



RESEARCH PAPER

Legal and Institutional Framework for Prevention of Corruption in Pakistan in Compliance with the United Nations Convention against Corruption (UNCAC)

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ABSTRACT

Corruption is a universal phenomenon attracting a huge amount of scholarship and media coverage. Corruption has remained a root cause of the falling economy and governance in Pakistan. Pakistan has marked as lack of political will and remaining inactive in framing institutional and legal framework to curb corruption according to the international standards. This paper explores the compatibility of the legal and institutional framework of Pakistan with the UNCAC (United Nations Convention against Corruption) to criminalize the corruption and prevent the same through law enforcement measures. The doctrinal aspects of the study explores the steps taken by Pakistan especially the promulgation of the enforcement of National Accountability Ordinance (NAO), 1999 and role of the National Accountability Bureau (NAB) in compliance with the UNCAC. Furthermore, this paper describes the role of the political parties to constitute a comprehensive framework to criminalize and root out the problem of corruption

Introduction

Corruption is a complex phenomenon, not possible to be defined accurately, normally observed in the form of dishonesty or criminal offense by a person or organization having authority or position to acquire illicit benefit or abuse of power for private gains (Rose-Ackerman, 2008). These activities may include bribery, embezzlement, and many other forms legally allowed in many countries. It may include illegal payment to a public agent to obtain a benefit or sale by government officials of government property for personal gain etc. (Shleifer & Vishny, 1993). A huge amount of work has been done by sociologists, political scientists, economists, bureaucrats and journalists to investigate the causes, types, consequences and

solutions of corruption. The activities of corruption are monitored by many international organizations including World Bank (WB), the Organization for Economic Cooperation and Development (OECD) and Transparency International (TI).

Corruption has remained a perpetual problem of Pakistan since its birth in 1947. Pakistan has inherited a strong bureaucracy and army from the British Raj, as Pakistan has been created after the division of Greater Hindustan ruled by the British Raj. Both the bureaucracy and army have remained involved in corruption throughout the history of the British Raj. The gravity of the situation can be noted from the extract of the very first speech of the founding father of Pakistan, Quaid-e-Azam Muhammad Ali Jinnah, during his address to the first constituent assembly of Pakistan:

“The second thing that occurs to me is this: One of the biggest curses from which India is suffering - I do not say that other countries are free from it, but I think our condition is much worse - is bribery and corruption. That really is a poison. We must put that down with an iron hand and I hope that you will take adequate measures as soon as it is possible for this Assembly to do so (Quaid-e-Azam, 1947).”

The bureaucratic set up in Pakistan has not been largely reformed and no major changes have been made in the set up established by the British. The efforts of the anti-corruption institutions have been weakened by the changing regimes between military and civilian institutions. So, there seems no significant improvement in eradicating corruption in Pakistan either in the tenures of civilian governments or military governments (Shah, 2010). Corruption is a widespread phenomenon in Pakistan, especially in the in the government, public office holders and other departments having nuisance power and dealings with public (US Department of State, 2011).

The lack of checks on the enormous powers of the bureaucracy, public office holders and other departments having nuisance power has led the speculations that "corruption has seeped into the higher echelons of bureaucracy" where "corruption cases are [mostly] reported against irregular and ex-cadre appointments" (Siddiqi, 2011). The image of bureaucracy has started being portrayed as an instrument of oppression by the late 1960s (Shafqat, 1999). A series of reports of the international organizations, including the World Bank, the bureaucracy of Pakistan has constantly been being rife with corruption. These reports have been portraying a disgraceful image of the bureaucracy of Pakistan being known as inefficient and bloated in size, having no mechanism of accountability (World Bank, 1983).

Pakistan is ranked 117th out of 180 countries in the 2015 Corruption Perception Index of the Transparency International (Transparency International, 2017). This ranking is becoming alarming as the Transparency International in its Corruption Perceptions Index 2017, has indicated that Pakistan has become more corrupt country than it has been in 2016 (Transparency International, 2017). Hence,

the government of Pakistan has the responsibility to reform accountability and anti-corruption policies at higher levels to confront the ever-increasing problem of corruption (Zaidi, 2010).

“Where an accused person is convicted for the offence of corruption or corrupt practices as specified in the Schedule to this Ordinance, he shall stand disqualified for 21 years for seeking, or from being elected chosen appointed or nominated as a member or representative of any public office, or any statutory or local authority of the Government of Pakistan: Provided that any accused person who has availed the benefit of sections 26 and 27 of this Ordinance shall also be deemed to have been convicted for an offence under this Ordinance, and shall stand disqualified for 21 years as above” (NAO, 1999, Sec. 15).

This paper aims to investigate and analyse the compatibility of the legal structure of Pakistan relating efforts to curb corruption, with the United Nations Convention against Corruption (UNCAC) that provides a comprehensive legal framework to eradicate corruption. The efforts of Pakistan in framing a comprehensive legal framework to curb corruption in the context of the obligation of state parties to take steps for the eradication of corruption with special reference to ensure the prevention, Criminalisation, and law enforcement measures. The feasibility and effectiveness of the policies of the government of Pakistan, and effects of the failure of the institutional structure on the economy are explored, as well as the necessity of a comprehensive institutional and legal framework, in line with the UNCAC, with adequate measures for prevention, criminalisation, and law enforcement to Curb Corruption in Pakistan.

United Nations Convention against Corruption (UNCAC)

The United Nations Convention against Corruption (UNCAC) is considered as a legally binding multilateral treaty on the matter of corruption (UNCAC, 2003). In 2003, UN General Assembly has adopted the treaty after the negotiations among member states of the United Nations and has entered into force in 2005. Pakistan has become signatory to the United Nations Convention against Corruption in 2003, that has later been ratified in 2007 (except provisions of paragraph 2 of article 66). Pakistan has also refrained from taking the Convention as the legal basis in terms of cooperation on extradition with other States parties under paragraph 6 of article 44.

The UNCAC is comprised of eight chapters and 71 articles. Many of the provisions are mandatory to be adopted by the state parties, while some provisions carry obligations to be considered by the state parties. There are other provisions that prevent conflicts with national legislation and allow significant room for different interpretations of the Convention’s requirements in any given country.

The main goals of the UNCAC are highlighted in the first chapter as:

“to promote and strengthen measures to prevent and combat corruption more efficiently and effectively; to promote, facilitate and support international cooperation and

technical assistance in the prevention of and fight against corruption, including in asset recovery; to promote integrity, accountability and proper management of public affairs and public property”(UNCAC, Art. 1-4).

The second chapter of UNCAC suggests preventive measures against corruption, to be adopted by the state parties. The states are under obligation to frame preventive policies in the lights of the UNCAC. The states need to adopt “transparent and competitive public procurement systems ensuring the transparency and accountability in the management of public finances”. The framing of “merit-based civil service with comprehensive frameworks for the prevention of the conflicts of interest” is required in this regard. The states are also required to ensure “enhanced transparency in the public administration, and provide effective access to information, auditing and accounting standards for the private sector, independence of the judiciary and prosecutors, active involvement of civil society, non-governmental organizations and community-based organizations in efforts to prevent and combat corruption, as well as measures to prevent money-laundering”. Every state is directed to:

“Have an independent anti-corruption body or bodies; Enhance transparency, efficiency and the use of objective criteria in the recruitment, hiring, retention, promotion and retirement of public officials; Enhance transparency in the funding of electoral campaigns and political parties; Apply codes of conduct (and of ethics) to the performance of public functions; Establish measures and systems aimed at facilitating the reporting of corruption by public officials to appropriate authorities; Promote the establishment of asset declaration systems for public officials regarding their private interests; Establish appropriate public procurement as well as public finance management systems based on transparency, competition, and objective criteria” (UNCAC, Art. 5-9).

Moreover, chapter.2 of the UNCAC directs states to encourage the participation of civil society and NGOs in the cause of fighting against corruption: focusses on the transparency in the public administration by asking states to ensure:

“Promote active participation of civil society and non-governmental organizations in the prevention of and fight against corruption, including by measures such as enhancing the transparency of and promoting the contribution of the public to decision-making processes, ensuring effective public access to information and promoting and protecting the freedom to seek, receive and publish information concerning corruption; Establish regulatory and supervisory regimes to deter and detect money-laundering” (UNCAC, Art. 13-15).

Criminalization and law enforcement measures are an important part of the UNCAC. Chapter.3 of the UNCAC suggests criminalization and law enforcement measures to be taken by state parties to penalize and punish the culprits. The state parties are directed to establish the following offences relating corruption as crimes:

“Bribery of national public officials; Bribery of foreign public officials and officials of international organizations; Embezzlement, misappropriation or other diversions of property

by a public official; Trading in influence; Abuse of functions; Illicit enrichment; Bribery in the private sector; Embezzlement of property in the private sector; Money-laundering; Concealment; Obstruction of justice” (UNCAC, Art. 15-25).

Furthermore, chapter. 3 of the UNCAC requires state parties to ensure the protection of witnesses of corruption, experts and victims (UNCAC, Art. 32). The states are also directed to take measures to protect the reporting persons (whistleblowers) from retaliation (UNCAC, Art. 35).

Material and Methods

The present study employs a mixed method qualitative research approach. The doctrinal aspects of the study are adopted to interpret the United Nations Convention against Corruption (UNCAC) and legal structure of Pakistan relating corruption to make a comparative analysis of both the legal structures by analysing the authoritative texts consisting of both primary and secondary sources. The readings and analysis of the primary data is made through legal documents and case laws, and legal glossaries, textbooks, journals, articles, case digests and legal encyclopaedias are consulted for secondary data. The factual material and legal issues, relating prevention of corruption in Pakistan to oblige the rules and regulations provided by the UNCAC, are identified and analysed with the help of secondary data. The authoritative text is used in the form of text to assume the character of legal driven from law itself.

Results and Discussion

Legal Structure of Pakistan

The legal system of Pakistan has been derived from English common law, that is based on the Constitution of Pakistan 1973 (with amendments), and Sharia (Islamic Law) provides basic criteria and policy guidelines. Moreover, the international laws, including treaties, are mended in this legal structure that makes it a unique structure. Pakistan has been struggling to establish a comprehensive legal framework necessary to curb corruption to meet the criteria set by the international legal framework to eradicate corruption. However, a series of efforts can be traced in the form of various laws to prevent corruption. The mainstream and social media has also been playing its role in spreading awareness among public as well as unveiling various high-level scandals of corruption, setting the government authorities and courts on motion that has been helping the government and judiciary to make many big fish accountable.

In 1947, the Prevention of Corruption Act was implemented in Pakistan. The purpose of this act was mainly preventing the corruption and bribery of the public servants working in the bureaucracy (Prevention of Corruption Act, 1947). In 1950, the same act was adopted by the Princely State of Bahawalpur (at that time the State of Bahawalpur had its own recognition as an autonomous State) having its own

version, named the Bahawalpur Prevention of Corruption Act, 1950. Later in 1958, the same Act was extended to the whole of the West Pakistan Province through an Ordinance, named as the Prevention of Corruption Act (West Pakistan Extension) Ordinance, 1958. The scope of this Ordinance was extended to the districts of Karat, Kharan, Makran and Lasbela. This Ordinance also repealed the Bahawalpur Prevention of Corruption Act, 1950.

In 1999, the National Accountability Ordinance was passed with expanded and extended sphere of operation since. This Ordinance can be considered as a serious effort to curb deep routed corruption from Pakistan (NAO, 1999). This Ordinance proposed the establishment of the National Accountability Bureau (NAB), supposed to be an autonomous federal institution. The main purpose and scope of the NAB was combating cases of corruption, all types of financial crimes as well as economic terrorism in Pakistan. This Ordinance empowered the NAB to launch investigations, hold inquiries, issue arrest warrants of the suspected individuals involved in all types of corruption and financial mismanagements. It also granted the NAB authority to direct these cases to the Accountability Courts. Moreover, the convicted individuals under the NAB Ordinance were prohibited to hold any type of political office for ten years.

The National Accountability Ordinance (NAO) (1999), Anti-Money Laundering Act (AMLA) (2010), Federal Investigation Agency Act (FIA) 1974 (VIII OF 1975), Prevention of Corruption Act (PCA) (1947), Extradition Act (EA) (1972) deal the matters of corruption in Pakistan. Moreover, the provisions of Pakistan Penal Code (PPC) (Act XLV of 1860), the provisions of the Code of Criminal Procedure (CrPC) (1898), and provisions of the Law of Evidence (Qanoon-e-Shahadat Order (QSO)), 1984, read with Electronic Transaction Ordinance (ETO), 2002, with reference to admissibility of evidence collected through modern devices also provide rules to curb corruption. However, the National Accountability Ordinance (NAO) (1999) is considered as the prime law of Pakistan, currently dealing all sorts of corruption and to curb corruption.

Prevention of Corruption

Theoretically, Pakistan has worked to prevent corruption and criminalized various types of corruption in compliance with the criteria set under the United Nations Convention against Corruption (UNCAC). The criminalization and law enforcement efforts have been made to implement rules of the UNCAC relating bribery and trading in influence (UNCAC arts. 15, 16, 18 and 21). All types of active and passive bribery have been criminalized under National Accountability Ordinance, and Pakistan Penal Code. It also criminalizes bribery of foreign officials. The Pakistan Penal Code largely criminalizes the trading in influence.

“Whoever, being or expecting to be a public servant, accepts or obtains, agrees to accept, or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or

forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person, with the Federal, or any Provincial Government or Legislature or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years or with fine or with both” (PPC, Sec. 161).

Criminalization

Money-laundering is a form of corruption and criminalized under UNCAC (UNCAC arts. 23 and 24). A comprehensive criminalization of all the aspects of money-laundering, including participation, concealment, conspiracy to commit, aiding, and abetting the money-laundering, has been made under the Anti-Money Laundering Act 2010 (AMLA). The predictive offences, including corruption offences, have been exhaustively scheduled (AMLA, Sec. 2).

The UNCAC prohibits embezzlement, abuse of functions and illicit enrichment as all are types of corruption. The legal structure of Pakistan treats all types of abuse of functions, misuse of power, and breach of trust.

“Whoever being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine” (UNCAC, Arts. 17, 19, 20 and 22).

Prosecution

The National Accountability Ordinance provides a broad reference to abuse of authority and functions in its preamble. The NAB Ordinance along with the Prevention of Corruption Act (PCA) treat Illicit enrichment as a form of corruption punishable under law. Obstruction of justice (UNCAC, Art 25), interfering and obstructing with the course of justice, in all matters relating corruption, is criminalized under NAB Ordinance (NAO Sec. 30 (a) and 31). The Pakistan Penal Code provides punishment for those who obstruct any public official from performing his public function; through threat, assault, and criminal force.

“Whoever voluntarily obstructs any public servant in the discharge of his public functions, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to 68[one thousand five hundred rupees] 68, or with both” (PPC, Sec. 186).

The UNCAC provides rules relating prosecution, adjudication and sanctions; as well as, binds suspect under investigation, to cooperate with law enforcement authorities (UNCAC, Arts. 30 and 37). There is a schedule of punishment, attached with the NAB Ordinance for the violators in this regard, ranging from rigorous

imprisonment from five to fourteen years including heavy fine (NAO section 10). The cooperation with the law enforcement authorities is commended and the Chairman of the National Accountability Bureau (NAB) can accept plea bargains with the approval of the Court (NAO Sec 15). The Chairman NAB has power to grant, full or conditional, pardon as well as return assets or gains acquired in return for a full discharge of criminal liability to reciprocate the provision of information and cooperating with the law enforcement authorities.

“Any person giving illegal gratification, or abetting, assisting or aiding a holder of a public office, or receiving or holding any property obtained or acquired by a holder of public office, through corruption or corrupt practices, or being a beneficiary of any asset, property or gain obtained through corruption or corrupt practices shall fall within the scope of this section and shall be liable to the same or a lesser punishment that may be awarded to a holder of a public office as may be deemed fit by the Court” (NAO, Sec. 26).

It is desired to provide protection to witnesses and reporting persons, helping the process to curb corruption, under UNCAC (UNCAC, Arts. 32, 33). Pakistan, although provides no formal system of the protection of witnesses and reporting persons in this regard, however, there are some measures available under NAB Ordinance for protection of witnesses and their families. There are options of ‘Safe Houses’ for witnesses and ‘Fearless Courts’ using modern technology.

In such cases as the Court may consider appropriate, the Court may allow to be produced any evidence that may have become available because of modern devices or techniques” (Qanoon-Shahadat Ordinance, Art. 164)

The legal framework of Pakistan provides rules on freezing, seizing and confiscation of the property while cases of corruption under investigation.

“If, in the opinion of a member of the Agency conducting an investigation, any property which is the subject matter of the investigation is likely to be removed, transferred or otherwise disposed of before an order of the appropriate authority for its seizure is obtained, such member may by order in writing, direct the owner or any person who is, for the time being, in possession thereof not to remove, transfer or otherwise dispose of such property in an), manner except with the previous permission of that number and such order shall be subject to any order made by the Court having jurisdiction in the matter” (NAO, Sec. 5).

The NAB Ordinance recognizes the rights of bona fide third parties and administration, seizure or confiscation of property are allocated on an ad hoc basis. The chairman NAB is empowered to seize and access bank records of the suspected criminals without an order of the court:

“The Chairman NAB or the Court trying a person for any offence as specified under this Ordinance, may, at any time, if there appear reasonable grounds for believing that the accused has committed such an offence, order the freezing of his property, movable or

immovable, or part thereof, whether in his possession or in the possession of any relative, associate or person on his behalf" (NAO, Sec. 12).

Jurisdiction

Jurisdiction is an important matter relating investigation of the cases of corruption (UNCAC, Art. 42). The NAB Ordinance and Pakistan Penal Code establish the jurisdiction of criminal offences committed in Pakistan, including the crimes of money-laundering. Pakistan also exercises jurisdiction for crimes committed by Pakistani citizens anywhere outside Pakistan:

"It extends to the whole of Pakistan and shall apply to all persons in Pakistan, and persons who are or have been in the service of Pakistan wherever they may be, including areas which are part of Federally and Provincially Administered Tribal Areas." (NAO, Sec. 4).

The coordination between specialized authorities and inter-agency is vital in dealing with the cases of corruption (UNCAC, Arts. 36, 38 and 39). The National Accountability Bureau, the Federal Investigative Agency, all the Provincial Anti-Corruption Establishments, and the Financial Monitoring Unit (FMU) in Pakistan work in collaboration with each other (NAO, 1999, Sec. 33).

Conclusion

Corruption is considered as a serious crime at both international and national levels, under international and national legal frameworks, however, the world has not succeeded to curb corruption at a satisfactory level. The United Nations Convention Against Corruption (UNCAC), 2003, being only legally binding multilateral treaty, signed by majority of states, binds state parties to take appropriate measures to curb corruption; specifically focussing on the prevention, criminalisation, and law enforcement measures. The bureaucratic structure of Pakistan empowers administrative and political authorities to influence the institutions for their personal interests and gains, including monetary benefits. The corrupt practices to achieve personal interests and gains have largely affected the efforts to curb corruption in Pakistan. Consequently, Pakistan has been struggling to overcome corruption amid efforts to achieve personal interests of various power groups at personal, departmental, political and institutional levels.

The United Nations Convention against Corruption (UNCAC) provides a comprehensive legal framework to eradicate corruption and state parties are under obligation to take steps for the eradication of corruption: especially ensuring the prevention, Criminalisation, and law enforcement measures to curb corruption. Pakistan, being a signatory to the UNCAC, need to comply with the UNCAC by taking adequate measures for eradicating corruption. However, Pakistan has remained on the list of countries failing to curb corruption, despite, all efforts made at judicial, legislative and political levels. The legal structure of Pakistan relating

corruption lacks a solid mechanism for the prevention, criminalisation, and law enforcement Measures to curb corruption.

The policies of the government of Pakistan to curb corruption lack a comprehensive mechanism to comply with the UNCAC relating prevention, criminalisation, and law enforcement measures to curb corruption. These policies seem ambitious but based on unfeasible promises rather pursuing anti-corruption work with effective and modest targets. Considering corruption as a root cause of the falling economy and failure of the institutional structure, Pakistan will have to take solid measures and show political will to curb corruption. Therefore, a comprehensive institutional and legal framework is necessary, in line with the UNCAC, with adequate measures for prevention, criminalisation, and law enforcement to Curb Corruption in Pakistan.

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