



MAKING OUR DEMOCRACY WORK

What Went Wrong and How to Fix It: A Lawyer's View

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Pakistan's constitutional democratic system has all but broken down. There can be no meaningful conversation unless we openly and fully acknowledge this very significant social fact. Let me give you just two examples of the kind of breakdown which I have in mind when I say this.

While the Constitution promises that power will be exercised by the "people through elected representatives", as a matter of fact, we don't have elected governments at the federal, provincial or local levels. And it has been quite a while. Punjab and KPK have been without any elected provincial government for over a year now. Sindh and Balochistan and the all-important Federal Government too are all unelected. If at all there is a certainty, it is that elections will not happen within the 90-day period stipulated in the Constitution. As I write, it is unclear just how long unelected Caretaker governments will continue to rule the country and how broad their mandate is.

It is worth taking a look at the situation of fundamental liberties, which, along with elected rule, represent the core of our constitutional compact. While the Constitution promises due process and liberty, it is an undisputed fact that hundreds of pro-PTI political workers have been 'disappeared' by the state's own agents; yet, no organ of the state, the judiciary included, is in a real and meaningful sense, willing to come to their aid.

While Pakistan's de facto situation has always been a little removed from the de jure; the confident and sustained departure from constitutionally prescribed norms which we are seeing at present is of a different magnitude altogether. We haven't seen something like this since at least November 2007, the last time someone decided to toss the Constitution in the air.

So how did we end up here? How did our democratic institutions become so weak that they now lie almost forgotten?

The usual story that we are told is that the breakdown of our democracy has happened because our system is nascent; nascent democracies are 'just like that'. There are others who put the responsibility for repeated systemic breakdown on interference by the 'military establishment' and the 'judicialisation of politics'; yet others put the blame squarely on 'corruption' and 'cronyism'. While all of these explanations are partially true, there is another side to the story which has never been seriously considered: constitutional design errors.

In this essay, I would like to argue that there are some serious design flaws in the constitutional scheme which militate against the strengthening of our democracy for repeated failure. Unless we correct these flaws, the system is doomed for repeated failure.

1. GOVERNMENT BY PARLIAMENT OR BY WINNING PARTIES?

In a democracy, the idea is that elected folks enjoy an upper hand over the unelected permanent state official. Come to think of it, the odds are always against this: how can a bunch of temporarily elected officials who are forever hounded by rival political parties enjoy ascendancy over a class of state officials who are permanent, and follow a command and control structure?

The institutional arrangement which has made this improbable formula – ascendancy of elected, temporary people over permanent officials – work in some countries is called Parliamentary rule. In this modality, the winning politicians (Treasury benches) are fully committed to work in a collegiate fashion with their fiercest political rivals (Opposition Benches) while taking all significant governmental decisions. This is why everything from taxation to legislation is to be done not by the government, but rather by Parliament - which is a collegiate and discursive institution that includes the fiercest rivals of the government of the day. It is only by coming together with their direct adversaries that the elected folks muster enough power to gain an ascendancy over the permanent and more organised state bureaucracy.

Unfortunately, our constitutional design doesn't really provide a sufficiently robust incentive structure which would make winning politicians treat their political rivals as parliamentary colleagues. As a result, the electoral rivalries continue well after elections and eventually completely rock all parliamentary boats. What are these weaknesses in the incentive structure for parliamentary rule? Three examples to demonstrate.

- Legislation through Ordinances. One reason why winning politicians in a parliamentary context find it essential to bury the hatchet after elections is that they have to get laws passed. Especially in countries with bicameral legislatures, this requires consensus-building with rival parliamentary parties. In Pakistan, however, Article 89 of the Constitution empowers the government of the day to bring in any legislation without having to go through Parliament at all. These are temporary laws but they can be re-promulgated and at the right time, bulldozed as Act of Parliament. My research shows that Ordinance-making has emerged as the principal method of legislation; since 1947, the President has promulgated over 2,500 Ordinances, most of which are about the most mundane topics. As long as this trap door for legislation remains, it would be used by governments to avoid the painstaking and patient dialogue in Parliament.

- Budget-making through Supplementary Grants, Taxation by SROs. One of the reasons why politicians who lose elections choose to sit amicably in Opposition rather than rocking the parliamentary boat altogether is because sitting in parliament gives them a direct say in

money matters: no tax concession can be granted and no budget can be raised without being put to vote before them. In our constitutional scheme, as interpreted by the courts, neither is true. The government can spend money first and then get ex post facto approval through what are known as Supplementary Grants. And the government can also grant tax concessions through SROs. When all of this this can be done without the Opposition Benches, why would anyone wish to sit there? If no one would like to sit in Opposition, how will Parliament become so strong as to counter-balance the permanent bureaucracy?

- Borrowing without Parliamentary Approval. The Constitution clearly states that there can be no taxation except by or under the authority of the Parliament (Article 77). The idea was that the government shouldn't be able to raise any money or spend it without first going to Parliament. But this isn't happening because governments are increasingly relying on borrowing – from both domestic and international lenders – instead of relying on tax revenues. Parliamentary approval is not mandatory for such borrowing contracts. As a result, each government can conveniently blame its predecessors for all the bad borrowing and then do the same – without anyone in Parliament ever finding out.

2. PARLIAMENT: BLENDING DEMOCRACY AND TECHNOCRACY

Another constitutional design issue in a parliamentary democracy, which we seldom dwell upon, is that of 'competence': how do we ensure that the elected rulers who temporarily take charge of permanent bureaucracy have sufficient know-how for handling the often tricky business of government? Bear in mind that the sole credentials of the top bosses in a democratically elected cabinet are: winning elections. Winning elections requires skills which have almost nothing to do with the skills required for running modern government.

One way in which this design issue can be dealt with is by structuring parliamentary 'careers' and instituting a formal Promotion System. So, for instance, it could be stipulated that each parliamentarian would have to start his or her career with Membership of one particular Standing Committee. To encourage winning politicians to actually sit in Parliament – which, at present, they seldom do – rules could be framed regarding compulsory attendance, including consequences for non-attendance. Only after having spent one tenure learning about the affairs of a specific department would a parliamentarian become eligible for Minister or Shadow Minister of that particular department. And finally, only after having served as Minister or Shadow Minister could someone be eligible for Prime Minister or Leader of the Opposition. These are mere possibilities for a different connotational design. I am delineating these to highlight the false binary between democracy and meritocracy which seems to underly our present constitutional design, and is militating against its success.

3. THE VERTICAL SEPARATION OF POWER: STRENGTHENING LOCAL GOVERNMENT

There is now an emerging consensus in the Pakistani intelligentsia that one of the key reasons why our democratic system gets rolled back by the ‘establishment’ every ten years or so is because it doesn’t have sufficiently deep roots in society. The reason for that is our failure to set up elected local governments and to devolve some of the state’s functions – municipal affairs, health and education, etc. – to them.

One of the reasons for this state of affairs is that whenever empowered and elected local governments were set up, they were soon rolled back by rival political forces in provincial assemblies. What few bother to mention is that these roll backs happened so easily because our Constitutions – Government of India Act, 1935, the 1956 Constitution and the 1973 one – contained hardly any protections for local governments. These constitutions – almost half of which are devoted to

charting out centre-province relationship, are remarkably quiet about the powers and structure of local government. This is one of the key reasons behind the weakening of local governments.

CONCLUSION

Let me end this article on a sanguine note. The good thing about attributing the present failure of our democracy to constitutional design flaws is that it opens the door of hopes. Constitutional design flaws can be identified through scientific analyses; and they can be readily fixed through an informed, mobilised and large enough reform constituency. Also, I have no qualms in admitting that when it comes to grand questions like this one, the lawyers’ lens is not the only one. But it is equally important to realise that the legal or constitutional perspective is an important part of the equation which political scientists and economists ignore at their own peril. I would therefore like to take this opportunity urge other legal experts to dwell on the subject of how we got here and to propose ideas for how we can still make our democracy work.

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