Amending the constitution

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The Special Committee on Constitutional Reform, which was constituted to frame recommendations with regard to the constrution of the 18th Amendment to the Constitution of Pakistan, is likely to come up with its recommendations soon. The focus of attention of the Committee and of the nation in general is on certain covenants of the Constitution—repeal of the 17th amendment in general and 58-2(b) in particular. Many political actors have also come up with specific recommendations with a focus on these and related issues.

An amendment to the constitution is not a trivial matter—whilst we await a debate on any envisaged recommendation, it is opportune to review the nature and history of constitutional amendments in the past, particularly with a view to exploring if they had the potential to strengthen state functioning and bring welfare to its people. These insights can be instructive in today’s environment as well.

Most of the amendments to the Constitution of Pakistan have been made in a fire-fighting mode. The principal objectives of such—nonetheless—recommendations have also included other elements that have owned a share in each of the three following areas. First, defining power relationships between the presidency and the prime minister’s office. The 17th Constitution provided for the separation of powers between the president and prime minister but greatly strengthened the position of the latter. The 18th Amendment to the Constitution in 1997, which validated the presidential order of 1977 and other martial law orders, while curtailing some of the powers of the president, altered the position in a semi-presidential system. The 19th and 20th Amendments would weaken the position of the president. The 21st Amendment in 1993 and validation of 24th Amendment under LFO no 24 of 1993, restored presidential powers. The 25th Amendment in 1997 restored the 24th Amendment to the Constitution, which provided for separation of powers between the president and prime minister but greatly strengthened the position of the latter. The 26th Amendment, the sharpest blow to the president’s position, was made on the 25th Amendment. The 27th Amendment (1999), in protest against the armed forces, restored some of the powers of the president. The current debate on constitutional amendments centre on 58-2(b), is aimed precisely at removing these and empowering the prime minister.

The second issue relates to enhancing or curtailing the powers of the judiciary and political parties. Of the 11 amendments—out of three that have already been abided to—of a total of 17 that were added—the first seven were focused on the prerogatives of political parties and the judiciary. This brings us to the question of weather there is any need to add the 58-2(b) to the amending powers of the president.

A citation or a collection of a few instances or which the amending powers of the president have been misused. The 58-2(b) Amendment to the Constitution was originally passed in 1980, making an explicit reference to social justice as one of the five principles guiding the democratic state. In Pakistan, there is no such trend. The societal political culture being weak, there is also no pressing public need.

The third issue concerned governance by many in the country is the role of Islam in state functioning. The 17th Amendment to the Constitution in 1997 redefined the position of Islam in the state. The 18th Amendment to the Constitution in 1997, which validated the presidential order of 1977 and other martial law orders, while curtailing some of the powers of the president, altered the position in a semi-presidential system. However, 58-2(b) read in conjunction with 58-2(a) has not been updated since the original framing of the constitution in 1973. The world has changed significantly since then and, therefore, the need for new constitutional frameworks.

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The proposed 18th Amendment to the Constitution of Pakistan will restore some of the powers of the president as well. The 18th Amendment to the Constitution in 1997, which validated the presidential order of 1977 and other martial law orders, while curtailing some of the powers of the president, altered the position in a semi-presidential system. However, 58-2(b) read in conjunction with 58-2(a) has not been updated since the original framing of the constitution in 1973. The world has changed significantly since then and, therefore, the need for new constitutional frameworks.

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The third issue considered germane by many in the country to constitutional amendments is the role of Islam in state functioning. The second amendment to the constitution pronounced Qadianies non-Muslims. The 9th Amendment Bill and the 15th Amendment Bill, both concerning enforcement of the Shariat, could not be enacted.

Here it must also be recognized that a few amendments, other than in these three areas have also brought some value to the state system. For example under the 12th amendment the salaries and remuneration packages of the judiciary were revised and under the 17th amendment, women’s representation in the parliament was increased, minorities were given the right to vote, the supreme judicial council was given the authorization to file a reference against a judge, the right to dissent was granted and some other areas, which relate to political representation were also addressed.

These notwithstanding, by and large, constitutional amendments have been about the three issues that have already been alluded to. This brings us to the question of whether this should be the case? Stalwarts in the area should know the answer.

A constitution is the most basic law of a territory from which all other laws and rules should be derived. It is true that constitutions are, in a sense, living documents and need to be revised form time to time based on emerging needs. However, amendments need to be focused holistically on all the core objectives that the constitution is meant to achieve. Constitutions serve many important functions. Regulating the relationship between institutions of the state and the relationship between the executive, judiciary and the legislature and the relationship of institutions within these branches is one. This is an area, which has received the most attention, but the focus has been highly narrow and has remained individual-centric.

Two, the other most important function is to define the relationship between individuals and the state and third, to establish the broad rights of individual citizens. There has been almost no attention to these areas in successive constitutional amendments in Pakistan.

A review of constitutional amendments in other countries reveals that these have focused on diverse subjects of public interest such as civil liberties, rights, rights to privacy, citizens’ privileges, immunities, due processes, etc. In Pakistan there is no such trend. The societal political culture being weak, there is also no pressing public demand.

Even the Principles of Policy, which are a set of values that guide action towards desired goals, have not been updated since the original framing of the Constitution in 1973. The world has changed significantly since then and therefore the need for new normative frameworks. The writer has attempted to draw attention to the 8 missing Principles of Policy and has recommended modification to two existing Principles in these columns on September 19, this year, in line with this understanding.

Similarly, the question of rights needs a concerted focus. Under the Constitution of Pakistan, most of the fundamental rights listed in Chapter 1, Part II—entitled Fundamental Rights—fall within the domain of civil and political rights. Socio-economic rights have not been explicitly recognized as rights in this chapter. However, a reference to socio-economic ‘rights’ features in two areas in the constitution. The Objectives Resolution, which forms the preamble to the constitution and was originally passed in 1946, makes an explicit reference to social justice as one of the five principles guiding the democratic state. Secondly, Article 25 and 38-d of chapter 2, Part II—entitled Principles of Policy—refers to ‘Equality of citizens’ and ‘Promotion of social and economic well-being of the people’, respectively. Other articles of relevance include Article 9 on ‘Security of a person’ and Article 14 on ‘Inviolability of the dignity of man.’ Conventionally, these covenants are referred to as the basis of socio-economic rights, with Article 8 and 9 read with Article 199 providing the basis of enforcement of fundamental rights. Article 9, in particular, has been broadly interpreted in case law in this regard. However, socio-economic rights have not been explicitly recognized as fundamental rights. Every time a constitutional amendment bill was tabled, the opportunity to holistically review the matter of rights was missed.

Even in the area of civil and political rights, there is lack of clarity in relation to freedom of information, which is an important component of the international guarantee of freedom of expression. The Pakistani constitution does not refer to the right to seek and receive information as elements of freedom of expression, as outlined presently.
in Article 19. However, despite this lack of clarity, the Supreme Court, in a 1993 ruling, stipulated that the right to freedom of expression includes the right to receive information, as discussed in these columns on October 12, 2009.

The word limit precludes a discussion on other areas, such as administration of the tribal areas and the subject of provincial autonomy, where amendments are also desired. The need to revisit the Concurrent list and the federal fiscal system has been raised time and again; in fact, the sixteenth amendment bill—a private members bill—was tabled on the subject of provincial autonomy but it couldn’t pass.

It is therefore an imperative that once the existing constitutional fire fighting is over, attention should be focused on other constitutional areas, which have remained orphaned in terms of the attention received.

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