

# Restructuring and reforming NAB

Dr. Sania Nishtar

The government is on its way to revamping the country's accountability infrastructure and statutes. It is evident from a review of news postings in early January, that the National Accountability Bureau (NAB) will be replaced with an Independent Accountability Commission (IAC) with the antecedent repealing of the current National Accountability Ordinance, 1999 (NAO) and promulgation of the Holder of Public Offices Act, 2009 (HPOA). It is important to ensure that this is not just a switch of acronyms but a substantive institutional restructuring and realignment of statutes as a step towards fostering accountability and transparency within the country—a core attribute of good governance.

The news items in early January surprisingly generated very low level of interest from stakeholders in the political and governance arenas and

the civil society, all of whom appear to hold institutional strengthening esteemed in rhetoric. It must be recognized however, that unless we actively and substantively engage in shaping institutional norms and structures, rhetorical commitments cannot come to fruition. It is therefore with a view to initiating a dialogue on the subject that some thoughts are being articulated herewith in relation to the envisaged institutional restructuring.

*First of all*, it is important to clearly conceptualize the mandate of the proposed commission and recognize that an *accountability body*, as is being envisaged herewith has a different though related mandate than an *anti-corruption structure*, which is what NAB represented. The connotation of an accountability commission is too broad and all-embracing. Accountability as a concept in ethics and as a key aspect of governance can relate to several attributes. Even if it is limited to the political dimension of accountability as the proposed commission envisages encompassing, it is not clear whether it is in the financial, moral, procedural or performance realms. Not all criminal acts are defined in the penal code; some procedural misconducts and moral trade-off by holders of public offices and lack of performance cause more damage to the state and its interests than graft punishable under the penal code. The government therefore needs to define the scope of accountability with respect to the envisaged IAC if the remit is accountability and not just anti-corruption-related work.

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The news items in early January surprisingly generated very low level of interest from stakeholders in the political and governance arenas and the civil society, all of whom appear to hold institutional strengthening esteemed in their rhetoric. It must be recognized, however, that unless we actively and substantively engage in shaping institutional norms and structures, rhetorical commitments cannot come to fruition. It is therefore with a view to initiating a dialogue on the subject that some thoughts are being articulated herewith in relation to the envisaged institutional restructuring.

First of all, it is important to clearly conceptualise the mandate of the proposed commission and recognise that an *accountability body*, as is being envisaged, has a different though related mandate than an *anti-corruption structure*, which is what the NAB represented. The connotation of an accountability commission is too broad and is all-embracing. Accountability as a concept in ethics and as a key aspect of governance can relate to several attributes. Even if it is limited to the political dimension of accountability as the proposed commission envisages encompassing, it is not clear whether it is in the financial, moral, procedural or performance realms. Not all criminal acts are defined in the penal code; some procedural misconducts and moral trade-off by holders of public offices and lack of performance cause more damage to the state and its interests than graft punishable under the penal code. The government therefore needs to define the scope of accountability with respect to the envisaged IAC if the remit is accountability and not just anti-corruption-related work.

The concept of an accountability commission is closely linked to truth and reconciliation commissions, the most pioneering example of which is South Africa's Truth and Reconciliation Commission established by President Nelson Mandela after apartheid. This example was followed by many other countries around the world, including, most recently, Bangladesh in the creation of its Truth and Accountability Commission in 2007. There are also many other variants of accountability commissions. One model centres on the implementation of conflict-of-interest laws and analysis of public disclosures given the importance of disclosure in fostering transparency. Many states in the USA follow this model.

Accountability commissions have also focused on democracy and corporate accountability, as in the case of a privately funded Canadian commission and on legislative modernisation as a means of structuring accountability in a country, as has recently been the case in Bulgaria. Within Pakistan, the much-referred-to Charter of Democracy also calls for the creation of a Truth and Reconciliation Commission in order to counter politically motivated accountability. There are therefore several niches for an accountability commission. If the intent of the Government of Pakistan is to develop a commission centred on accountability as a core theme, it should explore the best fit for Pakistan's setting by taking into account pressing priorities and indigenous needs.

However, on the other hand an anti-corruption commission, or any other anti-corruption institutional structure such as the NAB, has a more specific function, which relates to investigative responsibilities and/or prosecutorial functions. Most of the well known anti-corruption commissions around the world, such as Hong Kong's Independent Commission Against Corruption (ICAC), New South Wales' Independent Commission Against Corruption, the Malaysian Anti-Corruption Commission and the Cor-

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rupt Practices Investigation Bureau (CPIB) of Singapore perform investigative functions, whereas some, such as the Malaysian commission, also perform prosecutorial functions, as did the NAB until recently.

Any attempt to restructure the NAB, therefore, has to come up with clear directions for the investigative and prosecutorial scopes of work of the new body. From what is publicly known about the proposed restructuring it appears that there has been a call for a separation of the two functions. Corruption-related investigative work involving holders of public offices as defined in the government statement is envisaged to be entrusted to the new body and the same relevant to public servants and the private sector is meant to be brought under the jurisdiction of the FIA, whereas prosecutorial functions are being handed over to the regular legal and judicial systems. Here, it is acknowledged that, in principle, it is a good idea to separate investigative work from prosecutorial functions as it mitigates the possibility of bias and acts as barrier against political exploitation. However,

there are two problems in this regard in Pakistan's context and the direction being envisaged specifically. One relates to concerns regarding two different groups of citizens being dealt with under different institutional arrangements and possibly varied normative arrangements—holders of public offices vs. public servants and the private sector—and it needs to be ascertained if this approach is discriminatory in any way. The other reservation relates to the capacity and efficiency of the FIA as an independent and impartial agency given the historical perspective. Challenges emanating from lack of reform within the judicial system is an across-the-board issue as well which may dampen the impact of any new arrangement.

The last and most critical attribute relates to independence. A Commission by spirit is a constitutional body whose independence must be guaranteed in the same way as the independence of the judiciary is guaranteed under a constitution. In view of this, the government carefully needs to review the extent of value that a commission with reporting relationship with the ministry of law can bring to fostering accountability of parliamentarians, who by virtue of their mandate can exercise a significant influence over the ministry. It might be of relevance to note here that Article 36 of the United Nation's Convention Against Corruption (UNCAC), to which Pakistan is a state party, requires independence and autonomy to be ensured for any anti-corruption and accountability authority and any attempt to subvert that, in advertent as it may be, is tantamount to a deviation from that norm.

There are many ways of institutionalizing independence of an agency as sensitive and politically explosive as the one under discussion. Successful examples around the world, some of which have already been alluded to, have ensured independence by structuring systems of oversight, which provide policy guidance and oversee operational and administrative matters. Many countries have solicited the participation of individuals of unquestionable integrity from different walks of life in participatory governance arrangements, ensuring that the selection process is transparent and consensus-driven. However, most of the success stories represent examples from developed countries with systems of governance far superior to Pakistan's. Therefore, the key challenge for Pakistan, as it sets out to restructure and reform the National Accountability Bureau will not just be to ensure "independence" in governance arrangements but also to minimise opportunities of capture of independent governance by vested interest groups. It is only then that we can make a solid contribution to strengthening an anti-corruption structure and take a positive step towards promoting political responsibility, responsible governance and public accountability. The need to do so cannot be overemphasised at a time when making governance effective should be one of the utmost priorities in the wake of unprecedented array of challenges the country faces.

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