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Pakistan's Anti-Corruption Legal Regime: A Story of Political Rag Tag

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Abstract

Corruption has been recognized as a globally organised crime with overwhelming damage to economies of less developed countries. Pakistan dealing with brunt of corruption failed to curb corruption owing to inherent fault-lines with anti-corruption legal and Institutional framework. The political governments counterpoised the anti-corruption legislations with legal, procedural and judicial lacunas to the advantage of their party members. This paper attempts to identify the reasons for failed institutional initiatives for repatriation of stolen assets back to country and how Pakistan failed to benefit from international cooperation through Mutual Legal Assistance. This paper would also explore the internal politicking between state institutions frustrating the due process of law to recover proceeds of corruption with special reference to legal manipulation of criminal proceedings in Panama Leaks Corruption Case.

Keywords: National Accountability Bureau; Corruption; Mutual Legal Assistance; Asset Repatriation; Panama Leaks.

Introduction

The threat from corruption to Pakistan was rightly perceived by the founding father of Pakistan, Quaid-e-Azam Muhammad Ali Jinnah in 1947 perceived the threat from corruption in the following words:

One of the biggest curses from which Sub-continent 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 it down with an iron hand. (Address to Constituent Assembly, 11 Aug, 1947)

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Till today after more than 72 years, Pakistan's national development is at a disappointing position because of corruption. Successive governments in Pakistan framed anti-corruption legal regime leading to conflict of applicable laws and lack of coordination between anti-corruption bodies established there under. Before the paper advances its arguments on the dynamics of crime of corruption, it is pertinent to comprehend the legal connotations of the term, though no unanimous consensus as "a fiduciary's or official's use of station or office to procure some benefit either personally or for someone else, contrary to the rights of others or an act carried out with the intent of giving some advantage inconsistent with official duty or the rights of others"(Garner, 2014:422).Pakistan Penal Code(1860) from section 161-165 refers to corruption as *illegal gratification* or *criminal misconduct* as mentioned in the Prevention of Corruption Act 1947.

For the sake of this paper, broadly anti-corruption regime in Pakistan can be divided into two phases; a) pre-1996 phase and, b) post-1996 phase. Before 1996, corruption was dealt as an ordinary offence with ordinary procedures and penalties and the anti-corruption bodies (provincial or federal both) were controlled directly these governments. Post-1996 phase however differed in recognition of corruption as a crime of special import the anti-corruption bodies for the first time were seemingly made independent of political governments with an extended scope of anti-corruption law to powerful public office holders. *Ehtesab* cell (1996) followed by *Ehtesab* Act 1997 and National Accountability Ordinance(NAO)1999 were serious attempt to promulgate strict anti-corruption laws with first phase in 1996 and the latest attempt in 1999,both made by undemocratic powers. Since the civilian and military both utilized these legislations and institutions for political victimization therefore a big question mark is placed on their credibility and independence. Thus Apex powerful anti-corruption agency i.e. the National Accountability Bureau(NAB), was used by General Musharraf for scapegoating political opponents and political engineering to shift the political loyalties to prolong the illegitimate military control. Latest phase of accountability drive in Pakistan, faced a tug of war between state organs to control the affairs of the Bureau; initially between the *defacto* Musharraf regime and the Supreme Court(SC) of Pakistan, subsequently between the SC Vis-à-vis democratically elected governments, People's Party and Muslim League(N) (Javed, 2010:126).

Globally, Corruption has become a transnational crime requiring transnational law enforcement involving absconded individuals, illegal assets in foreign jurisdictions and the evidence of criminal money transaction in yet other states. Evidence collection, asset recovery requires sophisticated cooperation

between anti-corruption institutions in states strengthened by effective Mutual Legal Assistance (MLA), bilateral and multilateral treaties and domestic legislations. The most significant reason for the need of international cooperation to deal with corruption is that profits/incomes from corruption are often converted into foreign assets or stashed in bank accounts abroad.

Though traditionally in majority state jurisdictions, domestic legislations provided for confiscation of assets accrued through Corruption because law enforcement agencies could effectively discover the stolen assets in state jurisdiction. Therefore, the illegal proceeds of corruption are stashed outside state jurisdiction through money laundering. Until recently, existing international legal framework provided for state cooperation for arrest of fugitives but now identification, confiscation, repatriation of stolen assets is legally provided in UN Convention Against Corruption (UNCAC) 2003 in Article 51, Chapter V to disable the corrupt from enjoying their illegally acquired wealth. "The return of assets pursuant to this chapter is a fundamental principle of this convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard."

Another important legal consequence is that corruption involves multiple jurisdictions when corrupt individuals move illegally obtained money to foreign jurisdictions in the form of bank accounts and immovable properties, placing the matter in the ambit of private international law. The states institutions have a hard time bringing back the national wealth moved illegally into foreign jurisdictions unless the other states provide active assistance. Corruption now is not placed in the list of conventional crimes entailing minimal punishment through ordinary sentencing without any restriction on the enjoyment of stolen assets; rather constitutes an organized sophisticated crime because of a global *modus operandi*. Contemporarily, the corrupt individuals do not scoot free after serving sentence, instead the state of origin emphatically attempts to repatriate the misappropriated money. Combating corruption and money laundering essentially constitutes Asset Repatriation therefore, MLA and individual extradition of looters of national wealth through treaties are significant now.

Domestically, corruption as an organized crime has deep-seated imports on the economy and politics of Pakistan but the internal and external challenges are intense because of the inherent legal and procedural flaws in the system. On the one hand, Jurisdictional overlaps between parallel anti-corruption agencies and inconsistent statutory provisions challenge the fundamental legal protections of fair trial and rule of law available to the accused under the Constitution of Pakistan 1973.

On the other hand, the individuals involved in corruption in Pakistan in-order to evade the national anti-corruption institutions stash their illegitimate money acquired through corruption has far reaching economic repercussions. In the last few years, this important factor has caused Pakistan to make ardent demands for repatriation of stolen assets from abroad to home, to the extent that current government in UN General Assembly session in Sept 2019, established corruption as a global concern requiring a globalized campaign for its eradication. A very significant question emanates from this discussion is that in order to combat corruption how far MLA, Assets Recovery or extradition as forms of international cooperation are required for Pakistan?

The paper has two sections with the first part addressing the legal basis for Inter-State Cooperation against Corruption and the second part discusses the faultiness existing in Pakistan domestic legal regime upon which the corrupt individual capitalize to gain a legal advantage against conviction.

Legal Framework for International Cooperation

Internationally the states cooperate with each other to combat corruption in the ambit of two types of legal frameworks; a) Treaty based cooperation and b) non treaty based cooperation. Cooperation based on Treaty can be categorically divided into multilateral and bilateral treaties; whereas cooperation not based on treaty is domestic legislations of the states, letters rogatory and Principle of Reciprocity. Nevertheless, these alternative recourses may be available to a state simultaneously both for seeking and providing assistance; still this is contingent upon the nature of assistance required by a requesting state and the readiness of the state to entertain such requests.

The next section would discuss the available arrangements between states for international cooperation both based on treaties and non-treaty.

Treaty-Based Cooperation

Cooperation based on Treaty is effective for international anti-corruption initiatives between state entities, requested state is bound by international law to provide assistance to requesting state. Parameters of cooperation are clear for state parties, while these elements are lacking in non-treaty based arrangements. However, a doctrinal problem arises from the variation in state practice of giving effect to international treaty obligations in their domestic laws (some states having more comprehensive legislations) such as execution of requests, appeals against decision of competent judicial platforms, explicit provision of reasons incase a state party is unable to process a request for extradition or MLA are clear procedural safeguards provided by some state parties. Contrarily, states with

limited legal framework for extending international cooperation such as Pakistan, with fewer provisions for MLA under accountability law, NAO(1999) with application of general procedure code culminates in legal ambiguity without fulfilling international standard of cooperation (Pieth, 1997:119).

Treaty based cooperation is two pronged; a) multilateral anti-corruption treaties including regional treaties, and b) bilateral treaties between two state entities. Multilateral treaties, UNCAC (2003), with an extended scope recognizes demands for repatriation of stolen assets from foreign jurisdictions and extradition procedures for Offenders. United Nations Conventions for Transnational Crimes 1997recognized mutual cooperation of states in dealing with corrupt public officials, though Pakistan is a signatory but not ratified. Multilateral treaties drawn at regional level address crimes though not corruption directly but may seek assistance for it as a transnational crime whereas bilateral treaties are limited, addressing specific needs of state parties with easy amendment procedures but lack of state resources to bear costs and time makes it difficult for states to draw bilateral treaties(Joutsen & Graycar, 2012).

Non Treaty Based Cooperation

Domestic legislation

In the absence of formal interstate treaties, the domestic laws of the state would complement the international treaty regime leading to direct state cooperation with procedures laid to send, receive and execute requests on case to case basis or may extend general assistance to all foreign states. The demerits are of this cooperation mechanism is preconditioned on goodwill and reciprocity of states without binding obligation under international law on requested state.

Letters Rogatory

As one of the oldest mechanism for international assistance, *Letters Rogatory* denotes a request by a judge in a requesting state to a judge in a requested state for providing assistance in criminal matters, issued by police or prosecution. The demerits are non-binding obligation and common law jurisdictions such as Pakistan with neutral judiciary is independent of investigations (Windsor & Getz, 2000).

Challenges in International Cooperation

Two fundamental mechanisms of international cooperation are; (i) extradition and (ii) MLA. Extradition is a legal process involving request for repatriation of a fugitive, who absconds to another state jurisdiction after committing a crime in one state jurisdiction. Contrarily, MLA, involves support in evidence collection to substantiate the criminal case and mechanism for assets recovery transferred through corruption. However, in international politics, even after concluding

extradition and MLA treaties, requested states may refuse to cooperate on following grounds;

- National interests, without precise legal definitions in domestic laws, inclusive of repercussions on the political relations of the requested state, security and sovereignty.
- Political offences, though not well-defined, despite article 44 (4) UNCAC, candidly providing that offences falling within its scope would not qualify as political offences.
- Mandatory domestic legal prohibitions or state discretions may invoke refusal of a state to extradite its nationals with laws for prosecution of individuals charged with corruption offences.
- Another obstacle is Dual criminality and severity clause; that the offence is criminalized in both the jurisdictions of requesting and requested state and the offence is of severe nature which is not legally defined in majority state jurisdictions.
- In human rights law, the death penalty and fair trial rights obstructs the states from extending cooperation under extradition arrangements for instance UK refused entry into extradition treaty with Pakistan because Extradition Act 1972, has offences punishable by death. Therefore Pakistan had to enter into a memorandum of association for extradition of ex-foreign minister Ishaq Dar, after corruption investigations were initiated against him.
- Requested states may require stronger evidence instead of Prima-facie evidence to process extradition requests, which is time taking, difference in evidentiary jurisprudence, difficulty investigating Accused without arrest (Article 8 (2) of Extradition Act, 1972 Pakistan). For instance, Pakistani government's request for issuance of red warrants for the arrest of Hussain Nawaz while Pakistan has the unique legal provision which allows the suspect of giving a defense whether offences alleged against him are non-extraditable or political offences(Shah, 2012).
- Requesting state having multiple state institutions extending international cooperation, categorization of offences relating to same accused face complication. For instance, NAB, in Pakistan extends cooperation internationally for corruption while requesting states have to use diplomatic channels to approach Ministry of Interior (MOI)for money laundering.

- Delayed MLA due to absence of time limits in majority jurisdiction.

Challenges to Recovery of Stolen Assets

Ppractically, from foreign jurisdictions the confiscation and repatriation of stolen wealth presents a daunting task for requesting states as Strict bank secrecy laws of requested states present an intense problem for tracing proceeds of corruption in foreign bank accounts and the cash flow from state of origin is difficult. If the illegal wealth is converted into immovable assets then offender's formal ownership is difficult to establish if the property is put in the name of off shore companies, trusts systems yet enjoying ownership of such assets. Tracing incurs financial costs on requesting state for hiring private investigator agencies, lawyers and accountants or worst if the accused chooses to take the matter for litigation before a judicial forum.

Institutional responsibilities if unclear then concurrent powers of multiple parties' overlap causing delay of sending requests to foreign jurisdiction or to timely honor any incoming request from a foreign jurisdiction. Despite article 6 and 36 of UNCAC for designating specialized authorities' for combating corruption through law enforcement, Asset recovery process will be compromised enabling accused to further transfer stolen assets to jurisdictions complicating the asset repatriation. Additionally, Requested state clash of interest may be an obstruction for repatriation of stolen assets, if its economy is based on providing offshore banking services, with legal framework and tax infrastructure facilitating stolen assets in the garb of 'investments'(Khuram, 2016).

Differences in procedural laws of the states for instance Switzerland require the written requests to be made in German, French and Italian accompanied with certified translated copies of court judgment or criminal conviction for asset confiscation presents problems such as onus of proof on the requesting state. Qualification of an offence is also problematic such as possession of assets beyond means of income is a chargeable offence in certain state jurisdictions while not in others; while bank loan payment default may be a civil matter in most state jurisdictions but in Pakistani law (NAO section,5) it is a chargeable crime of corruption. Certain jurisdictions place a time bar (estoppel) for entertaining asset recovery request on adjudication in courts; significant example of Switzerland refusing to assist Pakistan for repatriation of Ex-President Asif Zardari illegal assets for expiry of limitation period.

Political considerations of the requesting and requested state can present significant obstruction in repatriation of stolen assets from foreign jurisdictions. Lack of political will of requesting state because the political and economic elites of states (both in power and opposition) possess vested interests in weakening the organizational capacities of anti-corruption institutions leading to flawed investigation. Requested state may hesitate in repatriating the stolen assets

because of potential wastage of resources lest requesting state government misappropriates again or suspect ulterior motives underlying potential political victimization of political opponents by manipulating investigation agencies instead of bonafide efforts. Glaring examples in Pakistan is later part of 1990s and beginning 2000s era when national accountability institutions noticeably targeted individuals on political grounds; caretaker government in 1996, PML(n) government afterwards and after 2002 general elections Musharraf. Another example is election agenda of the two political parties Bangladesh Awami Party (Khalida Zia)and Bangladesh Nationalist Party (Haseena Wajid)involve corruption allegation to win electorate without sincere interest in recovering stolen national wealth. Though accusations are not completely unfounded but malafide intent of requesting state political power's compromises the seriousness of investigations hence lack of international cooperation.

Pakistan Anti-Corruption Framework

In order to understand corruption as an internationally organized crime, it is pertinent to study the legal regime in the milieu of a corruption ridden economy of a developing country. Pakistan present a relevant case study because the last three years after the Panama Leaks have been very intense in Pakistani politics and apex judiciary in the South Asian region. Pakistan, lately sought MLA from states for investigation, evidence collection and recovery of proceeds of corruption, through treaty or without treaty, established mechanisms for exchange of information and reciprocity. Nevertheless, anti-corruption initiatives of Pakistani governments have not borne fruits of recovery of stolen assets or extraditions of accused of crime of corruption. In order to identify the concrete basis of these failures, the next section of this paper would probe the legal and institutional framework in Pakistani regulating MLA, asset recovery and repatriation, and extradition regime.

In addition to bilateral or multilateral MLA treaties, as discussed in the previous sections of the paper, recovery of proceeds of corruption can be sought on the grounds of 'Reciprocity.' Reciprocity could not strike a workable balance for Pakistan being economically weak with its own stolen assets stashed in foreign jurisdictions while Pakistan has negligible chances of receiving proceeds of corruption and using them as s Quid-Pro-Que for repatriating its stolen assets.

Since Pakistan, doctrinally dualist state, therefore the international obligations arising from treaties are not self-executory; rather given effect in domestic laws through incorporation. UNCAC (2003) ratified by Pakistan in Article 46, is the prime international legal document providing MLA and eradication of corruption through international efforts. While NAO, 1999 in

section 21, provides for the legal mechanism of MLA and the recovery of proceeds of corruption. Chairman NAB, or an authorized officer seek MLAin crimes related to corruption falling in the ambit of NAO from foreign jurisdiction directly without the intervention of the MOI or the Ministry of Foreign Affairs(MOFA). Contrarily, NAB under the existing domestic laws, cannot directly process assets repatriation from abroad or extradition of accused without involving the MOI and MOFA while MOI can execute requests for repatriation of assets abroad. Reciprocity Principle enshrined in the Ordinance authorizes Chairman NAB to directly honor a MLA request received by Director Overseas Wing (NAB Headquarter) from a foreign jurisdiction in cases of corruption, after evaluating the information received(Sherewani, 2009).

Pakistan a victim of corruption of its political elites', despite ratifying UN treaties and domestic legal mechanism remained unsuccessful in recovering assets from foreign jurisdictions or extradition. Despite, the current government's sincere interest in recovering the looted wealth of the state, the repatriation is obstructed for multifarious interconnected reasons.

For Pakistan the foremost obstacle in asset recovery from abroad is absence of sufficient treaty regime since only Bilateral MLA Treaty existed with Kazakhstan however recently Pakistan entered into three more treaties with China, Sri Lanka and Uzbekistan. A relevant fact is that these states are not attractive destinations for hiding looted wealth therefore these bilateral treaties are practically rendered insignificant. This legal gap could be filled by states becoming party to multilateral treaties, for instance UNCAC, 2003 however majority signatory states do not give effect to treaty obligations through transformation of domestic laws. Pakistan doesn't have sufficient domestic legislations to extend MLA as foreign requests can be entertained by MOI through MOFA and not by NAB in the ambit of brief regulatory provisions of Ordinance, 1999.

Pakistan has not been able to bring in a sizeable amount of stolen assets back home so far because of cumbersome investigative procedures, delay in confiscation which benefits the accused in moving the proceeds of corruption to other jurisdictions further complicating the legal procedures of asset recovery. Another problem is applicability of statutory limitation period; Pakistani government requested Swiss government to seize 60 million dollars in Swiss bank accounts after initial conviction by a Geneva Court in a money laundering case against Asif Zardari and his wife Benazir Bhutto in 2003. However, the assets were released to Asif Zardari forming government in 2008 because he had conflicting interest. (Haq, 2012).

Some state jurisdictions does not allow the indigenous lawyers to plead asset repatriation cases forcing requesting states like Pakistan to hire expensive private firms incurring huge expenses. During Musharraf era (2000) Broad sheet LLC Company was hired to investigate secretly stashed properties of Pakistani individuals in USA and UK. NAB in 2003 terminated its agreement with the firm for not being effective in asset recovery while the firm filed a suit challenging negotiated sum of 2.25 million dollar becoming entitled for damages from Pakistan for committing a tort of civil conspiracy by repudiating the agreement (Malik, 2018).

Pakistan, a cash-based economy, therefore chunk of monetary transactions, especially foreign remittances happen through unauthorized means such as hundi/ hawala forcing SC to take *Suo Moto* [Case No.2 of 2018 and Constitution Petition No.72 of 2011] on 1st February 2018.SC expressed disappointment that declaration of such assets, repatriation or imposition of taxes cannot be enforced through lawand foreign currency is siphoned off through unauthorized means without payment of taxes. Since Pakistani authorities could not provide the money trail to legally establish the crime of money laundering in Zardari Swiss accounts case, therefore assets were released to Zardari. (Ali, 2018). A logical reason for absence of MLA treaties and lack of efforts for repatriation of stolen assets is concealed interests of political elites; a glaring example is the malafide delay in the bilateral treaty on the exchange of information and elimination of double taxation by Pakistan in 2005(enforced in 2008)(Khan, 2016). On the basis of Organization of Economic Cooperation and Development (OECD) model, in 2014, Pakistan sought an updated version of article providing exchange of information, the draft was reviewed and initiated, which would have enabled the two states to exchange information in 2015. Interestingly, the federal government of Pakistan chose to revise and renegotiate the treaty in 2014 September but left the ratification suspended (Ali, Khan & Khalid, 2016) till May 2017. Therefore retrospective effect could not be given, a protection sought by the Nawaz Government (Abbasi, 2018) with ulterior motive to transfer untaxed and stolen wealth from Swiss accounts into new jurisdictions, nonetheless the criminal liability for purportedly causing revenue losses could not be placed. SCin *Mobashir Hassan and Others Vs. The Federation of Pakistan and others*,2010 declared the National Reconciliation Order *void-ab-initio*, reopening domestic and international litigation against corrupt, while strongly condemned then Attorney General Malik Qayum who in *ultra vires* of his constitutional role laid in Article 100(3) 1973 Constitution furthered the interests of Zardari. He caused millions of dollars loss to national exchequer, by withdrawing MLA request citing no irregularity in contracts(kickback allegation)abandoning the status of civil party

causing termination of all corruption proceedings including Zardari, who under Bhutto government(1994) was accused of receiving kickbacks in contracts regarding inspection of Pakistani cargo goods awarded to two Swiss companies. SC ordered federal government(People's Party) to declare all the unconstitutional actions of highest law officer void but government malafidely refused to act against Malik Qayum. Prime Minister Gillani was convicted for contempt of court and therefore removed from Office, for blatantly ignoring SC direction to renew MLA request and revival of Pakistan status as a civil party before the Swiss judiciary. Failure in filing an appeal played outin December 2012, when Attorney General Farooq Naiq, requested Swiss authorities for reopening Zardari case but was refused on the basis of estoppel in Swiss courts(Ahmed, 2013).

Another important reason for failure of asset recovery is delayed request for MLA due to lack of institutional coordination at domestic level, and judicious entry of accused names on Exit Control List(ECL), enabling corrupt accused to transfer stolen assets to other safe havens; before the competent authorities confiscate those assets. Streamlining anti-corruption mechanism is crucial to detain and investigate the suspects within Pakistan forcing cooperation for evidence, prevent the transfer of stolen assets abroad by ensuring the money trail for all the transfers of wealth, instead of relying on more expensive, complicated methods of seeking MLA and extradition of suspects from foreign jurisdiction.

However, the political government directly controls MOI, thus demonstrated malafide intentions by not honoring NAB requests to place the names of accused on ECL, case in point, Panama Leaks Case.NAB request to MOI for placing Sharif Family members names and Dar in ECL(2018) was turned down on the grounds that ministry would only be liable to act on the accountability court orders (which is not a procedural requisite).Obviously, the government protected individual interests of its party leaders and instead of following the standard procedure of MOI committee deciding on names entry into ECL, instead the Prime Minister Shahid Khaqan, refused to place the names of accused on ECL.

A report in *Touqeer Sadiq Case(2013)*[Constitutional Petition No.42 of 2011] revealed, the Chairman Oil and Gas Regulatory Authority, under detention in NAB headquarter with arrest warrants issued, facing a commission constituted by CJ Jawad S. Khawaja, was allowed to abscond to Dubai (Via Kabul)by Director General under the alleged directions of Chairman NAB (NAB held responsible, 2015). This lends discredit to NAB's independent role while other institutions such as senior judiciary also is not absolved of criticism. Accused Shahbaz Sharif, also an opposition leader filed a petition to Lahore High Court for removal of his name from ECL, after a favorable decree fled to London. NAB

investigations were frustrated as he resigned from the office of opposition leader, showing no intention of return to Pakistan.

NAB [Letter No.3-1(1)(1)/L/NAB. Dy. Dir (ECL) dated February 16, 2018] requested MOI to place Dr. Amjad name (facing criminal proceedings) to be placed on ECL in *Eden Garden Case*, the mega housing project involved in multibillion fraud and a subsequent request to Director General Passports and Immigration (falling under MOI) for passport cancellation lest accused Amjad and others abscond.MOI remained negligent allowing the accused and his family members to abscond to Canada. In Sept 2018, FIA and Interpol by issuing Red Warrants arrested co-accused, Murtaza (Son-in-Law of Ex-CJ, Chaudhry Iftikhar) from Dubai, but released by three-member SC bench headed by CJ Saqib Nisar for want of more substantial evidence. (Iqbal & Tahir, 2018).

In-addition to SC leniency, the Accountability Court's declaration of 'proclaimed offender'(Sept 12,2018) was challenged by wife of accused Murtaza (daughter of Ex-CJ Iftikhar Chaudhry) (Cheema, 2016) before a two-member bench of Lahore High Court which set-aside the said Accountability court order.
Major lacunae, the lack of institutional and legal collaboration in Pakistan which lends ambiguity to the responsibility of institutions; pertinently under the Extradition Act 1972, an extradition cannot be requested for the offence of money laundering in addition to NAO.

The first law regarding money laundering, the Anti-Money Laundering Ordinance 2007, was succeeded by the Anti-Money Laundering Act 2010.Drawing the legal link, the offences laid under section 9 Ordinance are scheduled offences under Anti-Money Laundering Act(2010), where the authority to investigate and subsequently prosecution is vested in NAB, FIA or Anti-Narcotics Force or any other body for the time being notified by the federal government. The legal glitch is that NAB can only act as an investigative or prosecuting agency if notified by Federal Government; in the absence of which the FIA is vested with competent authority to investigate and prosecute money laundering by virtue of money laundering being a scheduled offence laid in FIA Act, 1974. These investigative and prosecution power is not vested with any other law enforcement agency provided in section 2(j) of the Anti-Money Laundering Act 2010.

The next section would specifically discuss anomalous criminal proceedings in a mega-corruption case, Panama Leaks in Pakistani Politico-legal history, which might have been the possible outcome of the legal and institutional manipulation detailed in the previous section.

Panama Leaks

Panama papers leaked by International Consortium for investigative

journalists in April 2016 revealing the prime-minister Nawaz Sharif, Shehbaz Sharif and their childrens' link with offshore companies. Pressurized by the opposition parties, the government requested to the CJ Anwar Jamali, to form judicial commission under Commissions of Inquiry Act 1956 to probe the allegations leveled against the Sharif family in International and national newspapers. However, the SC declined the request vide letter to Chief Secretary Ministry of Law and Justice citing reasons that Formation of Commission of Inquiry under the Pakistan Commissions of Inquiry Act 1956 would be toothless, the letter was open-ended without specifying the terms of reference or the names of persons to be inquired. CJ wanted a special legislation for this inquiry, however the government and opposition parties could not agree on terms of reference for the proposed law and formation of inquiry commission. During this political grappling between political parties, the Pakistan Tehreek Insaf (PTI) took the case to SC in the ambit of Article 184(3) of the 1973 Constitution for Sharif's disqualification from office and also National Assembly. Interestingly, NAB Chairman despite having wide investigation powers through *suo-moto*, remained nonchalant during the entire episode and did not initiate any criminal investigation proceeding against the Accused Sharif family.SC Judgment of 20 April,2016 in the case *Imran Ahmed Khan Niazi Vs. Mian Muhammad Nawaz Sharif & 9 Others*, PLD 2017 SC, expressed disappointment that, all relevant agencies NAB,FIA, the regulatory body FBR, State Bank of Pakistan, Securities and Exchange Commission of Pakistan(SECP) and Speaker National Assembly despite being the competent redress forum did not perform their duty exhibiting subservience to successive governments depicting intense politicization and absence of independence. Chairman NAB came up with the lame excuse to SC that it waited for action of other regulatory bodies, whereas section 18 Ordinance provides that Chairman NAB can initiate an unrestricted criminal proceeding. .Chairman FBR, responded that there are separate laws and investigation agencies for intervening in money laundering cases, thus inaction on part of regulator (Khan, Rethi & Szegedi, 2018).

This paper highlights a pertinent legal point that a statutory limitation on NAB, prevents it from investigating corruption cases prior to 1985, though this limitation was not particularly pleaded before SC. However the other investigative agencies were not under statutory bars, yet they also remained impassive. The money corruption under Panama Leaks dated back to 1972, though Sharif admitted having assets abroad but failed to prove cash out-flow from Pakistan via authorized legal channel. This implies corruption as a means to own assets abroad falling under the offence head, *assets beyond the known sources of income* but also violates the Foreign Exchange Regulation Act 1947.

Institutional inaction and legislative lacunae led to constitutional petitions being heard by five-member SC bench in November 2016, under Article 184(3) and 187(1) as Public Interest Litigation, a rather liberal interpretation of fundamental human rights of people of Pakistan under chapter no 1, part II of Constitution. SC jurisdiction is criticized for lacking statutory and constitutional mandate and liberally interpreting the jurisdiction under Article 184(3) to be inquisitorial and not adversarial therefore SC could collect, ascertain and determine facts involved in these petitions. This bizarre interpretation within the existing legal system is inquisitorial and further justifying exercise of jurisdiction that alternate remedy is not available to petitioner since Speaker National Assembly had already shown bias in previous election petition under Article 225 of the Constitution. This paper suggests that SC would have been better off by referring the Panama corruption case to NAB with strict orders of due investigation into the corruption charges and the question of disqualification of Sharif under 62(1)(f) to Election commission of Pakistan for consideration.

SC verdict in April 2017,on Sharif disqualification, instead of forwarding the matter to investigative agencies, unprecedentedly ordered the formation of Joint Investigation Team(JIT), a controversial move in existing accountability regime, headed by Add.DG, FIA Wajid Zia, consisting of five other members, Amir Aziz, MD State Bank Pakistan, Bilal Rasool, Executive Director, SECP, Irfan Mangi, DG NAB, Brigadier (retired) Nauman Saeed, Director ISI and Brigadier Kamran Khursheed (MI).This work specifically mentions the members' organizational affiliations to clarify the novelty of the investigation procedure framed for corruption cases. The JIT was constituted by three-member SC bench called JIT implementation bench, which submitted its report to SC in July 2017, leading to disqualification of Sharif from office. Another unprecedented move was SC orders to NAB, to file three direct references against Sharif, his sons, daughter and Ishaq Dar in Al-Azizia Steel Mill, Avenfield Apartments and Flagship investment Offshore company, whereas the accountability court sentenced Sharif and his daughter to fines and imprisonment in these references.

SC superseded an equipped institution,(NAB) for investigation of crime of corruption by picking individuals (of choice)for JIT from existing institutions distrusting the Chairman NAB. SC, without any statutory provision set the terms of reference for working, powers, time-frame and finances of the JIT as a onetime arrangement.SC argument in support of JIT was that this case needed a broader pool of experts for investigation, though under different statutory provisions of NAO these powers were otherwise available to NAB.

SC vested vast powers in JIT with clear direction to all executive authorities to extend complete cooperation in investigation, empowered with all the enabling provisions under the Code of Criminal Procedure 1898, the FIA Act 1974 and NAO 1999. JIT was time-barred to complete investigation within sixty days and its progress after every fifteen days was over-seen by SC implementation bench and authorized to seek assistance from (domestic/foreign) experts and institutions to investigate offshore assets of the Sharif family. Ordinance in section, 21, 27 and 28 vests NAB with all these powers, yet JIT was specially formed for this case.

Frustration of Criminal Procedures in Panama Case

This work would now further expounds on how the criminal proceedings were contrived to achieve the desired objective of convicting Sharif Family**.** SC acted as the court of instance(trial) instead of Appellate Court depriving the accused of the fundamental right to appeal. Secondly the liberal interpretation of the Constitutional provisions to assume un-mandated power can lead to misuse of SC jurisdiction in future.

Any investigation under the Code of Criminal Procedure or FIA Act, can only proceed if a formal first information report(FIR) is necessarily lodged; therefore technically no investigative procedure could be followed in this case in the absence of FIR against Sharif Family. Contrarily, an investigation under NAO Section 18 (b)(ii) can only be initiated on receipt of a complaint or government reference under section 18(b)(i) or Chairman NAB *suomoto* action under section 18(b)(iii); but no recourse was made to any of these available procedures.

Complaint Verification under section 18(c) of NAO to *prima-facie* authenticate the allegation against accused is the primary stage; 'inquiry' to collect evidence, arrest of an accused while granting the right of 'Voluntary Return of Stolen wealth' to evade criminal liability is the second step.

The third stage being investigation after Chairman NAB formally approves whereas the accused can still avail 'Plea Bargain' option; however these four procedures were sidestepped in this particular case. Consequently, neither JIT could exercise full investigative powers like arrest nor the accused could avail the options of Voluntary Return(section 25(a)) or Plea Bargain(section 25(b)), though these options are under ordinary circumstances are available to common citizens.

SC judgment violated section 18(d) of the Ordinance which exclusively envisages investigation powers for Chairman NAB or any agency authorized by him.SC surprisingly ordered Chairman NAB to file three direct reference against accused violating section 18(a)NAO vesting special authority in Chairman to initiate inquiry on the grounds of evidence(section 18(g)) or altogether drop a case

thereof; which means Chairman NAB was stripped of his statutory rights and discretion.

In the Criminal Procedural Laws of Pakistan, SC implementation bench as a watchdog for investigation in corruption case and appointment of sitting SC judge to oversee filling of reference by NAB is a bizarre innovation, neither recognized under the Code of Criminal Procedure (1860) nor FIA Act(1974) or NAO. This unique case in the legal history of the country resulted in violation of the fundamental fair trial rights of Sharif family. Though it is very relevant to assume here that this institutional and legal manipulation was the result of failures of the governments to bring back stolen wealth through complex procedures in the absence of money trails in the past.

The important question is that what alternatives are available to Pakistan, if adopted would help to address the existing challenges in the domestic legislations and the international law. The previous sections of this article clearly discussed that international anti-corruption regime goes hand in glove with domestic anti-corruption initiatives because no domestic initiative of a state can succeed independent of international legal framework and cooperation in good-faith.

Since there is a lot of room at international level for meaningful state cooperation and legal regimes need to be augmented for smoother mechanism, but domestically Pakistan can adopt best practices prevailing in foreign jurisdictions to strengthen the anti-corruption initiatives at home.

Recommendations

This paper would suggest an advantageous way forward for Pakistan with Switzerland, a favorite destination for corrupt offenders to stash illegally acquired money to seek tax information on Swiss Banks account holders, by availing one of the two methods.

The information if required by foreign tax authority, would be provided through administrative assistance under bilateral double taxation treaties. Contrarily, any information sought for criminal proceedings, would be provided through treaties providing MLA or the Federal Act on International Mutual Assistance in Criminal Matters.

Bilateral double taxation treaties with foreign jurisdictions until recently sought limited assistance in suspected tax frauds, not extending to tax evasions. On the standards of OECD, in 2009, Switzerland withdrew reservation to Article 26 of OECD Model Tax Convention which previously allowed Switzerland to ignore requesting state's domestic law criminalizing tax evasions by declining

requests received for exchange of information. Article 26 provides for exchange of information upon special requests extended by state parties' to implement tax convention and enforcement of domestic tax laws, consequently Switzerland relinquished the legal distinction between tax evasion and tax fraud providing information to contracting states who renegotiated Double Taxation Treaties. Pakistan in 2005 (Hussain, 2005) initially entered into a bilateral treaty with Switzerland based on older mechanism of information exchange, subsequently into the revised treaty on avoiding double taxation wherein the article 25 providing exchange of information has been amended to extend to banking informationvide notification of Federal Board of Revenue SRO No. 187(I)/2019.The revised legal scheme prevents the contracting states from withholding information behind the legal cover of strict secrecy laws in banking and financial institutions. Furthermore, the Swiss government introduced Tax Administrative Assistance Act 2012, to comply with OECD Convention and regulate the execution of administrative assistance accordingly which otherwise is subject to domestic law (Giroud & Nadelhofer, 2012).

Pakistan and Switzerland, both ratified the OECD Convention on Mutual Administrative Assistance in Tax Matters,a powerful international tool to prevent illegal financial flows.

In Sept 2016, Pakistan, ratified the said Convention, signed by 129 jurisdictions globally has become an effective legal bulwark against offshore tax evasion. Consequently, now FBR has the authority to gain actionable information regarding offshore assets and tax evaded accounts of Pakistani nationals rather it also provides for illegal asset recovery using the mechanism provided under the UN Convention Against Corruption/Another useful example for Pakistan is The Unexplained Wealth Order, basically a UK High Court Order, an anti-corruption mechanism introduced through Criminal Finance Bill, 2016, Part-1, requires suspect to explain source of income utilized to acquire certain property. Individuals suspected of serious crime such as money laundering, bribery and corruption scheduled in Part-1 of Serious Crime Act 2007 and also politicians and officials (not suspected of serious crimes) from outside the European Economic Area can be summoned through Order, a civil action applied by National Crime Agency, the Serious Fraud Office and the Crown Prosecution Service, it has proved to be a game changing enforcement tool against assets beyond means(Faisal & Jaffri, 2017).

UK discouraged the illegal flow of assets from under developing countries therefore the corrupt individuals would not be able to benefit from the existing legal lacunae in UK under which legal action against suspicious wealth is prohibited unless legal conviction is secured in the country of origin which brings

the entire process to square one. Despite shortcomings, the advantages are evident as in 2018, the first Unexplained Wealth Order was issued to *Zamira Hajiyeva*, wife of *Jahangir Hajiyeva*, former chairman of the International Bank of Azerbaijan, serving jail on allegations of stealing millions from the said bank (Casciani, 2019).

Pakistan can also benefit from another international forum for investigation and asset repatriation of proceeds of corruption, 'The Stolen Assets Recovery Initiative' (StAR) a partnership between the UN Office on Drugs and Crime and the World Bank. This platform facilitates the developing countries in establishing contacts with different jurisdictions but also assists in developing institutional expertise to trace stolen assets.

In the absence of formal international instruments, MLA provisions if inserted in domestic legislations would enable the states to assist each other in evidence collection in crimes of corruption. Pakistan commendably and uniquely incorporated such provisions in its anti-corruption legislation as Section 21 of NAO provides for MLA. Pakistan can benefit from such enabling provisions for assistance from other jurisdictions.

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