



# CONSTITUTIONAL EVOLUTION

**Farhatullah Babar**

The year 2023 marks the 50th anniversary of the unanimous Constitution of 1973 as well as the completion of 76 years of independence. It is thus a propitious occasion to reflect on the country's constitutional evolution and the direction it has taken.

As the foundational document of a state the Constitution is a social contract that binds the state and the citizen and a binding agreement on how powers are distributed among various organs of the state.

Unfortunately for nearly quarter of a century from independence Pakistan did not have this foundational document. Military dictators who usurped power tried to give a one-man made constitution to advance their own political agendas but failed.

In the ensuing vacuum the space was occupied by the civil-military bureaucracy and clergy in association with the feudal lords.

Even when the people in East Pakistan had risen in revolt against military rule, General Yahya forced an interim constitution called legal framework. In it he gave himself powers to reject any constitution that may be made by the future assembly if it did not adhere to the 'principles' he had laid down. The so-called constitutions given by dictators vanished as soon as the dictator vanished. General Yahya's was the shortest lived as he was soon forced to quit by the very junta that had been defeated in the war.

In the first quarter century of the constitution-less country the nation almost forgot what the Quaid wanted Pakistan to be.

Indeed, his first famous speech in the Constituent Assembly on August 11th, 1947 laying down the contours of the state of Pakistan was sought to be tampered with but it failed. A few months after his death the Objective Resolution was adopted that introduced the concept of 'Islamic state' as the state's guiding principle.

The concept of an 'Islamic State' persuaded the clergy to assert its authority on the basis of a self-assumed role to interpret religion and Shariah. It sowed the seeds of a system that was neither republican nor Islamic as became evident in later years. The Shariat Court struck down land reforms, the very basis of social justice, as against religion. Pakistan thus continued to be an exploitative state.

Ayub's abrogation of the 1956 constitution followed by a decade long of his autocratic rule deprived the nation of arriving at a consensus on how to shape their lives in the federal structure. It sowed the seeds of disenchantment among the people that soon turned into rage and eventually in 1971 to the breakup of Pakistan and the military surrender.

The two-nation theory, based on the foundation of religious divide, received a huge setback by the creation of Bangladesh in 1971 but the signal was not registered. People were led to believe that Pakistan was dismembered because of the presence of a large number of Hindus in East Pakistan. Intolerance and exclusion of minorities increased as a result.

It was in this backdrop that the unanimous Constitution of 1973 was adopted. It sought to address issues in the distribution of powers, in defending human rights, empowering the common man and giving hope to the youth of Pakistan.

The Constitution of 1973 held the field for less than five years when General Ziaul Haq struck and held it in abeyance. A decade later he lifted martial law but not before arm twisting the National Assembly in 1985 to pass the 8th Amendment which in effect defaced the constitutional structure. Even after its passage Zia tried to impose Shariah through the 9th Amendment in 1986 but failed.

Despite numerous interruptions the people of Pakistan, whose ethos is democratic, bounced back and restored in 2010 to a large extent the original 1973 Constitution and the parliament once again made supreme through the 18th Amendment.

## THREATS TO CONSTITUTION

Some powerful elements believing in a strong centre have not given up machinations against the Constitution. They have called the 18th Amendment as a reincarnation of Shaikh Mujib's six points.

Direct abrogation of the Constitution has given way to a new norm, the 'hybrid' system in which the person on the wheel is not the actual driver but someone sitting in the rear controls vital levers of the vehicle. It is difficult to say which of the two civilian governments in the last five years outdid the other in strengthening the hybrid.

This poses a great danger to the state. A vehicle driven not by the man on the wheel but by back seat drivers is doomed to meet a disastrous accident. More so when the man of the wheel is accountable for accidents the back seat driver is not.

There is another threat. It is from judicial verdicts which, while claiming to enforce the Constitution, amount to rewriting the Constitution itself: the threat from judicial imperialism.

The top court has upheld unconstitutional measures of military dictators but has been hyper active when it comes to democratic government and institutions. It has only weakened, not strengthened, other democratic institutions.

From the dismissal of the elected Assembly in 1954 to the abrogation of the Constitution by General Ayub in 1958 to another abrogation in 1977 by General Zia to yet another abrogation, not once but twice, by General Musharraf (1999 and 2007), the judiciary has willingly submitted - offering no resistance. It not only endorsed abrogation but also allowed dictators to re-write it.

The top Court also judicially executed the principal architect of the Constitution which later a judge on the bench Nasim Hasan Shah publicly acknowledged was done under pressure.

A 12-member bench headed by Irshad Hassan Khan validated the first coup of General Musharraf in 1999. When he retired in January 2002, he readily accepted the job of Chief Election Commission which the dictator had offered him for three years. Sadly, no judge protested.

Contrast it with judicial overreach during democracy particularly after the CJP Iftikhar Chaudhry and other sacked judges were reinstated in 2009 as a result of what appeared to be a mass public movement but later turned out to be part of byzantine intrigues within the establishment.

The judges appeared to stretch the principle of independence of judiciary to mean their independence from the constitution and the law itself. Instead of repairing the broken criminal justice system the Court went on to expand his own powers at the expense of other democratic institutions including the Parliament.

Thus two elected Prime Ministers were sent home one after the other, the ruling of the Speaker National Assembly overturned and the Election Commission interfered with forcing CEC to resign. The Court declined to place its financial accounts before the Parliament's Public Accounts Committee (PAC) and used suo motu powers in a way that will embarrass jurists everywhere. When the parliament made a regulatory legislation, the Court rejected it: ruling that the SC rules framed by it in 1980 superseded any ordinary legislation made by the parliament.

The judiciary also assumed powers of appointing and sacking judges to the exclusion of Parliament, the President and the Prime Minister. One CJP in his time thus appointed 126 judges and sacked over a hundred judges. The concentration of powers in just one person has threatened to turn the Court into a monolithic structure like a unit of the military on the one hand and what critics describe a 'judiciary of the judges for the judges' on the other.

There is also little accountability. A reference was filed against CJP Saqib Nisar by over a hundred members of civil society. It was not heard as long as he was in office. When Saqib retired it was returned saying that it had become infructuous thus making Judges' accountability almost impossible.

The hybrid system and judicial overreach together have threatened to upend the democratic and constitutional order. This indeed is the challenge in the 50th anniversary of the Constitution and the 76th anniversary of independence.

The Parliament must stand tall, refuse to cede its space, courageously invoke parliamentary instruments of legislation, motions and resolutions, set up a Truth Commission and call a spade a spade.

*The author is a former editor and former Senator.*