

August 26, 2009

## The Holders of Public Offices (Accountability) Bill 2009

### Current Status of the Bill

*The Holders of Public Offices (Accountability) Bill 2009 was drafted following the announcement by the Prime Minister of Pakistan to wind up the National Accountability Bureau ("NAB"). The Bill was introduced in the National Assembly of Pakistan by Federal Minister for Parliamentary Affairs Senator Zaheeruddin Babar Awan on April 15, 2009 and is currently being considered at the committee stage. So far 10 meetings of the committee have taken place.*

### About 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. A broader objective is to make the legislative process open and participatory. This legislative brief is based on the text of the Bill available on the National Assembly of Pakistan website as on August 10, 2009. The views expressed in this Brief are not necessarily shared by the Friedrich Ebert Stiftung-FES.*

### Highlights of the Bill

The main provisions of The Holders of Public Offices (Accountability) Bill 2009 proposed in the published draft are as below:

- Abolition of the NAB and the creation of an Accountability Commission;
- Limitation of the accountability regime to holders of political office;
- Redefinition of corruption to exclude owning unaccounted for property disproportionate to one's means, misuse of authority and the granting of concessions for one's own benefit.
- Introduction of a limitation period 3 years for prosecutions;
- Limitation on the powers of the Accountability Commission to seek information during an investigation both within Pakistan and abroad;
- Removal of powers to freeze and seize assets during investigations;
- Removal of the duty upon banks to report suspicious transactions;
- Removal of the plea bargaining and pardons process;
- Removal of powers of arrest and the introduction of the availability of bail;
- Transfer of jurisdiction to try offences from a specialist Accountability Court to the Sessions Courts; and
- Shortening of the disqualification period, barring the holding of a limited range of public office for those convicted, from 21 to 5 years.

### Executive Summary

The Bill represents an attempt by the current government to redefine anti corruption measures in the light of criticisms of the NAB, created by the National Accountability Bureau Ordinance 1999 ("NAO"). The NAO, introduced by General Musharraf, came to be regarded as a tool through which political opponents were targeted. Despite these criticisms, the NAB has achieved some useful results, recovering over Rs. 225 billion in a large number of investigations and prosecutions. Each of the major parties included reference to public accountability in their 2008 election manifestos, with the Pakistan Peoples Party (PPP), the Pakistan Muslim League-Nawaz (PML-N), the Pakistan Muslim League (PML) and the Awami National Party (ANP) each calling for an independent, non-partisan Commission for public accountability. The NAO adopted a model of a specialist investigation and prosecution agency, the NAB, and specialist court, the National Accountability Court, both with exclusive powers. The NAO covers a wide range of politicians, office holders, government servants, local government servants, the management of banks and financial institutions and members of the armed forces holding office in public or some private institutions. There is a wide definition of corruption, including an inference of corrupt practice where assets are disproportionate to income and cannot be explained. The NAO sets out no limitation period for prosecutions and grants wide investigatory powers to the NAB, both within Pakistan and in terms of seeking assistance from foreign governments. The NAB has powers of arrest and offences are non-bailable. The NAB, significantly, is granted wide-ranging powers to freeze assets during investigations. The penalties set out in the NAO include imprisonment, fines, forfeiture of assets and disqualification from holding public office and from taking loans. The Bill adopts a

## The Holders of Public Offices (Accountability) Bill 2009

### Executive Summary

more restricted model, covering solely holders of political office, and adopting a narrower definition of corruption. The model of a specialist investigatory commission is retained but with reduced investigatory powers and a limitation period upon prosecutions. There is no power of arrest or to freeze assets. The offences are bailable. The model of a specialist court is discarded, in favour of trial before Sessions Courts. Penalties continue to include imprisonment, fine and forfeiture, but the disqualification period in relation to public office is considerably reduced, from 21 to 5 years. Two important procedural differences arise from the Bill. The first is the automatic acquittal of those returning misappropriated assets prior to trial. The second is the removal of the plea bargaining/pardon procedure. Jurisdiction in relation to corruption offences outside the Bill will return to the position prior to the NAO. Prosecutions will be dependent upon the general criminal law set out in the Pakistan Penal Code and other relevant legislation. Investigatory powers will rest with the Federal Investigative Agency (FIA) and various provincial bodies. In the past these bodies have been criticised for their poor performance in this area. According to the NAO, the NAB was headed by a chairman appointed by the President, with no fixed term of office and at the discretion of the Chief Executive of Pakistan. The Bill provides for the appointment of the Chairman Accountability Commission by the Prime Minister, in consultation with the leader of the opposition and confirmed by the Parliamentary Committee constituted under the Bill within 90 days. The chairman must be a judge of the Supreme Court or equivalent, is appointed for a non-renewable three year period and may be removed only on grounds of misconduct or where s/he is incapable of performing her/his duties in accordance with Article 209 of the Constitution.

### Analysis of the Bill

#### The Limitation of the Bill's Scope (Section 2(g)):

The NAO set out a wide range of individuals covered by the anti-corruption provisions encompassing:

1. The President or Provincial Governor;
2. Prime Minister and his/her special assistant and advisors, Members, Speakers and Chairmen of the National Assembly and Senate, State and Federal Ministers and Law officers;
3. The equivalent Provincial posts;
4. Current and former administrators and bureaucrats, local council members, management of banks and financial institutions, members of the armed forces holding office in public corporations, banks or financial institutions controlled or administered by Federal or Provincial Government.
5. Chairmen or Vice Chairmen of Zila councils, municipal committees or municipal and metropolitan corporations.

The Bill excludes 4 and 5 above, effectively limiting the scope to those holding political office and excluding totally the private financial sector.

#### The Limitation of the definition of corruption (section 11):

The NAO adopted a wide definition of corruption, made up of:

1. Accepting or offering any gratification in return for undertaking an official duty, in the exercise of official duties

- or as a favour;
2. Obtaining or offering a thing at an undervalue;
3. Dishonestly or fraudulently misappropriating property;
4. Seeking to obtain pecuniary advantage dishonestly or illegally;
5. Owning or possessing property or resources disproportionate to one's means which cannot be reasonably accounted for;
6. Misusing authority to seek a benefit or favour; and
7. Issuing any concession or benefit under any directive or order for the benefit of him/herself or his/her dependents.

The Bill adopts a more restrictive definition, excluding 5, 6 and 7, thus excluding the possibility of investigating any unexplained accumulation of wealth or property whilst in office and removing the obligation to explain any such assets.

#### The Introduction of a Limitation Period (section 24):

The NAO does not contain any limitation on the period after which a prosecution can be initiated in respect of corruption. The Bill sets out a short limitation period of 3 years after a person has ceased to hold a relevant office.

#### Changes to Investigatory Powers (sections 9, 15(4), 18 and 25):

The NAO contained extensive investigatory powers to:

## The Holders of Public Offices (Accountability) Bill 2009

1. Arrest suspects;
2. Call for information;
3. Require the delivery of documentation;
4. Question individuals;
5. Require information from banks and financial institutions;
6. Freeze the assets of those suspected of corruption pending investigation;
7. Request assistance from foreign governments in relation to investigations, including the issue and execution of search warrants, the freezing of assets abroad and the return of evidence and individuals to Pakistan.

The Bill replaces these investigatory powers with a general power to require the production of documents (excluding banking documentation) and to seek the assistance of any agency, police officer or official. The ability to question individuals, require the production of banking documentation and to freeze assets are removed. Additionally, the power to seek the assistance of foreign governments is limited to having evidence taken and documents produced and sent to Pakistan. Under the Bill there is no power of arrest and offences are bailable.

### **The Removal of the Duty to Report Suspicious Transactions:**

The NAO imposed a duty upon banks to report suspicious financial transactions. This duty is removed by the Bill.

### **The Return of Assets and Plea Bargaining (section 10):**

The NAO provided two mechanisms in relation to return of assets and plea bargaining. Under the NAO, the NAB has a discretion, with the leave of the Accountability Court, not to prosecute where the accused returns all misappropriated assets. Secondly the NAO sets out a plea bargaining process allowing for full or partial pardons (the latter with agreed reduced sentencing) in return for full disclosure and evidence against others.

The Bill provides instead for automatic acquittal in cases in which assets are returned (albeit with a ban on holding public office) and removes the plea bargaining process in its entirety.

### **The Removal of a Specialist Court (section 16):**

The model of a specialist court is discarded and jurisdiction to try corruption allegations under the Bill is transferred to the Sessions Courts.

### **Imprisonment/Disqualification Periods (sections 12 and 14):**

The NAO provides that those convicted of corruption offences face a maximum term of 14 years' imprisonment and are barred from holding public office for 21 years. The Bill sets out reduced

penalties, with a maximum of 7 years' imprisonment. A more limited bar, on being a member of the National or Provincial Assembly, applies for 5 years following release.

### **Other International Models**

Drivers for corruption are regarded as low salaries, opportunities for corruption and low risk of detection/punishment. All of these are present in Pakistan, which is currently ranked 134/180 in the Transparency International Corruption Perception Index. Several models for anti corruption strategies have been adopted internationally, with no single model seen as being paramount. Within Asia different models have been adopted, encompassing anti corruption legislation with:

1. No independent agency;
2. Several agencies;
3. A multi-purpose single independent agency;

The first model prohibits corruption through legislation but with no specific agency with responsibility for detection, investigation and prosecution. This model sees corruption as part of the general criminal law, to be investigated and prosecuted in the same manner as any other crime. This is regarded as the least successful model, with there be no overall responsibility for tackling corruption. It has operated in, for instance, Mongolia.

The multiple agency approach has been adopted elsewhere, including India. Corruption is prohibited by the general criminal law and also by the Prevention of Corruption Act 1988. The Act covers a broad range of public servants and a wide definition of corruption, including gratification, exerting influence, obtaining property at an undervalue, misconduct and owning resources disproportionate to one's means. The Act does not establish a specialist investigation agency but does appoint special judges with exclusive jurisdiction in corruption cases. A limited plea bargaining arrangement is set out. Prosecutions are, however, dependent upon the prior approval of authority to remove the accused from office, such as federal or provincial government. The need for specialism has led to the establishment of anti corruption bureaus, within the police force, in various states.

The single multi purpose agency is regarded as the most successful approach and has been followed in Hong Kong and Singapore. This approach sees a single specialist agency with responsibility for detection, investigation, policy making and development.

The NAO follows a model combining elements of the second

## The Holders of Public Offices (Accountability) Bill 2009

and third models, incorporating specialised investigation, prosecution and judicial functions. The Bill essentially represents a return to the first model, with responsibility for corruption being split between the police, FIA, provincial agencies, Accountability Commission and Sessions Courts.

### Pakistan's International Obligations: the UN Convention Against Corruption (UNCAC):

Pakistan has ratified the UN Convention Against Corruption, which requires states to have in place processes to deal with corruption. The Bill appears to fail to meet a number of Pakistan's Convention obligations, in particular in relation to:

- i The restricted definition of public official: article 2 of the Convention requires a broad definition coverage of the legislature, executive, administrative and judicial office and those carrying out public functions
- ii The restrictive definition of corruption: chapter III of the Convention requires coverage of bribery, embezzlement, misappropriation, abuse of influence or function and illicit enrichment without reasonable explanation, amongst other activities
- iii The exclusion of the private sector
- iv The failure to provide a long limitation period
- v The failure to provide for a specialised agency and in particular a single body capable of developing, implementing and monitoring corruption policies
- vi The removal of asset freezing powers
- vii The failure to provide for the removal of obstacles in banking secrecy laws
- viii The absence of protections for whistleblowers and witnesses
- ix The failure to provide for disqualification from public office in a wide sense
- x The failure to sufficiently provide for international cooperation

The provisions of the NAO previously dealt adequately with a number of these concerns.

### Recommendations to the Legislators

- a) The Bill requires serious review and redrafting to ensure compliance with Pakistan's international obligations and best practice especially relating to the United Nations Convention Against Corruption - UNCAC
- b) A number of the elements of the NAO should be reinstated into the Bill to provide for:
  - Robust anti corruption provision
  - This must include broad definitions of corruption and those covered by the provisions.
  - A specialist court should be retained
  - The limitation period for prosecution of offences should be lengthened.
  - The ability to freeze assets should be included and sufficient investigatory powers should be given to the Commission
  - The banking secrecy laws should be modified to allow for proper investigation.
  - The issue of plea bargaining should be re-examined and plea bargaining provisions be included in the Bill
  - Penalties for offences should include a wider ban on holding public office
- c) Specialisation in investigation, prosecution and adjudication bodies should be ensured
- d) Measures should be incorporated to ensure independence of agencies and to prevent political interference. The appointment of the chairman by consensus for a fixed term and the limited circumstances upon which s/he can be removed should be retained. Information in relation to investigations and prosecutions should continue to be made publicly available.