

Constitutional amendments

Dr. Sania Nishtar

The Special Committee on Constitutional Reform is currently deliberating on the nature of constitutional amendments to be introduced through the 18th Amendment. Achieving balance of power should be an important outcome of this exercise. In addition, however, the potential within constitutional changes to foster improvements in the public policy domain should also be explored. Within this context, this comment draws attention to the need for updating the Principles of Policy, articulated in Part II, Chapter 2 of the 1973 Constitution.

Principles are a set of values that guide action towards desired goals; these are distinct from laws, which can compel or forbid behaviors. Defining the right principles can inspire the desired culture in articulating norms in policy instruments. The Principles of Policy in the 1973 Constitution were articulated at a time when the world was a very different place. Although these are relevant even today, other considerations have also assumed importance. Pakistan has signed up to many global normative frameworks since then—many of which have binding covenants. Many indigenous challenges warrant the inclusion of another generation of principles. The manner in which governance ineffectiveness has been pervasive, creates an imperative for covenants to set the right parameters in order. The opportunity to address these gaps should not be missed while framing the 18th Constitutional Amendment.

Chapter two stipulates 12 covenants as the Principles of Policy in Articles 29–40. These centre on the Islamic way of living; promotion of local government institutions; participation of women in national life; protection of the families and minorities; promotion of social justice and well being; eradication of social evils; discouraging prejudices; participation of people in armed forces and strengthening bonds with the Muslim world and international peace.

Some of these, to begin with do not sound like principles; they can at best be described as approaches or strategies. Additionally, there are *eight* missing principles of critical significance. These are being summarized hereunder.

Evidence is one of the most critical values in the domain of policy formulation. Similarly, *transparency in conduct and accountability for actions* is another critical principle—both are missing from the list. It is accepted that Government's decisions are regularly challenged before the High Courts on the basis of absence of evidence and rationality and that detailed rules exist to guide judicial review of administrative decisions. Constitutional experts also draw attention to the fact that the requirement of evidence-based decision-making can be read into several other provisions of the Constitution such as Articles 4, 5 and 25, which are directly enforceable through *inter alia* Article 199. Experts also state that the requirement of transparency in administrative decision-making has been established through judicial precedent and may also form part of Article 4—which has been interpreted as the due process clause in the 1973 Constitution—and enforceable through Article 199. These explanations are accepted. Notwithstanding, absence of both the principles in the listing of the Principles of Policy is an omission. Framing

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of administrative decisions. Constitutional experts also draw attention to the fact that the requirement of evidence-based decision-making can be read into several other provisions of the Constitution such as articles four, five and 25, which are directly enforceable through *inter alia* article 199. Experts also state that the requirement of transparency in administrative decision-making has been established through judicial precedent and may also form part of article four and are enforceable through article 199. These explanations are accepted. Notwithstanding, absence of both the principles in the listing of the principles of policy is an omission. Framing these can signal an important intent, which is needed to move beyond the culture of adhocism.

Outcome orientation is another principle, which needs to be included. Policies, particularly in the social sectors have often supported 'outputs'. Investment in infrastructure — hospitals and schools — is an example. The impact of such policies on actual goals or outcomes, which in the given example relates to better health and improved literacy, respectively is usually not optimally achieved.

For a federating country, solidarity should be defined as a principle of policy to signal that policy actions, while respecting autonomy of the federating units will not undermine cohesion and camaraderie.

The difference between inequality and inequity should be brought to bear. The principles of policy refer to inequities only in the context of the employer vis-à-vis employee relationship in article 38(a). The state's commitment to addressing inequities of power, money, and resources should clearly be reflected as an overarching principle as this forms the basis of social justice, which is one of the three principles, enshrined in the Objectives Resolution.

Technical and allocative efficiency which are concerned with the 'production of services at minimum cost' and 'producing the right collection of outputs to achieve its overall goal', respectively should additionally be included as principles.

Framing the right principles to guide decentralisation/devolution is important. Presently, Article 32 and 37(f) relate to promotion of local government institutions and decentralisation respectively. Article 140(A) makes it binding on every province to devolve political, administrative and financial responsibility and authority to elected representatives of the local government. Although, it is not within the remit of the principles of policy to outline specifics in this area, the importance of two overarching principles needs to be emphasised. One of them is subsidiarity, an organising principle, which means, 'Matters ought to be handled

by the smallest, lowest, or least centralised competent authority'. The other centers on community empowerment. In addition to the proposed eight additions, it is recommended that existing principles be reframed in the following two areas.

The first relates to social justice and well-being. Articles 37(a), 37(b), 37(c) and 38(a-e), emphasise their importance. Article 38(c) and (d) reiterate the need to provide welfare for "those in the service of the country" and "those that are unable to earn their livelihood as a result of infirmity, sickness and unemployment", respectively. Over the last decade, social welfare has been increasingly recognised as being synonymous with poverty reduction and social protection, whereas it is a much broader concept and links with the issue of enforceable social rights. Experts state that the impact of article 25 read with article nine provides for enforceable fundamental rights. Although article nine in particular has been broadly interpreted in case law in this regard, there is lack of explicit clarity.

The second area relates to women's empowerment. Currently, article 34 relates to full participation of women in national life, whereas article 37(e) stipulates women's rights with respect to employment and maternity benefits. The world has moved significantly further along in this area since 1973 with women's empowerment and matters related to access, rights and opportunities, including reproductive rights as being central to gender mainstreaming. Pakistan has made progress by signing the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and enacting the Protection of Women (Criminal Laws Amendment) Act, 2006.

In addition to these changes, a participatory mechanism is needed to periodically review the extent to which the principles of policy are adhered to in policy formulation and implementation. The recently tabled private member bill to add article 49(A) in order to enable the creation of a Council of Principles of Policy cannot provide this, given the usual public sector representation it calls for creating and the lack of a participatory approach. The Report on the Observance of the Principles — a constitutional requirement and part of the rules of procedure and conduct of business in the National Assembly — is in practice, treated as a mere formality. Faithful implementation of this requirement is important — the constitution envisages debate by Parliament, which if implemented in spirit would be a participatory process.

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these can signal an important intent, which is needed to move beyond the current culture of adhocism, personal preferences, and political expediency in the policy domain.

Outcome Orientation is another principle, which needs to be included. Policies, particularly in the social sectors have often supported ‘outputs’. Investment in infrastructure—hospitals and schools—is an example. The impact of such policies on actual goals or *outcomes*, which in the given example relates to better health and improved literacy, respectively is usually not optimally achieved. There is never an accountability drive to hold policy makers and implementers responsible for not achieving outcomes. Spelling out outcome orientation as a principle can signal its importance.

For a federating country, *Solidarity* should be defined as a Principle of Policy to signal that policy actions, while respecting autonomy of the federating units will not undermine cohesion and camaraderie. This can signal confidence to the small provinces at a time when provincial discord and separatist movements are taking root.

The difference between inequality and inequity should be brought to bear. The Principles of Policy refer to inequities only in the context of the employer vis-à-vis employee relationship in Article 38(a). The State’s commitment to addressing *Inequities* of power, money, and resources should clearly be reflected as an overarching principle as this forms the basis of social justice, which is one of the three principles, enshrined in the Objectives Resolution.

Technical and allocative efficiency, which are concerned with the “production of services at minimum cost” and “producing the right collection of outputs to achieve its overall goal”, respectively, should additionally also be included as principles, to signal the importance of optimizing resources in view of the present fiscal constraints.

Framing the right principles to guide decentralization/devolution is important. Presently, Article 32 and 37(i) relate to promotion of local government institutions and decentralization respectively. Article 140(A) makes it binding on every province to devolve political, administrative and financial responsibility and authority to elected representatives of the local government—a subject of great contention today. Although, it is not within the remit of the Principles of Policy to outline specifics in this area, the importance of two overarching principles needs to be emphasized. One of them is *subsidiarity*, an organizing principle, which means, “Matters ought to be handled by the smallest, lowest, or least centralized competent authority”. The other centers on *community empowerment*, without which decentralization cannot yield dividends.

In addition to the proposed 8 additions, it is recommended that existing principles be reframed in the following two areas.

The first relates to social justice and well-being. Articles 37(a), 37(b), 37(e) and 38(a-e), emphasize their importance. Article 38(c) and (d) reiterate the need to provide welfare for “those in the service of the country” and “those that are unable to earn their livelihood as a result of infirmity, sickness and unemployment”, respectively. Over the last decade, social welfare has been increasingly recognized as being synonymous with poverty reduction and social protection, whereas it is a much broader concept and links with the issue of enforceable social rights. Experts state that the impact of Article 25 read with Article 9 provides for enforceable fundamental rights. Although Article 9 in particular has been broadly interpreted in case law in this regard, there is lack of explicit clarity in this area, which must be addressed.

The second area relates to women’s empowerment. Currently, Article 34 relates to full participation of women in national life, whereas Article 37(e) stipulates women’s rights with respect to employment and maternity benefits. The world has moved significantly further along in this area since 1973 with women’s empowerment and matters related to access, rights and opportunities, including reproductive rights as being central to gender mainstreaming. Pakistan has made progress by signing the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and enacting the Protection of Women (Criminal Laws Amendment) Act, 2006. The Principles of Policy should signal an overarching position, which should be a benchmark for policies in this domain.

In addition to these changes, a participatory mechanism is needed to periodically review the extent to which the Principles of Policy are adhered to in policy formulation and implementation. The recently tabled private member bill to add article 40(A) in order to enable the creation of a Council of Principles of Policy cannot provide this, given the usual public sector representation it calls for creating and the lack of a participatory approach. The Report on the Observance of the Principles—a constitutional requirement and part of the rules of procedure and conduct of business in the National Assembly—is in practice, treated as a mere formality. Faithful implementation of this requirement is important—the constitution envisages *debate* by Parliament, which if implemented in spirit would be a participatory process.

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