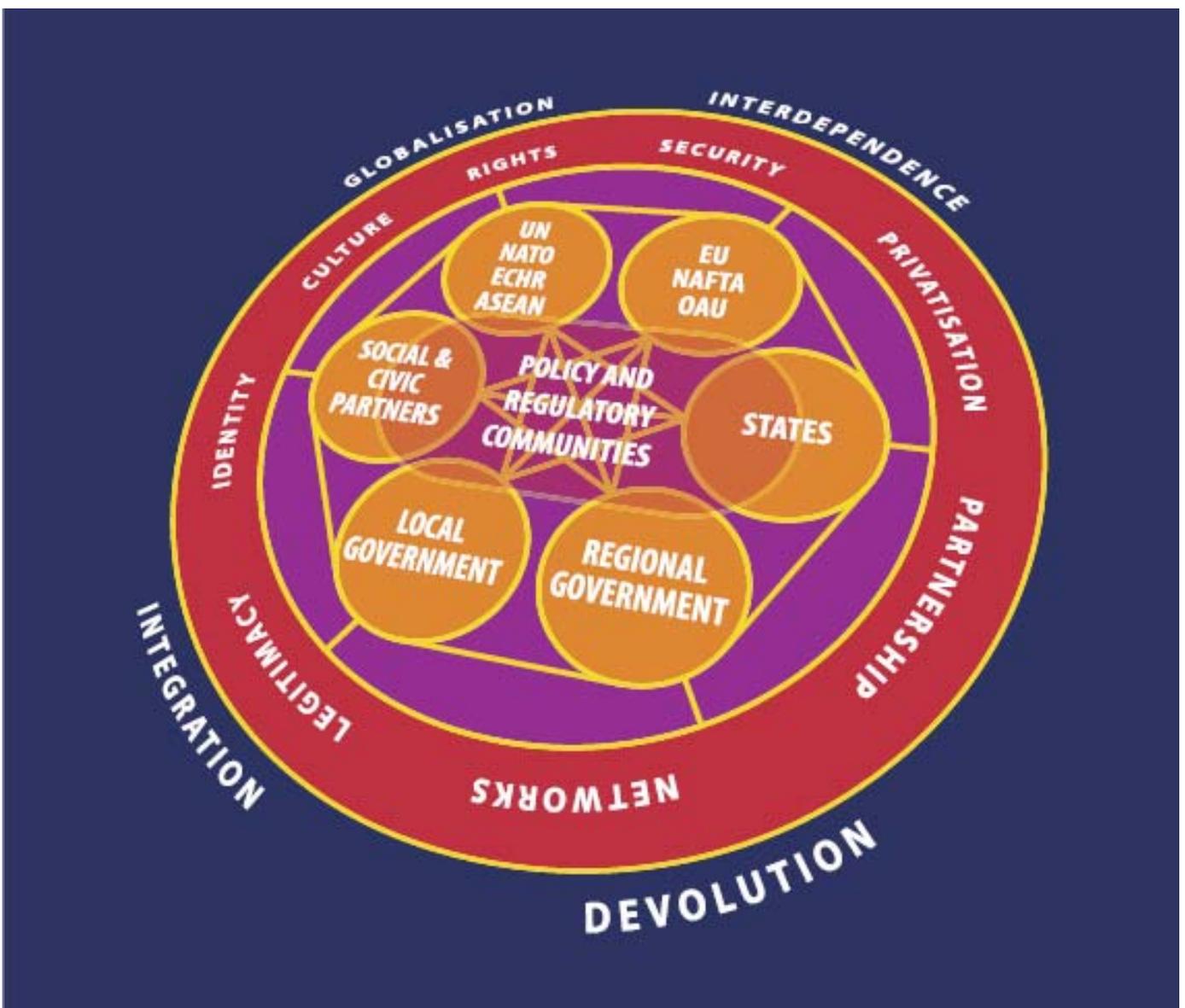


Prosecuting Corruption: The Case of Pakistan

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Introduction

The study of corruption has exploded over the past three decades, generating a literature that reflects the complexity of both the problem (see Heidenheimer and Johnston 2002) and the perspectives of those who focus on it (Jain 2001; Aidt 2003). Although present in all societies and universally condemned on moral grounds (Khera 2001), analysts have raised issues regarding the ambiguity of the term in both theory and practice that depends more on social construction and negotiation than on any inherent definable qualities (Chibnall and Saunders 1977; Park 1997; Philp 1997). And while some have been able to make strong arguments emphasizing the negative impacts of corruption on regime legitimacy, the quality of public services and democracy in general (Dobel 1978; della Porta and Vannucci 1997; Hutchcroft 1997; Seligson 2002; Warren 2004), others have been able to point out the more positive, functional side of corruption that has made it at least tolerable in some regimes (Bicchieri and Duffy 1997; Ehrlich and Lui 1999; Anderson 2003; Colombatto 2003).

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Despite these positive aspects, the effort to reduce or eliminate corruption has become a worldwide campaign pursued (at least nominally) by almost every nation and supported by a range of international programs (Windsor and Getz 2000). The World Bank declares that it “has identified corruption as the single greatest obstacle to economic and social development. It undermines development by distorting the rule of law and weakening the institutional foundation on which economic growth depends”⁴ (see Rose-Ackerman 1997). The Organisation for Economic Co-operation and Development (OECD) has established an Anti-Corruption Division devoted to fighting bribery and corruption that effect business relationships in member states. This includes an OECD Convention Against Bribery signed in 1999 that “makes it a crime to offer, promise or give a bribe to a foreign public official in order to obtain or retain international business deals”⁵ (see OECD 1997). Similar programs are found in regional organizations, from those focused on economic development⁶ to major political alliances;⁷ as well as in the donor agencies such as the US AID.⁸ Supporting these initiatives has been the emergence of Transparency International, a transnational NGO committed to the eradicating corruption in all jurisdictions, which has established offices throughout the world.⁹

Approaches to fighting corruption take various forms, but all are based on a simple logic articulated by Edward C. Banfield in a now classic examination of the problem published in 1975 (Banfield 1975). Using principal-agent theory, Banfield noted that corruption is basically a relationship between three parties: the public as principal, the public official as agent obligated to fulfil the wishes of the principal, and a third party seeking to have the agent work on their behalf instead. The potential for corruption depends to a considerable degree on the amount of discretion regarding program decisions and access to public authority and resources held by the agent (Jain 2001, p. 76-79). Seen in this uncomplicated way, the solutions to corruption are three fold: *pre-emption* by reducing the incentive for the agent to provide the third party with access to that discretionary power; *policing* in which the agent’s use of the discretionary power is

⁴ <http://www1.worldbank.org/publicsector/anticorrupt/index.cfm>

⁵ http://www.oecd.org/department/0,2688,en_2649_34855_1_1_1_1_1,00.html.

⁶ E.g., the Asian Development Bank; see <http://www.adb.org/Anticorruption/default.asp>.

⁷ E.g., the Organization of American States; see <http://www.oas.org/juridico/english/FightCur.html>.

⁸ See <http://www.usaid.gov/democracy/anticorruption/>.

⁹ E.g., see <http://www.transparency.org/>; for a list of regional offices, see http://www.transparency.org/contacting_ti/regional/region_groups.html.

monitored; and *prosecution* of the misuse or abuse of that discretion in the service of a third party (see (Cartier-Bresson 1997); cf. Jain 2001, p. 98).

Pre-emptive approaches are based on reform agendas seeking to prevent the emergence of “black market bureaucracies” where supplies of corrupt practices might be offered to third parties (Tilman 1968). It has long been assumed that corruption is a crime that feeds on opportunities, and administrative reforms are regarded as a means of eliminating those before they can be taken advantage of (Cohen 1993). For some this has meant the reform of personnel policies to facilitate the hiring of individuals whose integrity and competence would lead them to reject any such temptations (Anechiarico and Jacobs 1994), while for others it has meant enhancing the compensation for public service to a level that would minimize the incentive to entertain third party offers (Mookherjee and Png 1995). Reducing the amount of discretionary authority for any particular official is another approach to pre-emption, and this is often done by creating an institutionalized system of checks and balances (e.g. “many hands”) that make it difficult and costly for any third party to find an effective point of access (Persson, Roland, and Tabellini 1997). Public choice theorists see the same results emerging from competitive, overlapping and/or decentralized jurisdictional arrangements (Rose-Ackerman 1978; Rose-Ackerman 1999; Hopkin 2002; Arikan 2004).

The policing approach rarely stands on its own, but the premise is that corrupt behaviour will be limited by the presence of a monitor, or at least a monitoring process. Ranging from simple internal reporting requirements and oversight answerability to forensic audits, the role of monitoring can become a pervasive part of the operating culture of public officials (Kaufman 1967; Kaufman 1973; McCubbins and Schwartz 1984; Power 1999). In the public sector, it can emerge as self-regulation (e.g., among legislators Oliver 1997) or develop as an elaborate formal system on independent and autonomous auditors (Pollitt and Summa 1997). Criticisms of the approach has ranged from its ineffectiveness (Segal 2002) and association with growing “red tape” (Kaufman 1977; Banerjee 1997; Bozeman 2000) to the dysfunctional consequences of monitoring that turns panoptic (Anechiarico and Jacobs 1994; Anechiarico and Jacobs 1996). Nevertheless, policing has a proven track record in at least two previously problematic jurisdictions: Singapore and, more recently, Hong Kong (Lo 2001; Quah 2001).

The prosecutorial approach treats corruption like any crime, and to that extent it tends to focus on those acts that have been “juridified” – that is, made explicitly illegal and subject to some form of juridical process where the determination of guilt and imposition of sanctions are expected. Under systems where the rule of law is taken seriously, this approach does result in distinguishing between petty actions of dishonesty (e.g., stealing paper clips from the office for personal use) and more significant violations, some of which are formally treated as crimes in the legal system.

Elevating corruption to a criminal act raises the question of legal purpose. Is the intent to extract justice through prosecution, or to prevent further corruption? This is a classic question asked of all legal systems, but in this instance it helps distinguish between prosecution as a means for seeking retribution through punishment and prosecution as an anti-corruption tool. “Legal repression” has long been regarded as the most effective way to deal with systemic corruption, whether we are speaking about the United States during its Progressive Era (McGovern 1907) or China at the height of the Cultural Revolution (Liu 1983).

In the balance of this paper we will examine a special case of the prosecutorial approach to fighting corruption: the work of Pakistan’s National Accountability Bureau (NAB). We will pay special attention to a unique aspect of the NAB mission – its mandate to seek some restitution of resources lost to corruption through its prosecutorial powers.

Pakistan’s Fight Against Corruption

In a historical context, corruption and nepotism seem to be embedded in the cultural ethos of Pakistan. Pakistan has always appeared prominently on the list of the most corrupt countries in the world in its brief history.¹⁰ Questions about why Pakistan is frequently found near the top of the list are outside the scope of this study. In this paper we focus on the efforts since the birth of the country to curb the menace of corruption and how this aspect of the law has developed over

¹⁰ Transparency International CPI 2002, rank 77, score 1.7~4.0 [11th] (1995 survey: ‘Pakistan, worst’). In 1998 the World Bank placed the value of overall corruption close to 10% of the GDP. See www.icac.org.hk, International Anti corruption Newsletter—July2001.

the decades. We also present the case of prosecutorial strategies applied in Pakistan and examine both their logic and historical trajectory culminating in the establishment of the National Accountability Bureau in 1999. We provide an assessment of current NAB activities and discuss the relative merits of the prosecutorial approach in light of the Pakistani experience.

Legal History of Prosecuting Corruption

Prior to 1947, corruption was treated as a normal crime falling within the general definitions of dishonest misappropriation, forgery, breach of trust, cheating etc. But this was evidently insufficient to deal with the current nature and size of corrupt practices. After 1947 new law was promulgated¹¹ making the issue as a special crime. It created its own investigating and prosecuting arm¹² and designated its own special judges over the years. In the beginning its application was limited to government civil servants¹³ and was extend to public servants employed by state corporations in 1977 through an amendment.¹⁴ The law declared criminal misconduct as an offence punishable with seven years rigorous imprisonment and the offence was defined as “obtaining of any gratification as a motive or reward for doing or forbearing to do any official Act”.¹⁵ In addition, the law also made a crime of accepting of anything valuable from a person having business related to an official’s functions or the official abuse of his position for the purpose of obtaining anything of value.¹⁶ The amended law also made punishable the possession of pecuniary resources disproportionate to one’s known sources of income if the sources cannot be accounted for. This law became a model for all subsequent laws dealing with corruption of public servants, and the federal and provincial legislatures adhered to this basic structure despite various amendments at different times.

But this Act was not free from faults. Its inherent flaw was a requirement that special permission be obtained from the departmental head of the concerned department/organisation to

¹¹ Prevention of Corruption Act, 1947.

¹² Pakistan special Police Establishment Ordinance, 1948.

¹³ Section 1 Supra.

¹⁴ Act xiii of 1977.

¹⁵ As defined in sec.161, Pakistan Penal Code, 1860.

¹⁶ See sections 161 to 165 Ibid.

pursue a case and investigators had to inform the departmental head of the initiation of investigations. This made the prosecutions difficult as the investigators had to go through dubious bureaucratic procedures as well as causing unnecessary delays that provided time for the offenders to take countermeasures that would undermine the investigation.. Although the law was utilised successfully to prosecute offenders involved in minor cases, it effectively put the serious offenders and departmental graft beyond the effective ambit of the special police (which had itself sunk to one of the most corrupt institutions in Pakistan). This provision was repealed in 1953,¹⁷ although the accompanying section which made the offences under this Act non-cognisable was retained. In a milieu where the cognisance was to be granted by a public servant,¹⁸ the amendment had no practical effect. By inserting such a provision, it appears that the intention to ensure that the efficiency of the public servants remain intact by safeguarding them from needless harassment and false prosecution. The presumption, therefore while framing the law, was that the government itself is not corrupt and the senior bureaucrats representing the government are not corrupt at all. Later events and conduct of them demonstrate how false that presumption was.

Although, corruption was considered to be a national problem up to that point, it was only after the transition from the Martial Law government to an elected government in 1980, that the issue of corruption started to gain momentum, becoming one of the major issues confronting the people of Pakistan currently. A major factor in this development was that the press found itself free to report cases of corruption, and this was encouraged by the overseeing army bosses. Another reason, of course, was the machinations and political manoeuvrings of the politicians themselves to align with the ruling regime and the willingness of the regime to purchase the loyalty of the individual politicians in a non-party Parliament (election held were on non-party basis). On the revival of elective democracy by the then martial law government, political parties were banned and the elections thus held were partyless. One could also see throughout these martial law years a consistent policy of lampooning politicians as a means of establishing that the martial law government was a better option for the people of Pakistan. Gradually a

¹⁷ Criminal Law Amendment Act, 1953, (xxxvii of 1953).

¹⁸ The magistracy (judges who were required to give sanction) was an administrative arm of the government till 1995.

perception emerged of not only of a corrupt bureaucracy, but of corrupt politicians and that both are in league. Subsequent events and behaviour of the elected representatives led credence to such theories. The hunters and the hunted became one. The weaknesses of the legal system, the monitoring and auditing systems, were exploited to the hilt. The gaining of wealth was the sole aim of the individual in the society and thus gaining respectability was related to gaining wealth no matter what its source was.

In this backdrop, electoral politics was fully introduced in the country after the death of Zia-ul-Haq in an air crash in 1988. Four successive governments were dismissed mainly on the grounds, *inter alia*, of corruption before completing constitutional five-year term. The first government of Ms Benazir Bhutto was dismissed on 16th August 1990 and the Supreme Court upheld its dissolution.¹⁹ Then in April 1993, the government of Mr. Mian Nawaz Sharif was dismissed. The Supreme Court declared the dissolution order illegal, the Prime Minister and his cabinet resumed their administration, which did not go for long, and the Prime Minister advised the President to dissolve the National Assembly together with cabinet.²⁰ As result of election Ms Benazir Bhutto came into power but her second government was dismissed in October 1996 on the ground of corruption and others and the Supreme Court upheld the dissolution order.²¹ Mian Nawaz Sharif came into power for the second time who was sacked in October 1999. The corruption ground remained prominent in the dissolution and courtroom debates. The Supreme Court validated the dismissal order.²² A strain of governmental incompetence and corruption remained a factor in all the dismissal saga of governments and legal battles. This is reflected in the 2000 judgement of the Supreme Court, which validated the military take over:

[T]heir (military government) avowed intention to initiate the process of across the board and transparent accountability against those, alleged of corruption in every walk of life, of abuse of national wealth. ...that the government shall accelerate the process of

¹⁹ PLD 1992 SC 416

²⁰ PLD 1993 SC 473

²¹ PLD 1998 SC 388

²² PLD 2000 SC 869

accountability in a coherent and transparent manner justly, fairly, equitably and in accordance with law.²³

The Ehtesab [Accountability] Ordinance, 1996

The Ehtesab Ordinance, enacted in 1996, was the first law to deal with corruption which did not follow the pattern set in the Prevention of Corruption Act 1947. It was promulgated to eradicate "corruption and corrupt practices from public offices and to provide for effective measures for prosecution and speedy disposal of cases involving corruption."²⁴ It brought within its ambit both the bureaucracy and the politicians, including the President and the Prime Minister. The Ordinance also made, for the first time, the ownership of assets disproportionate to the known sources of income, an offence for both the bureaucracy and the politicians whose life style was much more ostentatious, and under whose patronage the bureaucracy thrived. The Ordinance provided for a general amnesty clause for those who presented themselves voluntarily to the authorities within *ten* days of the enactment of the law and agreed to return the ill-gotten wealth. Nobody availed the benefits of this provision. The three-member bench of the High Court was to try the offence under the Ordinance and the trial was to be concluded within thirty days.

This law, which remained in the field for three years, did not bring about the desired results and was regarded more as an instrument of harassment and political victimisation rather than a genuine attempt to curb the menace of corruption. The government, which had enacted the law and was vigorously pursuing its opponents, was dismissed for corruption itself and the Supreme Court upheld the sacking of government.²⁵

National Accountability Bureau Ordinance, 1999

By this time another military government was in place and therefore the perception of political victimisation in prosecuting corruption was apparently no longer in the equation. The

²³ Qazi Hussain Ahmed vs. Gen. Pervaiz Musharraf, CP no. 15 of 2002. www.scp.com.pk

²⁴ Preamble, Ehtesab Ordinance 1996.

²⁵ PLD 1998 SC 388.

expectations of the nation in dealing with corruption were high. The issue was no longer simply of prosecuting corruption but also of somehow recovering the wealth robbed by the corrupt. By some estimates this was equivalent to the total national foreign debt of over \$36 billion. We shall see how the NAB law attempted to recover the same. The preamble of the law gives in some detail what it hopes to achieve:

It is necessary to provide for effective measures for the detection, investigation, speedy disposal of cases of corruption, corrupt practices, misuse or abuse of power misappropriation of property, taking of kickbacks, commissions.... and there is an emergent need for the recovery of outstanding amounts.... There is an urgent need for the recovery of State money...and to educate society about the causes and effects of corruption...

The offence of corruption and corrupt practices was made punishable with 14 years rigorous imprisonment and the definition of corruption, while bringing under its net all holders of public office including politicians like in the previous law, also added that a person who maintains a standard of living not commensurate with his known sources of income shall be found guilty of corruption.

One of the methods of 'corruption' that had come in vogue by this time was to obtain loans from banks and financial institutions that were controlled by the state for non-existing securities and then to default on payment, the bank being left with no means to recover the defaulted amount. The wilful default in 2002 was reported to be \$3.3 billion and non-performing assets were placed at \$5 billion.²⁶ As such, the NAB was given a further role in investigating such loans and to recover them.²⁷

This was accompanied by a special insertion, for the first time in the history of the country, for settling issues through 'plea bargaining'²⁸. There was scathing criticism of this provision from some quarters for letting criminals go who deserved deterrent punishments.

²⁶ <http://www.dawn.com/2002/03/02/>

²⁷ Sec. 25-A inserted by Ord. IV of 2000.

²⁸ Sec. 25, NAB Ord.

Recovery of looted wealth however was considered more important in a country with a floundering economy.

An attempt was made in the latter part of 2001 to make NAB independent of the government by inserting in the ordinance that the chairperson shall be appointed for a term of three years and shall not be removed except on the ground of removal of a judge of the Supreme Court who is to be removed by the Supreme Judicial Council, a constitutional body. The Chairman NAB was given wide-ranging powers to pardon²⁹ the accused if the accused surrenders the ill-gotten assets. This was in the aftermath of the resignation of Lt.General Mohammad Amjad, a reputedly uncompromising and forthright person. He now stands accused of being allotted land at much less than the market value.³⁰ It is interesting to mention that NAB Ordinance has indemnified “federal government, Chairman NAB, or any other member of the NAB” from “prosecution or any other proceedings” in performance of their function under this Ordinance.³¹ We shall see later on whether or not the guarantee of a fixed term has made any significant impact on the independence of the Bureau.

The judiciary and the armed forces personnel were pointedly absent from the purview of the NAB on the premise that both institutions have internal mechanisms of accountability. This did not wash very well with the public because even within the bureaucracy there did exist mechanisms for accountability, but such mechanisms had invariably failed, in the public perception, including the judiciary and the armed forces.

The ordinance also sought to establish its own courts and came directly in conflict with the established judiciary on this count. In the case *Mehram Ali*³² it has been held that:

The constitution recognises only such specific tribunal to share judicial powers with the courts which have been specifically provided by the constitution itself...it must follow as

²⁹ Section 26, Ibid.

³⁰ Pakistan Army has legalised the grant of such largesse and this form of corruption is not even considered as corruption in the social milieu existing today.

³¹ Section 36, NAB Ordinance.

³² PLD 1998 S.C. 1445

a corollary that any court or tribunal which is not founded on any of the articles of the constitution cannot lawfully share judicial power with the courts referred to...in the constitution...the supervision and control over the subordinate judiciary vests in High Courts, which is exclusive in nature, comprehensive in extent and effective in operation.....Therefore, any court or tribunal which is not subject to judicial review and administrative control of the High Court and or Supreme Court does not fit in within the judicial framework of the constitution.

The vires of NAB Ordinance were challenged in *Asfandyar Wali vs. Federation of Pakistan*.³³ The Supreme Court upheld the law but stressed the need for amending the Ordinance and came up with concrete guidelines bringing the courts within its own superintendence.

The Successes and Failures of NAB

The NAB reports that a total of 560 cases were filed up to June 2003, out of which 329 have been decided with 270 convictions and 51 acquittals. Out of these it is reported that 190 cases are against politicians and 394 against bureaucrats, and businessmen etc. A total of 2424 persons have been or are being investigated. Out of these 614 are politicians, 1234 are bureaucrats, and 354 are businessmen. Up till now Rs.90.383 billion (\$0.982 billion) has been recovered from bank defaults and Rs.2.737 billion (\$0.02975 billion) in plea bargains from over 200 persons. Rs.67.744 billion are also claimed to have been recovered as indirect recoveries.³⁴

Even if these figures are taken at their face value, they do not reflect a success story that ultimately leads to a change of perceptions concerning corruption. In a country of over 140 million a few hundred convictions and a few hundreds investigations are a drop in the ocean. The convictions of low ranked government officials do not change perceptions of corruption. There is not a single case of a high profile politician being successfully prosecuted by the NAB. Cutting of deals especially in a non transparent manner, withdrawal of cases against high profile politicians subsequently inducted in the government exacerbates the feeling that NAB is going

³³ PLD 2001 S.C. 607

³⁴ www.nab.gov.pk

the way of previous organisations namely the FIA and the Anti-Corruption Establishment set up under previous legislation. Several politicians, Aftab Shape and Faisal Saleh Hayat to name only two high profile instances, are today government Ministers with NAB cases still pending against them and some being withdrawn. A recent report appearing in the online daily “Dawn”³⁵ speaks of a US assets recovery company objecting to NAB’s “selective approach” and “political expediency”. The company accused NAB of squandering its good work for nabbing wanted men like former Chief Minister Sindh, Abdullah Shah and Amir Lodhi, an arms dealer, and eight other Pakistani bureaucrats but NAB advised them to “hold on.” A petition has been filed in the Lahore Court detailing “massive kickbacks and corruption”³⁶ and accusing NAB of striking “various under the table deals with various individuals accused of high profile economic crimes in addition to arm twisting NAB defaulters, into joining the present government. These include the present Prime Minister Zafarullah Jamali and at least one fourth of all elected legislators.”³⁷ In fact the NAB Chairman Lt. General Munir Hafiez himself admitted “NAB realised that the institution would fail to reduce corruption from the country on a permanent basis, unless causes of corruption were removed.”³⁸

There is another dimension to the seeming failure of the NAB strategy: the decision of the courts to bring the special NAB courts within their purview apparently to ensure their independence has tied the reputation of the courts with the success or failure of the NAB which is and cannot be within the control of the courts being essentially a prosecuting agency. Hence every murky withdrawal from prosecution reflects upon the courts and therefore the ‘dilemma’³⁹ of the courts.

Conclusion

In the final analyses it must be said that there is perceptible shift in the working of NAB from being an essentially prosecutorial agency to a recovery of assets institution and this shift has

³⁵ <http://www.dawn.com/2003/11/03/>

³⁶ www.hvk.org

³⁷ Ibid.

³⁸ See SDNP www.sdn.org

³⁹ A.H. Amin: www.hvk.org

been acknowledged by the NAB chief himself when he stated that “his organisation’s task was to bring back looted wealth of Pakistan home rather than to harass people.”⁴⁰ NAB has not been successful in achieving the goal for which it came into existence and the current government sought public acceptance and legitimacy. However, looked at comparatively, it has done better than any civilian government under previous anti-corruption mechanisms. Its shift from prosecution to recovery and selective prosecution cannot be justified as implemented, but could be explained and understood in country where the elite ruling class, civil and military bureaucracy and industrialists are all woven together by kinship, feudal and business ties. Added to this is political expediency: where two mainstream parties (Pakistan People’s Party and Pakistan Muslim League) are alienated and their leadership exiled, the government needs the support of some individual politicians and small parties who might be subject to prosecution if the selective approach was not used.

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⁴⁰ www.pakistanlink.com 16/3/04.

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