

The way forward—post NRO

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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 With this decision, the NRO will stand repealed on the expiry of a period of four months from July 31, 2009—the date of the short order of the Supreme Court in which the November 3, 2007 Proclamation of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 its 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 statute 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 lose the opportunity to structure that in a robust design.

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