



RETHINKING THE CONSTITUTION

Nadeem F. Paracha

It is encouraging to see and hear various political parties, democracy activists, judges, journalists and lawyers speak about the need to wholeheartedly adhere to constitutionalism. They want to “save” the 1973 Constitution’s “sanctity” because the evolution of democracy in Pakistan depends on how well state and government institutions, the judiciary and the polity uphold the “spirit of the Constitution.”

State institutions, such as the military, are often accused of toying with the Constitution and even callously undermining it to bolster authoritarian set-ups or to intervene in civilian matters.

This criticism has been a constant for decades now. But it has failed to resolve what it bemoans. The criticism expresses a besieged mindset, which fears that the Constitution is under attack from “anti-democratic” forces. But could it be that the Constitution itself is the problem?

The 1973 Constitution is frequently described as a hallowed document that is the key to realise the potential of democracy in Pakistan. Therefore, only rarely is it investigated in a more critical manner. So, instead of constantly getting stuck in the now entirely rhetorical discourse on the civil-military tussle, I believe the intelligentsia, the judiciary and supporters of democracy will be able to better understand why constitutionalism continues to fail in this country by critically evaluating the Constitution itself.

There is every likelihood that a critical evaluation will show that the 1973 Constitution’s largely religious character has been complicating the politics and economics of the country, attracting ‘undemocratic’ interventions. But these interventions, too, either become trapped by the problematic meta-narrative of the Constitution or they continue to bolster it.

The 1973 Constitution has not only failed to resolve but also compounded increasing tensions between secular laws and ‘divine’ laws, economic interests and public will, and the government and religious authorities

According to the legal scholar Ran Hirschl, there are various constitutional models of religion and state relations. There is ‘laicism’ or a radical secularism that completely separates religion from the state. Then there is what Hirschl calls “separationist reformism.” This constitutionally introduces secularism as a reformist pursuit, to secularise the politics and society of a state that is understood to have been bogged down by traditionalist or ‘religious’ decrees.

Another model is a “weak form of religious establishment”, in which a state religion is defined by the constitution, but it only plays a ceremonial role and has no influence on policymaking. Then there is the constitutional model, which allows a “selective accommodation of religion.” In this, an otherwise secular constitution allows minority religious groups to resolve certain matters according to their individual religious laws in special courts.

The constitutional model adopted in certain Muslim-majority states is a “mixed system of religious law and general/ universal legal principles.” Pakistan’s Constitution is exactly that. But legal scholars such as Larry Catá Backer maintain that, even though this model is designed to resolve tensions between cosmopolitanism and parochialism, modern and traditional meta-narratives, and modern judicial and theological interpretations of law, it actually ends up intensifying the struggle for power between supporters of theocracy and liberal democracy.

In Pakistan, to mitigate the intensity of this struggle, elected parliaments as well as authoritarian regimes have increasingly strengthened the Constitution’s religious character. They continue to create political space for theocrats at the expense of even pragmatists — so much so that the 1973 Constitution is now only suited to enervate a ‘theo-democracy’. And here lies the problem. It is because of this that the 1973 Constitution has been unable to resolve the increasing tensions between secular laws and ‘divine’ laws, economic interests and public will, government and religious authorities, and modern political ideas and ancient texts.

In fact, the Constitution has compounded the tensions. Over and over again, like repeating a wrong as if one day it might produce a right, the civilian and state elites have continued to try to resolve the tensions by allowing theocratic ideas to encroach on constitutional space.

This makes it increasingly tough for mainstream politics and economics to function in a 'normal' manner or in a manner in which religion is not evoked, or exploited, to get things done. Even if the military somehow pulls itself back from interfering in the political and economic matters of the civilians, there is no guarantee that democracy in Pakistan would come to full fruition.

The constitution that is supposed to guarantee this will carry on creating the aforementioned tensions, and parliaments will continue to pass bills that will keep functioning as theocratic roadblocks, frustrating the economic and political potential of the country.

Is there a way out? Fifty years of the Constitution's gradual theocratic mutation cannot be undone in any rapid manner. It will take years. But, ironically, it is a non-democratic country ruled by a totalitarian monarchy and a theocratic establishment that is providing an answer. That country is Saudi Arabia.

In the past few years, it has created, what Hirschl calls, "secular jurisdictional enclaves." Here, certain areas of economic law are carved out and insulated from the influence of religious law. Saudi Arabia has now exempted the entire finance, banking and corporate capital sectors from application of religious rules. Therefore, economic law is not subject to religious injunctions anymore.

Saudi Arabia is also relaxing its once-strict civil laws by relegating more conservative jurists and bringing in pragmatists who are skilled in reinterpreting religious texts to suit reforms.

Pakistan, a parliamentary democracy, can take the same path. But it will require some bold legislation. However, it is highly unlikely that a civilian government will be willing to do this — at least not on its own. After all, even during a peak in terrorism in 2014, the parliament was unwilling to commit itself to launch a military operation against Islamist militants. It was finally pushed in that direction by the military. Recently, a resolution to discuss anti-minority violence was shot down by the Senate.

Those expecting that an elected parliament alone will ever roll back the theo-democratic character of the Constitution to at least free the country's economics from theocratic roadblocks, are being over-optimistic. This can never be done without 'on-boarding' the figurative muscle of the military and breaking new ground in the antagonistic civil-military discourse that, as mentioned earlier, has now become entirely rhetorical and futile.

The author is a Pakistani journalist, author, cultural critic, satirist and historian. He is a columnist for Pakistan's largest English-language daily Dawn.

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