Viewpoint 61: Amending the Constitution

November 28, 2009: A viewpoint titled ‘Amending Constitution’ by Sania Nishtar has been published in The News International. Full text is accessible at Viewpoints
Context: With the 18th Amendment to the Constitution now imminent, this comment explores the motivations for the past 17 constitutional amendments and how they failed to focus on subjects such as social and economic rights. The Pakistani constitution does not recognize the right to health, which is one of the key impediments to universal coverage reform.

Amending the constitution

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The Special Committee on Constitutional Reform, which was constituted to frame recommendations with regard to the construct 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 any 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 objective of each—notwithstanding that constitutional amendments have also included other issues—has been centred on one of the three following areas. One, defining power relationships between the presidency and the prime minister's office. The Constitution in 1973 provided for separation of powers between the president and the prime minister but greatly strengthened the position of the latter. The 8th Amendment in 1985, which validated the presidential order of 1977 and other marital law orders, albeit whilst curtailing some of the powers of a uniformed president, changed the form of government from a parliamentary to a semi-presidential system. The 13th and 14th Amendments weakened institutional checks on the prime minister's powers. The 17thAmmendment, which revived the constitution in 2002 and validated all the constitutional amendments promulgated under LFO no 24 of 2002, restored 58-2(b), and therefore, presidential powers. The current debate on constitutional amendments centred on 58-2(b), is aimed precisely at removing these and empowering the prime minister.

The second issue, which constitutional amendments have been centred around relates to enhancing or curtailing powers of the judiciary and the political parties. Of the 13 amendments—out of a total of 17 that were tabled—the first seven, passed in May 74, September 74, February 75, November 75, September 76, December 76, and May 77, respectively, were focused on the prerogatives of political parties and the judiciary.

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 being 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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World Economic Forum; November 20-22

November 22, 2009: Dr. Sania Nishtar attends Summit of the Global Agenda Council, World Economic Forum as a member of the Global Agenda Council in Dubai, UAE, from November 20-22.

World Economic Forum; November 20-22

Meeting in Cuba; November 16-20, 2009

November 20, 2009: Dr. Sania Nishtar attends 13th Annual Meeting of the Global Forum for Health Research in Havana,

Cuba, from November 16-20, 2009. Chairs launch of the Alliance for Health Policy and Systems Research's report entitled: Systems Thinking. Panelist at the Pre-Launch Preview of the self authored book 'Choked Pipes;' and panelist in the closing plenary. Recorded comments accessible at http://www.youtube.com/watch?v=vvY1zupVQf8

Meeting in Cuba; November 16-20, 2009

Preview of 'Choked Pipes' in Havana, November 18, 2009

November 18, 2009: At the 13th Annual Meeting of the Global Forum for Health Research in Havana, Cuba, a preview of

‘Choked Pipes’ was held. Panelists included Adineke Grange, former minister of health of Nigeria, Keizo Takemi, deputy foreign minister of Japan, Rifat Atun, policy director at the Global Fund for AIDS, TB and Malaria, Stephen Matlin, executive director of the Global Forum for Health Research, Dr. Abdul Ghaffar, regional advisor-research, EMRO, and the author Sania Nishtar. Pictures of the event available at Choked Pipes

Preview of ‘Choked Pipes’ in Havana

Viewpoint 60: The way forward–post-NRO

November 07, 2009: A viewpoint titled ‘The way forward–post-NRO’ by Sania Nishtar has been published in The News

International. Full text is accessible at Viewpoints
Context: The government's announcement to the effect that it will not seek validation of the National Reconciliation Ordinance (NRO) is a welcome decision in the aftermath of the NRO. This comment underlines the need to draw lessons from a systemic controversy and to use insights to develop an accountability framework in which safeguards are built against chances of exploitation and maneuverability in the future.

The way forward—post NRO

Published in The News International on November 07, 2009:

The emotional turmoil, which the nation was going through over the fate of ethical standards in accountability norms and the threat of the widening gulf between justice and law appear to be easing with indications and pronouncements by the government that it will not seek validation of the National Reconciliation Ordinance (NRO) through the Parliament. With this decision, the NRO will stand repealed on the expiry of a period of four months from July 31, 2009—the date of the short order of the Supreme Court in which the November 3, 2007 Proclamation of Emergency and related PCO was declared void ab initio. The decision will be a positive step indeed and can help in fostering a positive environment for the establishment of an accountability framework within the country. It must be recognized however, that although necessary, this is not a sufficient step to overcome the myriad of challenges that stand in the way of developing a legal, policy, and institutional framework for mainstreaming accountability in governance within the country.

Before these challenges and the opportunities arising as a

result thereof are discussed, two things about the NRO must be appreciated. First, the decision of the parliament is, in a way, irrelevant with respect to the individuals who were eligible to derive benefit from the NRO, as benefits acquired, accrued, or incurred under the NRO during the first four months of is validity have already been derived. Repeal of a law does not, according to the Constitution's Article 264 "affect any right, privilege, obligation or liability acquired, accrued or incurred under the law." Secondly, it is also apparent that by not declaring "the NRO void ab initio for being ultra vires of the Constitution," as explained by a legal expert in these columns on October 26, and by referring the matter to the parliament, the Supreme Court—the two pending petitions notwithstanding—has refrained from ruling on the legal validity of the Ordinance. If the Supreme Court had held that the law was invalid the outcomes would have been different altogether. What's done is done. It is time to chart the way forward now.

In the aftermath of the NRO, therefore, it is critical that we look beyond the highly charged personalized discussions to draw lessons from a systemic controversy and use insights to develop an accountability framework—one in which safeguards are built against the chances of exploitation and manoeuvrability in the future. This is also an opportune time to do so. The accountability statute is currently under review by the Parliamentary Committee on Law and Justice. Although the government has not heeded to its earlier recommendations, which called for making the statute more robust, a case can still be made for modifying the Bill.

The new Bill entitled Holders of Public Offices Act 2009 (HOPA or Bill) would, if enacted, repeal the National Accountability Ordinance (NAO) and replace the National Accountability Bureau (NAB) with an Accountability Commission (AC).

It is critical that we take stock of the weaknesses of the envisaged legal and institutional framework to be established

under the HOPA. In this regard a careful analysis of the characteristics of the NRO beneficiaries, the pattern and specifics of cases that were withdrawn, and the nature of penalties bypassed can be instructive as the new law must bring these within its purview. A review of covenants in the Bill conversely indicates that this hasn't been the case so far.

A range of public functionaries and members of private financial institutions and not just holders of political office benefited from the NRO. But paradoxically the definition of "holder of public office" in the Bill has been restricted to holders of political office. For the latter category the definition of corruption has been made more restrictive by excluding "owning unaccounted for property disproportionate to ones means, misuse of authority, and the granting of concessions for one's own benefit." Whilst it is recognized that these areas can be easily exploited for political victimization, it is also precisely in these areas where corruption and misuse of public office becomes most pervasive.

The prerogatives of the new AC are also being curtailed in the same vein. The new AC will have limited investigative powers with a limitation period upon prosecution as opposed to NAB, which is more comprehensively empowered as an investigative and prosecutorial agency. Limitations imposed on the AC relate in particular to its powers to seek information during an investigation both in Pakistan and abroad, its powers to freeze and seize assets during investigations and its powers to arrest. Penalties have also been reduced—the disqualification period in relation to public office has been reduced from 21 years to 5 years and an avenue is being created for those that return misappropriated assets, as they will deem automatically acquitted under the new law. HOPA also absolves banks of their responsibility to report suspicious transactions. There are inherent difficulties with regard to

conviction for graft, given that corruption does not leave a paper trail. With limited scope, restricted prerogatives and milder penalties under the new framework, it will be even more difficult to do so in the future.

Rather than using the NRO insights to strengthen the accountability framework it appears that flexibilities are being introduced into the legal framework. The natural assumption is that this is being done to facilitate collusive behaviour. However there may also be other reasons. For one, the long term negative impact of the legal framework on accountability, as a governance norm may not be fully appreciated. If that is the case, the importance of analyses being offered on the subject must be heeded to in all earnest. The other reason could relate to the fear of political victimization. After all, most instruments and institutions of accountability, which could offer potential, have been sacrificed at the altar of personal vendettas and political exploitation in the past. The many criticisms targeted at NAB, for instance, were not a result of inherent structural weaknesses in the design of the institution that couldn't be remedied, but due to systematic manoeuvring for achieving political objectives. The answer to this problem is not in cutting back on prerogatives, but in structuring impartial oversight, independence in governance and openness in disclosure with reference to the AC. Unfortunately, the AC's current design doesn't draw on the strengths of these attributes.

The prerogatives of the chairman are illustrative in this regard. Under the new AC, an inquiry can only proceed with a go-ahead with the chairman and/or his designate—clearly a few individuals can fall prey to capture by Pakistan elite-dominated political dispensation. The opportunity to foster participatory governance has been missed in the new statue and needs to mainstream.

The Bill in its present form, will not only restrict the scope

and remit of accountability, it will also alter its current institutional configuration. NAB represented the model of a single multi-purpose 'independent' agency. A model which has proved to be successful in many Asian countries where the attributes of governance referred to earlier have cascaded in institutional designs. In the model of accountability governance being instituted through HOPA, accountability and responsibility for corruption will be assigned to various agencies—FIA, police, AC and session courts and criminal laws set out in the PPC will serve as the legal framework for cases of corruption, which fall outside of the jurisdiction of HOPA. Clearly, reform of a single agency is a lot more feasible than systemic changes in many crumbling institutions.

Accountability as a core attribute of governance is dependent critically on the governance of an accountability framework! We must not loose the opportunity to structure that in a robust design.

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Public stewardship of mixed health systems.

Lagomarsino G, de Ferranti D, Pablos-Mendez A, Nachuk S, Nishtar S, Wibulpolprasert S. Public stewardship of mixed health systems. Lancet 2009 Nov 7;374(9701): 1577-8