behavior, for they don’t allow such definitions to be standardized.

Two, society is becoming increasingly sanctimonious. The cult-inspired self-righteous start with the assumption – which in their case is an axiom – that ethically they are supreme. While others may be actuated by egoistical motivations, they are guided solely by altruistic considerations. While others may be mired in corruption, they are clean as a whistle. The assumption leads to the conclusion that others should be presumed to be guilty, sinners and culprits, without giving them a fair chance to speak for themselves or even when they’re proved otherwise. When it gains considerable currency, such a mode of thinking becomes a narrative.

A sanctimonious society has little room – as well as use – for dialogue, debate, logic and argumentation for addressing public issues. Such methods are dismissed as a sign of moral weakness. Instead, it relies on sanctions, force and coercion in dealing with disagreement and dissent. In such a society constitutionalism will remain at best on sufferance.

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