**Checks and balances**

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After a semester of trying to understand and debate the scheme of separation of powers in the US constitution at Harvard Law School, a fellow student asked our professor which design was best to keep government honest.

Professor Fallon said in his affable style that the history of evolution of law and democracy is one of trying to prevent abuse of power and, while designs can vary, the underlying principle is evident: the more you concentrate power, the greater the likelihood of its abuse, and the wider it is distributed the lesser the prospect of abuse.

Back then General Musharraf had monopoly over state power. And as a Pakistani one wondered why such a foundational point about the nature of power and its abuse has evaded our collective consciousness. And almost two decades later our dominant narrative still favours concentrating power to enable the state to protect itself from citizens. It is thus that we must keep restating the basics. Can you get outcomes right when there is no consensus around the underlying design?

The journey from rule of men to rule of law is a journey of checking the power of men, distributing it widely amongst institutions and providing guiding principles for its exercise. The journey of democracy is a journey of placing the whims and ambitions of powerful men in check by distributing power widely amongst citizens. The journey of constitutionalism is a journey of establishing government with limited enumerated powers and designing systems sceptical of state power that fetters the rights and entitlements of citizens.

In 2019, these are truisms for most but not Pakistan. Someone needs to keep reading Article 4 of our constitution out to our citizens and state. It essentially says that the state only exercises such powers as expressly vested in it by law and can only do what it is authorized by law to do. The citizen, on the contrary, has unlimited freedom and can only be prevented from doing what is expressly forbidden by law. An entire body of law is in place to constrict the state. In this scheme, freedom of the citizen is the rule not the exception.

We however continue with the colonial mindset where the citizen is seen as the monster that must remain under suspicion, and the state – while acting in the citizen’s name – is afforded freedom to act with impunity. And the state is no anonymous amorphous being. At any given time, it comprises those who control key state institutions and claim to act in the wider public interest. To let them act arbitrarily and whimsically, not bound by legal principles and due process for any reason means reverting from rule of law back to rule of men.

Our constitution separates and distributes power horizontally and vertically. Horizontal distribution is between the executive, judiciary and legislature. And vertical distribution is between the centre, provinces and local governments. This distribution acts as a check on concentration of power and its abuse. A free media and civil society are additional checks meant to act as whistleblowers and pressure groups. The rationale for this elaborate structuring exercise is to keep in check those wielding power.

When Operation Midnight Jackal was conceived and launched to put together the IJI, it might have been done by those inspired by their spirit of patriotism to do good for the country. When Nawaz Sharif created the Ehtesab Commission and used it to hound his political opposition, he too might have led himself to believe that he was doing so in the larger public interest. When the PPP struck a deal with Musharraf that led to the National Reconciliation Ordinance, it might also have told itself that its predominant motivation was to create space for democracy.

But every time we have chosen expediency over principle and due process (and we have done so a lot over the decades) the results have not been pretty. The latest saviour regime riding roughshod over our scheme of distribution of powers and checks and balances is also enamoured by the self-belief that constraints on their exercise of power aren’t in public interest. The ruling regime’s bias against checks and balances and constraints put in place by law are not implicit either, which is dangerous for rule of law and democracy.

IK’s passionate statements last week against the NA speaker’s orders for production of accused members under arrest betrays his approach to fundamental rights as well as separation of powers. The principle that every person is presumed to be innocent until proven guilty is so obvious and entrenched that it needs no advocacy – except in Pakistan. We have a state that refuses to distinguish between accused and convicts. The issue is highlighted with the arrest of a Zardari or a Rana Sana, but thousands who languish in jails on trumped-up charges feel its brunt.

Ours is a country with an abysmally low conviction rate and a large number of convictions overturned on appeal. This means that cooking up false stories to charge folks is an established practice within the investigation and prosecution components of our criminal justice system and undue deference to the state’s story a part of court’s mindset at the trial stage. That we keep folks locked up pending trial, which linger for years and years, is just inexplicable, especially when we know that a majority of the accused will never be convicted.

We hear Chief Justice Khosa lament week after week the falsehood in testimonies that makes our criminal justice system unsafe and robs people of the dignity and freedoms guaranteed by the constitution. The life destroyed and rights trampled cannot be undone when an accused is released after trial or upon overturning of conviction. And this lot gets no home-cooked meals, no hospital visits and no media attention. The solution for establishing equality is not to begin tormenting the accused that are privileged, but to fix our law of arrest and bail and trial process.

So why do we do it? Because there is an unstated compact amongst do-good saviours (whose composition keeps changing) that we don’t have the time or ‘luxury’ to wait till we fix the system. As the system in its current form doesn’t nab the guilty in accordance with the law, it is okay to frame those that the state deems guilty. And as the state’s story will be scrutinized at some point and fall apart, arrest-pending-trial will become the actual punishment and the fear of being caught at the side of the system the real deterrent.

And what about other checks and balances? Our PM, as head of the executive, wishes to influence how the co-custodian of parliament belonging to his party exercises his discretion to summon accused and arrested opposition MPs. That he sees no conflict of interest or abuse of authority in this is instructive. If a parliamentarian is convicted of corruption, he will be disqualified under Article 63 and the question of production orders won’t arise. But till the time the state establishes its case, why should the constituents who elected him be disenfranchised?

Then comes the judiciary. The outcome in the Justice Qazi Faez Isa reference is relevant for the personal redemption of the honourable judge. But the reference itself and the campaign run alongside has delivered the message that has been heard loud and clear. Judges don’t often court publicity the way CJPs Iftikhar Chaudhry and Saqib Nisar did. Most can’t endure being objects of scandal even when built upon falsehood.

Vertical separation of power fares no better. We’ve never had an effective local government tier. And, despite tall claims, the IK-led regime isn’t different. More troubling is the rollback of provincial autonomy braced by the 18th Amendment. Whether through horse-trading, use of federal police powers (by NAB or ANF etc), constitutional interpretation or in the name of fiscal space for the centre, the state’s focus is on monopolization of power. Can a bad policy produce better results only because you keep retrying it relentlessly?

We’re free to speak so long as we sing praises for men who sit atop concentrated power. The media is free if it bolsters the state’s ‘positive’ narrative. It now seems that the passing of Asma Jehangir also marked the demise of the civil society. Isolated but vocal civil rights movements are the odd ones out in our post-resistance world. This looks like the absolute triumph of our do-good saviours. But do they never wonder if a stable polity can be built upon a single pillar, no matter how strong or stable?

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