

TIME FOR A REVIEW OF THE CONSTITUTION TO WEED OUT ANOMALIES!

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Recently, two constitutional issues cropped up which generated a heated debate that continues to-date without a satisfactory resolution in sight. Both sides to the debate cite articles of the constitution in support of their arguments.

The first case is hardly a month old when President Arif Alvi posted an emotional post on X (erstwhile Twitter) after the Army (Amendment) Act, 2023 and Official Secrets (Amendment) Act, 2023 were formally notified by the Ministry of Law and Justice as valid laws of the land. The President, in his post, apologised to the nation and, more specifically, the people who may have to suffer after the enforcement of the two laws implying that it was a *fait accompli* that the two laws were on the statutes book. He blamed his staff who, according to him, failed to return the unsigned bills within the stipulated period of ten days. Although the President himself did not contest to the two bills becoming Acts of Parliament, his post sparked a passionate debate among constitutional experts, political parties and civil society which continued to dominate print, electronic and social media for weeks. Several litigants approached the superior courts for adjudication and conclusive interpretation of the relevant Constitutional provisions. The courts have not taken up the case as yet.

At the heart of the controversy is an apparent gap in the Constitution. While Article 75 (1) of the Constitution authorises the President to exercise only one of the two options within ten days when a bill (other than the money bill) passed by the parliament is sent to the President for assent i.e. either to assent the bill or return the bill to the Parliament with a message requesting that the bill or any of its specified provision be reconsidered and that any amendment specified in the message be considered.

The Constitution does not provide for the option to not exercise either of the two choices and legal experts differ on what exactly it will mean if the President does not opt for either option. The Ministry of Law and Justice interpreted that if the President does not exercise any of the two options, it will be deemed after the lapse of ten days that the bills have received the assent of the President. Many experts concurred with this interpretation but many others considered that the absence of both the assent and an objection would mean that the President had not granted the assent and the bill would be deemed to have been returned to the Parliament for reconsideration. In fact, with due deference to both groups of legal experts, the Constitution is silent about the fate of a bill which has neither received an assent or a message for reconsideration from the President. Only the Supreme Court has the authority to conclusively interpret the Article of the Constitution but even in that case, the legal experts may consider such interpretation as 're-writing of the constitution' or 'reading into the constitution' as some of the judges of the Supreme Court did write in their note of dissent when the Supreme Court 'interpreted' Article 63A of the constitution dealing with the defection of the legislators from their party. The right course, therefore, would be for the parliament to amend Article 75 in such a way that there is no gap or ambiguity left.

The second recent, or rather current, case of more than one interpretation of the Constitution is regarding Article 48(5). The relevant part of the Article reads, 'Where the President dissolves the National Assembly, notwithstanding anything contained in clause (1), he shall, (a) appoint a date no later than ninety days from the date of the dissolution, for the holding of a general election to the Assembly ...'

Apparently, it seems to be a straightforward provision which authorises the President to fix the Election date but unfortunately, this is not the case. The Chief Election Commissioner (CEC), in his reply to the President's letter inviting the former for consultation on the election date, differed with the President's interpretation and stated that the dissolution of the National Assembly on 9th of August was, in fact, not the dissolution by the President because it was done at the advice of the then Prime Minister. The CEC went on to cite another Article of the Constitution, Article 58(2), in which President had been empowered to dissolve the National Assembly in his discretion where, after a vote of no-confidence has been passed against the Prime Minister and no other member of the National Assembly commanded the confidence of the majority of the members of the National Assembly. The CEC informed the President that in such a dissolution of the Assembly, the President would be authorised to fix the election date.

A number of legal experts subscribe to the position of the President while many others support the interpretation of the Election Commission. Apparently, it is not very clear whether Article 48(5) really means 'dissolution in his discretion' by the word 'dissolution' in the Article. Either Supreme Court may step in to interpret the Article or the Parliament may remove the ambiguity by passing an amendment.

Even if the President's interpretation of Article 48(5) is accepted, the question arises whether the President can fix the date of the election on his own without the advice of the Prime Minister (Caretaker Prime Minister in the current scenario) in view of the provision in Article 48(1) which states that 'In the exercise of his functions, the President shall act on and in accordance with the advice of the Cabinet or the Prime Minister'

Only the Parliament can adequately and satisfactorily respond to this and similar questions by considering the apparent ambiguities and passing an amendment, if required.

Another recent confusion arose when the Council of Common Interests (CCI) approved the results of the population census 2023 just a couple of days before the Prime Minister tendered the advice to dissolve the National Assembly. Although Article 224 (2) clearly states that 'When the National Assembly or a Provincial Assembly is dissolved, a general election to the Assembly shall be held within a period of ninety days after the dissolution . . . ' the ECP decided to first undertake fresh delimitation of the constituencies which normally take about four months to complete, pushing the election date much beyond the ninety days limit prescribed by the Constitution. The ECP relied on the interpretation of Article 51(5) which states, 'The seats in the National Assembly shall be allocated to each Province and the Federal Capital on the basis of population in accordance with the last preceding census officially published.'

Although Article 51(5) does not call for fresh delimitation and its scope seems to be limited to the allocation of the total National Assembly seats (currently 266 general seats) among the provinces and the Federal Capital, the ECP insists that fresh delimitation is required. Only the Parliament can iron out the ambiguities in this particular article as well.

As mentioned earlier, the Supreme Court had, on a presidential reference seeking interpretation of Article 63-A of the Constitution, decided in May 2022, that the votes of defecting lawmakers would not be counted. The verdict by the 5-member bench of the apex court was a 3-2 split decision, with a majority of the judges not allowing lawmakers to vote against party line in four instances outlined under Article 63-A.

In the dissenting note, Justice Miankhal and Justice Mandokhail stated that Article 63-A was a "complete code" in itself and provided a comprehensive procedure regarding defection as well as the consequences for doing so. "In case the Election Commission of Pakistan confirms the declaration sent by a party head against a member, he/she shall cease to be a member of the House. As a result thereof, his/her seat shall become vacant," the judges said, adding that a right of appeal had also been provided under Article 63-A.

They said that any further interpretation of Article 63-A would amount to "rewriting or reading into the Constitution", which would affect its provisions that had not even been asked by the President.

The majority judgment on Article 63A is apparently much beyond the scope of interpretation and the Parliament, sooner or later, will have to amend this Article to remove any ambiguity on whether the votes of defecting lawmakers should be counted or not. The Parliament should either explicitly incorporate the Supreme Court interpretation of Article 63A into the Constitution or make it explicitly clear that the votes of the defecting members will be counted before they are proceeded against for defection from the party.

Another gap in the Constitution is about the lack of any provision for follow-on constitutional action if a Caretaker Prime Minister or Chief Minister resigns or expires in office. The Constitution as it stands today does not provide for the procedure to appoint the new Caretaker PM and CM. The Parliament may amend Article 224 and plug the constitutional gap.

The above list of anomalies and gaps in the Constitution may not be exhaustive. These anomalies may be existing since the time the original constitution was adopted in 1973 or these may have found their way into the Constitution while several large-scale constitutional amendments were introduced during the time of Gen. Zia ul Haq's Martial Law from July 1977 to December 1985 or during Gen. Pervez Musharraf's military rule from October 1999 to November 2002 or during other packages of constitutional amendments introduced at various times. The 18th Amendment passed in 2010 seems to be one of those packages.

The country has been facing constitutional bottlenecks with increasing frequency in the past few years. The solution is to cleanse the Constitution of most, if not all, such anomalies and by plugging the gaps while undertaking a general review of the Constitution by a Joint Parliamentary Committee which may also invite proposals from the general public as well. Such a committee can be formed, obviously, after the new National Assembly is in place. After the Committee has identified all such gaps and anomalies, it may prepare the proposed package of amendments for consideration and approval with further refinements where needed, in the two houses of the Parliament.

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