

January 2010

The Defence Housing Authority Islamabad Ordinance 2007

Current Status of the Ordinance

The Defence Housing Authority Islamabad Ordinance 2007 was promulgated on February 22, 2005 and re-promulgated on September 26, 2007 by the then-President, Gen. Pervez Musharraf, by way of Presidential Ordinance LI of 2007. Following the July 2009 Supreme Court decision it was one of the Ordinances that were required to be approved by the Parliament by November 28, 2009 or its provisions would lapse. As a result it was laid before the National Assembly on November 2, 2009. It was not discussed before the Assembly prior to the end of the session or approved before November 28, 2009. It was re-promulgated by the President of Pakistan Mr. Asif Ali Zardari on November 27, 2009. The National Assembly Standing Committee on Defence approved the Ordinance by a majority vote on December 17, 2009 while the PML-N members present in the Committee opposed the bill. The Leader of the Opposition in the National Assembly has also opposed the bill and stated that the PML-N does not favour the tabling of the draft Bill in the Parliament.

About the Legislative Brief

This Brief is a part of PILDAT's Legislative Development Programme. The objective of the Brief is to assist parliamentarians to understand the context, objective and issues relating to the legislation and to enable them to participate in a more informed debate and take well-considered position on the subject. The Brief is also intended to enhance awareness of the Citizens and Media in general so that they may also participate in the process as informed stakeholders and communicate their views to the public representatives.

Highlights of the Ordinance

The Ordinance comprises 31 sections and a statement of objects and reasons for the establishment of a Defence Housing Authority ("DHA") in Islamabad. The key features include the:

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- Establishment of the DHA and the dissolution of the Army Welfare Housing Scheme;
- Grant of corporate status to the DHA;
- Establishment of a DHA Governing Body and Executive;
- Quasi public status and ability to function as a municipal administration;
- Ability to levy taxes and charges;
- Staff of the DHA to be public servants;
- Non-application of the Industrial Relations Act; and
- Immunity for actions of officers and staff acting in good faith.

Executive Summary

This Ordinance was introduced by President Pervez Musharraf and represented a further expansion of the already existing model of Defence Housing Authorities in Karachi and Lahore. The Ordinance served to change the status of the previous body, the Army Welfare Housing Scheme ("AWHS"), from a private, regulated authority to a quasi-public, commercial entity. This expansion was a further step in the process of enlarging the interests of the Army-related institutions into non-military, commercial concerns, whilst granting discriminatory advantage to the Army-related institutions in terms of the market. The Ordinance dissolved the AWHS and transferred its assets and liabilities to the newly created DHA. The DHA was established as a corporate body, with legal identity and the ability to enter into contracts, hold land and sue/be sued.

The Ordinance established a governing body, headed by the Secretary, Ministry of Defence and Aviation, along with an Executive Board to carry out the administrative, executive and financing functions of the DHA. The Executive has broad-ranging powers to purchase and develop land, enter into contracts and financial transactions, raise funds, plan developments, employ staff and issue rules and regulations. It may also operate an Authority fund, into which all of its funds are placed.

However, in addition to these standard commercial functions, the DHA is granted a number of significant public and quasi-public powers, which grant it a significant advantage over privately operated concerns. The DHA operates as a municipal authority, effectively as a form of unelected and unaccountable local government. Its employees are civil servants and are given effective immunity in respect of legal proceedings arising from any actions taken in good faith. The provisions of the Industrial Relations Act do not apply to its employees. The DHA Executive also has a broad power to make and issue rules and regulations to assist it in carrying out its functions.

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Analysis of the Bill

The Legal Status of the DHA Islamabad

The Ordinance establishes the DHA Islamabad as a corporate body (section 3), based in either Islamabad or Rawalpindi.

Governing Body

Its Governing Body is established to provide general direction and administration, and consists of six members (section 4), who meet annually (section 6(1)). The Governing Body comprises a Chairman, (the Secretary of the Ministry of Defence), Vice-Chairman (the Adjutant General of the Army) and four members, being the Director General of Welfare and Rehabilitation, Administrator, Chairman of the Capital Development Authority and Secretary.

Executive Board- Nature and Powers

The Executive Board carries out the executive, administrative and financial powers of the DHA and is made up of the Adjutant General of the Army, Director General Welfare and Rehabilitation and Secretary, along with two co-opted residents (section 5(3)). The Executive Board has powers to perform a wide range of functions including purchasing and disposing of land, plant and machinery, planning projects, undertaking works, entering into contracts, issuing rules and regulations, levying charges and fees and raising funds (sections 8 and 9). The DHA may also cancel allotments for non-payment, impose penalties for misuse and remove buildings and structures for non-compliance with rules and regulations (sections 19, 20 and 21). The Administrator of the Executive Board acts as its chief executive (section 10).

DHA Staff

The Executive Board has the power to appoint staff, consultants and advisors, etc., (section 11) all of whom are deemed to be public servants (section 23), to whom the Industrial Relations Act has no application (section 22). Additionally, the DHA, members of the Boards and all employees receive what is termed an "indemnity," but is in fact legal immunity from suit (in respect of both criminal and civil matters) for acts undertaken in good faith (section 24).

Municipal Powers

The Federal Government may, by notification in the Gazette, permit the DHA to function as a municipal administration and exercise the powers of a municipality (section 17). This provision allows the Federal Government to enable the DHA to function as a non-elected local government. While the Parliament has the constitutional authority to set up Local Government for the Islamabad federal area, it is against the letter and spirit of Article 32, to set up non-elected Local Government. Article 32 reads as under:

"32. Promotion of Local Government Institutions: The State shall encourage local Government institutions composed of elected representatives of the areas concerned and in such institutions special representation will be given to peasants, workers and women."

As the statement of Objects and Reasons for establishment of DHA, Islamabad indicates, the DHA Islamabad also includes areas of Rawalpindi district. i.e., areas outside the Islamabad Federal Area and forming part of the Punjab Province. Local Government is a provincial subject which is not included in either the Federal or the Concurrent Legislative List. The Parliament cannot legislate Local Government for any part of the territory of a province. It may also be pertinent to mention here that Provinces are bound to provide for elected Local Government as per mandate contained in Article 140 A of the Constitution which reads as under:-

"140A. Local Government: Each Province shall, by law, establish a local government system and devolve political, administrative and financial responsibility and authority to the elected representatives of the local government."

Responses to the Ordinance

The Ordinance represents a replication of structures seen elsewhere in the country and, in legislative terms, represents nothing that is new. The DHA has now been operating in Islamabad since 2005 and is well-established. To remove the DHA would cause administrative and legal chaos.

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However, the Ordinance also represents an important issue of principle for the National Assembly in terms of the future. Whilst the Ordinance was originally promulgated under a Government that was led by the Chief of Army Staff, General Pervez Musharraf, the government now in place is a civil administration. One must, therefore, question why a military body would be given a preferential role in the market and a quasi-governmental role in terms of local governance.

Of particular concern are the provisions dealing with the staff of the DHA and its municipal powers.

The staff of the DHA (including advisors and consultants) are deemed public servants and their employment is exempted from the Industrial Relations Act. This places the DHA in the position of a quasi-public body, operated by the civil service, whilst exempting staff from the protections of unionisation, etc. There is no reason why the staff of a DHA should benefit from civil service status in contrast to other non-military associations. Civil service status renders the staff as a public cost with no benefit to the general public and places the DHA at a commercial advantage in the market.

The position of staff of the DHA is, however, also problematic. Removal of public service status would significantly disadvantage those existing employees, etc., already in place. It would, however, be possible to render all new appointments private as opposed to public in nature and to strengthen the position of existing workers by application of the Industrial Relations Act. Over time existing staff would be shed and ultimately full private employment could be achieved.

Equally, the "indemnity" set out in the provisions places the DHA, its governance and staff, in a discriminatorily privileged position. Private concerns would be open to legal suit in relation to both criminal and civil matters, whilst the DHA is immune save in cases of bad faith. This exempts the DHA from liability in most criminal, contract or tortious disputes, placing it at a significant advantage in the market and failing to allow for judicial accountability in relation to its actions.

The grant by federal government, of municipal status, also goes beyond normal commercial functions. The grant of municipal status allows the DHA to operate as an (unelected) form of a

local government, regulating services, raising taxes and carrying out other, public, functions. This again serves to skew the market, distorts accountability and blurs the distinction between the Army and the Civilian Government.

The re-promulgation of this Ordinance and its reconsideration by the National Assembly give the civilian administration the opportunity to reposition the status and powers of the DHA in Islamabad. The DHA can be re-formulated as a private association (like its predecessor) without the special and preferential powers previously granted to it due to its links to the military. In particular, the municipal powers and legal immunity granted to it may be removed. Such a decision would remove from the DHA powers to act in a public authority capacity, such as tax-raising, and would place it on a level with other private housing associations in terms of commercial transactions.

Recommendations

1. That the broad framework of the Ordinance be approved to ensure continuity and stability in housing provision and land transactions
2. That the provisions granting special status, public powers and immunity to DHA, its members and workers (sections 17, 22, 23, 24, 25, 26) be removed
3. That whilst the public service nature of existing workers be retained, the status of workers appointed in the future be private in nature and not subject to civil service status

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PILDAT is a premier research organization of Pakistan focusing on democracy, governance and public policy. It is an independent, indigenous, non-partisan and non-profit think-tank founded in 2001. Our mission is to strengthen democracy and democratic institutions through objective, research-based analysis and solutions.

PILDAT conducts research on issues including finance, economy, poverty-reduction, regional/international trade, foreign/regional relations, political-economy, inter-provincial relations/federalism, women/youth in politics, etc. PILDAT prepares legislative Briefs on key legislations in consideration before Parliament.

PILDAT has held over 200 capacity-building and issue-based briefings for Parliament/Provincial Assemblies. PILDAT provides forums for comparative political and parliamentary learning through regional/international conferences and organizing study visits to other Parliaments. These work to promote dialogue between Parliaments, especially with India and Afghanistan, for improving relations crucial to South Asian security and prosperity.

PILDAT carries out performance review of Parliament/Provincial Assemblies. PILDAT facilitates formation of policy groups for research and dialogue on issues including Civil-Military Relations, Electoral Reforms, Relations between Muslims and Western World, FATA Status, Centre-Province Relations, etc.

PILDAT also launched the first-ever Youth Parliament of Pakistan to inculcate culture and values of democracy in youth and to prepare them for future leadership roles.

Acknowledgments & Disclaimer

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