Viewpoint 50: Judicialization of rights

July 25, 2009: A viewpoint titled ‘Judicialization of rights’ by Sania Nishtar has been published in The News International on July 25, 2009. Full text is accessible at Viewpoints
Context: This comment has evolved in the context of the recent advent of judicial activism in Pakistan, progressive court decisions in the country, and the trend towards judicialization of rights. Ideally, this should have a knock-on effect on social rights and health rights in particular.

Key note address

July 25, 2009: Sania Nishtar gives a plenary talk at the Asian Institute of Technology Professional Development course on ‘Enabling Effective District Leadership for Reproductive Health in Pakistan, held in Klong Luang, Thailand, from July 19-25, 2009. Title of the talk: ‘Health Policy Challenge in Pakistan.’

Judicialisation of rights

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The Petroleum Development Levy (Amendment) Ordinance, 2009, which offset the Supreme Court’s suspension of the imposition

of the carbon surcharge was challenged on the basis of the Constitution's Articles 2A, 4, 5, 8, 9, 25, 37, 38(d), 77 and 89. The resulting difference of opinion between the three pillars of the state—the executive, the judiciary and the legislature—raises some important issues to be resolved; both with reference to their respective constitutional domains as well as the matter of human rights and their legal enforcement.

Many of us perceive human rights as belonging to the narrow domain of civil liberties, political rights, freedom of expression and equality before law. But there is much more in the remit of Rights than there is in these areas. The definition of Rights embodies economic and social rights and the right to life and education; several international treaties and human rights instruments, enacted after 1966 have attempted to further expand this definition.

The recent advent of judicial activism in Pakistan in general, and adoption of a progressive interpretation of rights in this case, in particular, has largely been a response to domestic situations; however, in many ways, it is also, part of a burgeoning trend, internationally. Some observations from other countries, particularly Latin America and the UN system are instructive in this regard. The example of health as a human right can illustrate this point further.

Currently, there are 115 countries in the world, which recognize the constitutional right to health; Chile provided the first constitutional recognition in 1925. Over the last two decades many Latin American courts, from both civil and common law jurisdictions, have handed down landmark decisions, guaranteeing access to treatment affecting thousands of individuals. In South Africa, since the constitution came into force in 1994, health rights together with housing rights have become the most important socioeconomic rights cases considered by courts. The movement of judicialization of health rights has particularly been fueled by challenges that

states face to provide antiretroviral treatment (drugs used for the management of HIV and AIDS) in the face of the HIV and AIDS epidemic and the treatment of other diseases, which cause catastrophic expenditure. Cases such as the Minister of Health vs. Treatment Action Campaign 2002 (the TAC case) and Soobramoney Cases in South Africa illustrate this point.

Brazil is another example of progressive interpretation of rights. The Brazilian constitution of 1988 granted the right to health to all its citizens and mandated the creation of a National Healthcare System; in 1996, legislation granted universal access to antiretroviral treatment. Following that, patients across Brazil have been turning to courts to access prescribed drugs and since then lawsuits, all over the country have secured access to antiretroviral treatment for thousands of people. In addition to individual treatment, public interest litigation cases impacting on the right to health have also been those concerning protection of the environment, particularly in judgments from South Asian courts.

From a study of all these examples, one thing is evident: where right to health is specifically guaranteed under the constitution, courts have to wrestle with challenging issues; however on the other hand, the lack of express constitutional entrenchment of the right to health in domestic law is not necessarily a bar to consideration and enforcement, as is the case in Untied Kingdom and Canada.

Insights from another domain are also relevant. Last month (June 2009), the United Nation’s Human Rights Council adopted a landmark resolution acknowledging that preventable maternal mortality is a human rights issue and that national and international efforts to protect women worldwide should be scaled up; more than 70 UN member states co-sponsored the resolution, Pakistan being one of them, despite initial reluctance.

The background of the diffidence of some countries to

subscribe to a rights-based approach to social and economic issues is important to understand in a contemporary context. The Universal Declaration of Human Rights (UDHR), which represented a watershed in the history of human rights, adopted by the United Nations General Assembly in 1948, initially intended only one instrument. Later, it was bifurcated into two distinct and different covenants. A covenant on civil and political rights (International Covenant on Civil and Political Rights [ICCPR]) and another covenant on Economic, Cultural and Social Rights (International Covenant on Economic, Social and Cultural Rights [ICESCR]). The UN's committee on Economic, Social and Cultural Rights emphasized that it was upto states to give effect to the rights containted in the ICCPR.

Many states, which supported the seperation and which were ultimaltey sucsessful in obtaining a division were of the opinion that the two sets of Rights could not be equated. According to them, the connotation of 'social and econonomic prerogatives' of citizens could not be labled as rights since their realizaition was interlinked with a number of considerations—the indigenous body politic, availability of resources and idealogical and geo-political considerations. In their opinion, these could more appropraitely be labelled as aspirations or plans and not rights and could not be the basis of binding obligations, in the way that civil and political rights needed to be. Furhtermore, they argued that the means of enforcing the former were very different from the mechanims that were needed to ensure compliance with the latter. Other countries had other specific interpretations of human rights and argued strongly for the inclusion of all rights in the framework. The UN therefore, found a middle ground and the rights enshrined in the UDHR were split into two separate covenants, as previously stated; this allowed states to adopt some rights and derogate others.

Since then and in line with this trend there has been a

perception in many countries that socio-economic rights are not enforceable through courts. In Pakistan also, it was previously perceived that whilst the Principles of Policy of the Constitution form the basis of the right-based approach, they are not enforceable through courts. However, over the years, a series of court judgments have refuted this notion, arguing that since the word life has not been defined in the Constitution, it does not have to be restricted to mere existence in contradistinction to death but should include within its ambit, any hazard to life including ill health, both in individual as well as in communal settings. This has particularly been the case in the Syed Mansoor Ali Shah vs. Government of Punjab [2007 C. L. D.533] case and the case of Miss Shehla Zia and others vs. WAPDA [PLD 1994 Supreme Court 693]. In these cases, the court achieved equivalence between civil and political rights and their social and economic counterparts through the application of an expansive definition of right to life. These decisions set a precedent and since then there have been many other such progressive decisions.

The case of the petroleum levy is therefore, not the first time courts have attempted to legally enforce social rights in Pakistan. But in today's Pakistan, with an escalating trend of judicial activism, this decision has a different connotation. Does this signal the ushering in of an era of progressive jurisprudence, progressive interpretation of rights and public interest litigation with courts ordering compensation, and demanding concrete immediate steps? Only time will tell if that is the case. However, if that does happen, we must be mindful of the enormous administrative and financial burden on the government and the capacity of the judiciary, which in itself needs to be—and is on the way to being—reformed. It is hoped that judicialization of social rights can usher in a new chapter in the history of social sector reform in Pakistan where governments will be forced to weigh the impact of any decision on the grounds of equity and social justice.

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Viewpoint 49: The IDP-governance link

July 16, 2009: A viewpoint titled 'The IDP-governance link' by Sania Nishtar has been published in The News International on July 16, 2009. Full text is accessible at Viewpoints
Context: As the theater of war in the Northern Areas of the country has widened, a humanitarian crisis has been precipitated with a mass exodus of over 2 million internally displaced people. This comment is an attempt to underscore certain key shortcomings of governance in terms of their implications for management of the crisis

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The IDP-governance link

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There is hardly any problem in the country, which cannot be tracked back to challenges and weaknesses at the level of governance—the crisis of the internally displaced persons (IDPs) is certainly no exception. Both the technocratic and political aspects of governance, inclusive of policy directions at various levels, to the dynamics and pitfalls of the public management process, have deeply impacted the IDP crisis—right from the manner in which it evolved to the style

in which it was managed. Now that the IDPs are reported to be on their way back to being settled in their home communities, it is opportune to analyze impediments to the relief operations. A careful review will draw attention to most as being linked with limitations at the level of governance. These insights would be valuable not just in relation to disaster preparedness for the future, but would also be critical for rehabilitating the IDPs, and shifting the mode of assistance from humanitarian to development, which is the next imminent step.

First, a humanitarian crisis was clearly inevitable, ever since the theatre of war widened since the end of 2008; according to some experts, the writing was on the wall as early as 2007. The United Nations repeatedly issued warnings during this time span. Although the scale of the mass exodus—over two million people, equal to the entire population of Kuwait was displaced—could have been underestimated, the government's emergency apparatus must have envisioned that a significant humanitarian crisis was looming. Surely, the government must have made some plans, preempting the situation. And if it was unable to do that, it must analyze gaps in its own capacity and the factors, which prevented it from doing so. Although it is acknowledged that establishing relief camps in preparation would have signaled the imminent operation; notwithstanding, adequate measures could have been taken to provide transport to rescue people to safety. If that didn't happen optimally, someone is responsible for the lack of timely decision-making or seeing through that decisions were implemented, if indeed they had been taken. This is precisely what effective governance would call for. In a way, the IDP crisis was a test of the country's institutional capacity to respond with relief measures in a crisis situation. If it didn't perform well in an anticipated situation, the likelihood that it will respond in the event of an unforeseen crisis would be very slim. With the way things stand, this may not be the last crisis of its kind; we must

therefore, review evidence of our intransigency in the given context, with concern.

Secondly, it is important to recall the investments that were made towards creating a National Disaster Management Framework in the aftermath of the October 2005 earthquake; the framework comprised of policy, legal and institutional arrangements and implementing strategies and programs. The National Disaster Management Ordinance, 2006 was promulgated and the National Disaster Management Commission was created to oversee its implementation. The statute mandated the creation of the National Disaster Management Authority. Subsequently, the Provincial Disaster Management Authorities (PDMA) and the District Disaster Management Authorities (DDMA) were created. The National Disaster Management Framework used a holistic definition of 'disaster'—one inclusive of man-made catastrophies and therefore is relevant to the situation with reference to the IDPs, even though the framework doesn't refer to war and its consequences. As opposed to this however, the role of this framework in the IDP context was not clearly and fully evident and the creation of other parallel institutional entities raised many questions. For example, why was there the need to appoint a Provincial Relief Commissioner in NWFP under the National Calamities (Prevention and Relief) Act of 1958, despite the existence of the PDMA; could the latter not "ensure quick response related to matters" as was stated whilst justifying the creation of the former; why could the PDMA not deliver on this premise? Which factors led to the creation of the Federal Special Supports Group? Was the performance of the post-earthquake institutions not optimal? Or was it a leadership issue or a question of mandate or capacity? Were there any political hurdles or resource management issues? Or is this yet another example of the country's tendency to create institutional arrangements and hierarchies without appropriate resources to ensure that they can optimally function. Was there no evaluation of performance, no process examination, no efforts aimed at

drawing on lessons, which could have provided insights into the limitations that post-earthquake structures faced? If we continue to give performance evaluation—another important attribute of governance—the level of importance we currently do, this pattern of institutions-failing-when-needed, will be perpetuated. Nowhere is this more dangerous than in the area of emergency relief.

Thirdly, the IDP crisis should force us to rethink the approach to local governance. The Government has postponed the Local Government elections in a major policy decision on July 9; with this decision, the uncertainty, which existed about the fate of this initiative, has further exacerbated. However, this is not a chapter that can be wrapped up that easily, given that 'Promotion of local government institutions' is enshrined in the Principles of Policy of the Constitution and has been stated as a priority in political party manifestos of the ruling parties. Insights into the functioning the local government system are therefore needed to craft a way forward. Within this context, the relief operations have brought to the fore, many weaknesses. It is increasingly apparent that there is some level of centralization of decision-making in the 'decentralized system' and that, 'empowerment of local communities' as was originally envisaged, hasn't happened across the board. The District Coordinating Officers are not always seamlessly linked with the sub-district officers, who are in a better position to gauge local requirements and identify those in need. Union councils, which are the lowest tier of local government, were in a better position than provincial governments to identify IDPs that had chosen to settle outside of camps since they are supposed to have better links with the families and schools hosting the IDPs. However, this tier was neglected in relief operations. Moreover, mechanisms were not in place to enable host communities to determine their own needs and priorities and citizens were not empowered to demand greater accountability.

In the fourth place, weaknesses in accountability mechanisms posed additional challenges to implementing relief operations. In an environment where collusion in procurements and pilfering from the distribution chain were endemic, the impact of relief operations, which inherently hinged on stable supply chains, became a challenge. In such an environment, any promising initiative can be undermined. The federal government is currently giving priority to IDPs to get assistance from the Benazir Income Support Program—a cash transfer program, which uses a smart card with biometric features embedded—for providing assistance to economically and socially vulnerable women. The use of technology has brought value to this process; however, patronage in selection and tampering with criteria can undermine its usefulness.

In a nutshell therefore, in the absence of effective frameworks of governance not only can relief operation be jeopardized, the viability of long-term rehabilitation, reconstruction and development efforts can also be threatened. Comprehensive governance is not just essential for development and restructuring, it is also critical for targeting assistance beyond humanitarian support in order to catalyze economic activity and support independent economic generation. The ability and capacity to govern also underpin the success of constitutional, legal and political reforms, which are urgently needed to address the underlying causes of conflict, and without which significant success cannot be achieved. If communities cannot be rehabilitated and reunited in their homes where rule of law is enforced, human rights are respected and economic activity renewed, the displaced cannot become constituencies of peace.

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Addressing Non-Communicable Diseases and Injuries

July 08, 2009: Sania Nishtar attends as an invited expert, the United Nations Economic and Social Council Ministerial roundtable breakfast on 'Addressing Non-Communicable Diseases and Injuries,' held in Geneva, Switzerland, on July 7-8, 2009.

Viewpoint 48: Budget 2009-10 and the health sector

July 06, 2009: A viewpoint titled 'budget 2009-10 and the health sector' by Sania Nishtar has been published in The News International. Full text is accessible at Viewpoints
The budget has just been announced and the health sector has been marked by six policy highlights in the expansionary fiscal policy adopted by the government. This comment touches upon the context of each fiscal policy dimension.

Budget 2009-10 and the health

sector

Published in The News International on July 06, 2009:

The health sector was marked by six policy highlights in the expansionary fiscal policy of the government in the federal budget for 2009/10. These policy dimensions center on the following: scale up of the existing budget; pronouncement of a health insurance scheme; enhanced allocations for the two key national public health programs; a dedicated allocation for an action plan for emergency diseases; changes in tariffs for some essential medicines and increase in the excise tax with regard to tobacco. This comment briefly touches upon the context of each fiscal policy decision.

First, there are many caveats to the aggregate increase in allocation, which by itself is a positive step. The writer has raised the questions of quality of expenditure, the issue of the allocation-disbursement-expenditure disconnect and the tendency to scale back initial allocations towards the end of the year in view of fiscal deficit constraints, as potential impediments in this regard, in these columns on June 23rd 2009. In the budget of 2009/10, reliance on foreign assistance to finance much of the social sector outlay is an additional threat. However, even if the increased allocation is actually accrued to public financing for health, it would not represent a quantum leap. According to the Federal Bureau of Statistics' National Health Accounts, which have been released in May this year, public spending for health amounts to $14 per capita and with this increase, will only take this up to less than $16 per capita—still far short of the $34 per capita, considered as minimum by the World Health Organization to deliver essential services in a country. Increased allocations for health must therefore be seen in the context of these realities.

Secondly, the budget documentation refers to the launching of

a health insurance scheme. The government must carefully take into consideration, the context and imperatives of any envisaged scheme and their capacity in this regard. Majority of Pakistan's population who need to be secured for health are in the informal sector, which makes it impossible to levy payroll taxes or bind employers to make contributions; unless the state is willing to make per-capita contributions and inject significant additional resources to underwrite costs, comprehensive health insurance reforms will not be possible. Additionally, the institutional infrastructure to ensure provider buy-in and administer policies in far-flung areas is weak and most packages, which are currently being piloted, do not cover catastrophic expenditure on health, which is where the actual problem with health financing lies in Pakistan.

The question of health insurance therefore has to be viewed from the broad lens of the need to cover the population for essential services through public financing; the government should adopt a locally-suited approach and pursue a combination of measures to increase public financing in this regard. Increasing revenues in order to better equip basic health facilities so as to facilitate access to care, free at the point of service and augmenting pools of funds to finance waivers for those in the informal sector, who run the risk of spending catastrophically, should be part of this approach. Social health insurance can then be used in combination with these health financing arrangements to expand the base of existing health protection arrangements.

Thirdly, more than 50% of the allocations this year round have been earmarked for the two programs—the National Program for Family Planning and Primary Health Care (the Lady Health Worker program) and the Expanded Program for Immunization. Although these programs have had some level of success—e.g. increase in immunization coverage from 35% in 1991 to 47% in 2005 and better coverage of skilled birth attendants in LHW covered areas—progress has been unacceptably slow. Here it is

important to appreciate that the performance of these programs is deeply interlinked with broader issues. These include but are not limited to problems with social sector service delivery, issues of public finance management and procurements, the federal-provincial-district disconnect with respect to roles and responsibilities, and broader issues of governance in relation to staff deployment, oversight and accountability. The programs are additionally federally controlled in most instances; transfer of resources from the federal government to the districts, outside of provincial-district accounting channels has led to lack of ownership of these programs by the provinces. Confusion around decentralization further compounds these challenges. We therefore need to be very pragmatic with the level of achievement to be expected with the modest increase in resources, while overwhelming structural issues continue to prevail.

In the fourth place, allocations have been earmarked for an 'Emergency Plan for Diseases'—presumably for emergency preparedness in health. These allocations should be used for ensuring epidemiological security in the wake of threats from emerging and re-emerging infections and public health emergencies of national and international concern.

There is some evidence of recent increase in occurrence of emerging and re-emerging infections in parts of the country. The emergence of avian influenza in the poultry belt of NWFP and the chain of transmission beginning with poultry-to-human transmission followed by probable human-to-human transmission is particularly important in this regard. Virus transmission in this case was fortunately un-sustained; however, entrenchment of the virus means that more human cases will occur in the future. Each initial human case gives the virus an opportunity to improve human-to-human transmission and thus develop into a pandemic strain. Pakistan must take this evidence seriously and put mechanisms in place to ensure that

its public health system is capable of responding to disease outbreaks. As a signatory to World Health Organization's International Health Regulations 2005, Pakistan is bound to ensure compliance with its stipulations.

The world is still under the threat of the influenza pandemic and if it is hit against the current backdrop of the financial crisis, the impact could be truly catastrophic. Pakistan must be better prepared as part of its collective global responsibilities and ensure that allocated resources are used strategically to step up surveillance, stockpile medicines as needed, set up appropriate laboratory infrastructure and meet legal requirements to report notifiable diseases.

In the fifth place, concessional tariffs on some pharmaceutical raw materials are noted. However, the budget is silent with respect to many other measures, support for which could have been signaled and allocations earmarked in an attempt to curb the menace of spurious drugs and make drugs affordable, accessible and of good quality. The writer has outlined some key policy interventions in this connection in these columns on February 14, 2009, drawing attention to the need to resource and reengineer oversight and regulatory arrangements.

Finally, it is noted that tobacco excise duty is being increased. Tax policies as a tool to control tobacco consumption are based on the premise that the demand for tobacco is strongly determined by price. It needs to be explored if the strategy can be effective in Pakistan in terms of impacting consumption patterns, given its limitation to impact the illicit cigarette manufacturing sector; furthermore, increase in excise duty will augment the government's reliance on tobacco taxation as a source of revenue, which in turn could influence advertising and other restrictions.

In sum therefore, increase in aggregate allocations for health

in the federal budget is a welcome trend. However, the likely impact of this increase is limited given the huge gap that exists in public financing for health within the country and inherent issues at the health systems level. Concerted long term action is needed to restructure policies, laws, institutions, norms and regulatory and oversight mechanisms in the health and related sector in order to improve health status of the people of the country.

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