

POLICY BRIEF

Analysis of the anti-corruption Rules

Analyzing the system gaps with key focus on
Prosecution; and areas of improvement

Presented by:



Accountability Lab is a think-tank working to bring positive changes in governance structures making them more transparent, accountable, and responsive to the needs of the public.

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Executive Summary

Rules are the lifeblood of the organisations. Anti-corruption agencies (ACAs) specially rely on rules for both fairness and efficiency. The rules are both formal and informal. Both types of rules have significance for facilitation, transparency, protection and accountability. Defining of structure, laying out of powers and describing the functions are some of the main features of the rules. Effective and active rules result in improvements in the ways of working and the efficiency of any organisation. The agencies having either no rules or rules that work as road-blocks end up dysfunctional in their working while the functional organisation are able to get maximum output from minimum inputs due to formal and result practices adopted by the entire team.

The rule making process is generally continuous, consistent and consultative but in the case of our ACAs, is marred by high and low intervals in which the Anti-corruption movement is high and low respectively. Resultantly the rules tend to have features of arbitrariness, centralisation and rigidity. The overall system thus also suffers as a result and is embodiment of number of gaps showing the dichotomies within the system in which the ACAs are operating. These gaps are more pronounced in the areas of politics-enforcement, law-practice, eco-system, investigation-prosecution and institutional gaps. To bridge these gaps, better rules and better prosecution is needed. Better rules are those which are expansive, flexible, progressive and

relevant and balanced. Amongst the gaps, the police prosecution is the most significant and most pronounced due to the issues of professionalism, ownership, trust and coordination. There can be number of models through which these issues can be addressed like the bridge, the insider, the hybrid and the pool.

A. Anti-corruption Rules: concepts, definitions and objectives

Anti-corruption rules imply two concepts.

a. Rules as delegated (subordinate) legislation

Rules in the legal sense are used for the sets of directions and instructions formally called as such with capital R, and are issued under the authority of an act or legislation enacted by the parliament. While the laws are the domain of legislature, the Rules are issued by the government or the authority specified in the law to have the power to issue Rules. Thus such Rules have the power of law and are accepted by the courts as delegated or subordinate legislation. The examples are the Police Rules 1934, High Court Rules, CDA Rules etc.

b. Rules as processes and practices

Rules in the institutional sense would mean the processes and practices which become institutionalized in any organisation and become a norm or convention. As compared to the formal Rules, these will be mere rules. In common parlance, the rules of game is an expression used to denote such norms and practices which are not legally binding but are part of the organizational culture nonetheless.

Significance of Rules in ACAs :

Rules are lifeblood of any organisation, system or department. The law or the original design provides the structure but the rules lead the functions. Any institution work under a system and the rules define that system. Without rules both formal and informal, the system either becomes choked or free floating; both the situations are undesirable for rule of law and justice.

Rules are hall-mark of a functional system and ensure efficiency and productivity. A functional system thus provides maximum output for a given input while dysfunctional system does not produce desired output no matter how many inputs are pumped into it. It may also be the case that the rules are either absent in a dysfunctional system or may be part of the problem for being rigid and backward looking.

Purpose of Rules in Anticorruption Agencies (ACAs):

The rules fulfill multiple purposes of fairness, facilitation, protection and oversight. In ACAs, they have special significance as their operations are called into question in the courts of law. The judicial oversight is necessitated by the demands of the targets of Ant-Corruption i.e the accused for being mistreated at the hands of law. Furthermore, the rules are necessary on the fairness principle. Anti-corruption action does not just involve criminal prosecution but also results in deprivation of someone's liberty, property and reputation. Such authority cannot be allowed to be

exercised without the minutest details of operations being governed by the formal rules.

ACAs' main function is the investigation and collection of actionable evidence. The system has to be watertight and fool-proof with respect to the procedures and processes of investigation. Formal rules ensure that there is no room for discretion and inconsistency in the working and functions of agencies. Rules are thus a protection against the power and interference in the investigation functions.

Law enforcement rules take time to be developed and also take time to fade away. The Police Rules which govern the working and operations of Police departments in the country were fully developed after the gap of 70 years after the enactment of Police law. ACE and FIA Rules also took time to be developed and have been subject to number of versions. NAB is still without rules but that does not mean that it operates without any guidelines. The internal rules or SOPs in NBA are quite elaborate and over two and half decades, the practices have also become streamlined.

Another important feature of ACA rules is the high and low cycles of anti-corruption movements in the country. There have been times when the anti-corruption becomes a priority and the enforcement becomes active. Legislation also starts springing in such periods including the rules. On the other hand, there have also been quiet or lean periods when it comes seeing not much activity. The recent proliferation in ACE rules also have got a

lot to do with the autonomy given to provinces post-eighteenth amendment, leading to almost every province coming up with their own law and rules.

Three anti-corruption agencies (ACAs) of the country will be the focus of this brief. A short introduction and the status of their formal and informal rules is as under:

S#	Organisation	Jurisdiction	Year set up	Law	Formal Rules	Informal rules
1	National Accountability Bureau (NAB)	Federal & Provincial	1999	National Accountability Ordinance 1999	No Rules. Standing Operating Procedures (SOPs)	Yes
2	Federal Investigation Agency (FIA)	Federal only	1974	FIA Act 1974 Prevention of Corruption Act (1947)	FIA (Inquiries & Investigations) Rules, 2002.	Yes
3	Anti-Corruption Establishments (ACE)	Provincial only	1956	ACE Ord 1961 PCA 1947	Punjab ACE Rules 2014 Sindh Enquiries & Anti-Corruption Rules 1993 KP ACE Rules 1999 Balochistan Enquiries & AC Rules 2011	Yes

Salient Feature of the formal Rules at the ACAs

1. Powers

Rules generally contain procedures to exercise powers with the organisation and its members. These powers are further divided into following categories.

- I. Power to call information
- II. Power to initiate the process of enquiry or investigation
- III. Power to arrest or detain an accused

- IV. Power to attach or seize property
- V. Power to prosecute the case in the court

2. Composition of the ACA

The Rules define and explain the hierarchy of the organisation, the ranks and officers, their recruitment and training etc. Some organisations have

separate Rules of administration and Investigation while few have composite Rules covering all the aspects of the organisation.

3. Collection of evidence

The investigation and inquiries are in the true essence collection of evidence. The evidence comes in various forms and each requires a process through which evidence is explored, collected, stored and presented in the court. Most important of the evidence is the one collected from the witnesses, called as statements. The process of collection of evidence has certain sanctity attached to

it for the transparency and dispensation of justice. Chain of custody and handling of evidence thus becomes matters of paramount importance in the eyes of law. At the same time the law cannot cover every eventuality. Formal and informal rules are thus devised and evolved to cover the various possibilities which can arise in the collection and handling of evidence, and these rules thus become essential to the whole process of law.

B. Analysis of Rules; Process, trends and common themes

Rule-making process;

The rule making process especially in the cases of ACAs is irregular and inconsistent. The premier and most powerful ACA i.e NAB still doesn't have formal rules. The other two ACAs had number of rules but the process has been fraught with long gaps in which nothing happened and the suddenly the rules were issued without much consultation when the opportunity arose. The instances of the window of opportunity have also been limited because the rules are formally approved by the government through the ministry of law and the concerned ministry like home or interior and takes sometimes years to get through.

Another chronic issue is that of expertise in rule making. The rule making involves drafting, legal reasoning, criminal law, judicial precedents and the specialized subjects like finance and knowledge of related laws. Sadly such comprehensive expertise has been rarely available in the government sector and so often the rule

making is out-sourced leading to sub-optimal outcomes.

It must also be highlighted that rules are one step of the delegated legislation which does not stop with the drafting or enactment of rules. There are further administrative directions, instructions and orders. Normally standing orders and regulatory orders are issued in the government departments. All of these should be ideally issued after due diligence and thorough process while keeping in the view the syncing of law, rules and judicial precedents in one link. The more common practice is issuing of SOPs (Standard Operating Procedures) which tend to be issued in isolation and without regards to the legal mechanics.

Rules of the ACAs, both formal and informal convey certain themes which arise after the analysis. The rules hardly serve the purposes outlined in the previous section. Facilitation, fairness and protection are ensured to an extent but hardly the oversight and accountability are included in the framing of rules. The implementation of the rules is a separate issue altogether but the inclusion of the fundamental principles provides legitimacy and moral strength to the entire process.

Common Themes in the ACA Rules

The present analysis has been carried out after going through the Rules as well as interviewing the former and serving members of the ACAs, lawyers and observers.

i). Centralisation: A careful and thorough analysis of the Rules (both formal and

informal) reveals centralisation of powers and functions. The centralisation has evolved with the passage of time and has reached its peak with the National Accountability Bureau (NAB) with the jurisdiction, arrests, prosecution and freezing powers all vested in the office of the Chairman NAB. The earlier ACAs, the FIA and ACE did have the power concentrated at the top initially through Anti-Corruption Councils but those have been done away through the orders of the higher courts. The trend remains however and though the evidence is collected at the level of Investigator (most of ranks of Grade 16/17), the decision about the fate of the case and important milestones is taken by the senior authority, mostly the Director.

The centralisation is often justified to have better supervision because most of the Anti-Corruption cases involve senior government officials and huge sums of money. At the same time, the concentration of powers at the top slows down the progress of cases and it takes months, even sometime years to have a case even processed at the investigation stage.

ii). Arbitrariness;

Another important trend which emerges in the analysis of Rules and processes is the prevalent arbitrariness in the conduct of investigations. This arbitrariness is reflected in the range of activities; from the selection of cases to prioritization, and is further necessitated by the limited resources at the disposal of the ACAs. The prioritization is also linked with centralisation and the exercise of power

at the top of the ACAs. Not limited to selection of cases, the arrests and punitive actions also do not follow a consistent pattern, thus attracting lot of criticism and also opening the doors for misuse of powers.

iii). Delay in disposal of cases

The Rules and practices seldom include the efficiency aspect. Cases drag for years except for those that are put on rapid disposal due to some interest or the decisions of the authority. One must be mindful that not all the speedy disposal cases are due to vested interest. Often public importance cases like housing frauds, *Umra* scams or cases of similar nature involving public at large attract media attention and are pushed up. However the routine cases, which are invariably in majority remain stuck in the grind for a very long time, creating pain for both the complainants and accused alike.

The ACAs do have reasons for the inordinate delay besides the usual lacks of resources. The more convincing one is the limited availability of only documentary evidence necessary for the AC cases. Anti-corruption cases are complex and broad, and evidence is either hidden or too scattered. Most of the time, the legal acts are also mixed with the illegal activities and become hard to be differentiated. Sometimes, record is not at all available due to the lack of documentation in the economy.

iv). Solicitation and selection

Anti-corruption cases are seldom initiated by a victim who comes knocking

the doors of justice. Law and courts require in the case of old ACAs (FIA & ACEs) that anonymous complaints should not be entertained. This becomes a challenge when the applicants are hardly forthcoming against some powerful public figure. ACAs thus exercise the option of the 'source report' to justify their actions, which always remain questionable and prone to misuse too.

NAB does not have issue of selecting a case legally but the selection often becomes solicitation. Rules have not been able to address the issue of the selection of cases. The newly emerging source of STRs (Suspicious Transaction Reports) have become more transparent and neutral as are the government audit reports into projects and procurement. The Assets beyond means cases still remain biased for selection and open for solicitation.

C. Anti-Corruption System Gaps

1. Politics-Enforcement Gap

Anti-corruption is not an ordinary and routine law enforcement affair but is quite a political endeavor. No matter what the intent of legislature or the pretext is, the anti-corruption actions have political consequences. Two ACAs (FIA & ACE) are directly under the control of the political governments while the third one remains in news for being a source of political actions.

How to fill the gap between the political aspirations and neutral enforcement is one of the biggest challenges for the ACAs. Autonomy is one of the solutions but the experience has shown that just

the legal autonomy is not a sufficient safeguard. The systems where the ACAs have proven to be neutral and impartial, are not just those having the legal cover but strong norms and conventions.

2. Law-Practice Gap

The gap between the existing law and the requirements of the practice is the most common and oft repeated justification for the ACAs staff and members. During the interviews for this brief and in various consultations otherwise with the stakeholders, the members of the ACAs complain about the lack of legal cover and legal powers to nab the white-collar criminals who have elaborate ruses to hide their actions and assets. This is despite the fact that the ACAs enjoy more legal powers than the normal law enforcement and remain a subject of criticism from legal community and civil society.

The demands of the ACA staff withstanding, ACA laws are made in narrow windows during the times of high intensity on antic-corruption front. Alternately, the laws are amended or their impact lessened during the times of low priority. In most of advance countries, the law making is done with long and through deliberations. UK came up with its unexplained wealth order (UWO) and later the economic crime law after detailed examination of issues. Similarly, in US the congress takes time and consults with experts before passing of laws.

3. Eco-system Gap

Every system works within an eco-system. The ACAs have an investigation system powered by the law and rules. But the agency system is part of the larger eco-system or the justice system. To deliver results, the entire eco-system has to operate in unison and not just one sub-system. Justice system has courts in the center of the eco-system with the prosecution and the legal fraternity as the support arm. The investigation system is supported by the government's own sub-systems like audit and finance. Then there are support systems in the private sector like the real estate, financial institutions and the data repositories.

Unfortunately, the sub-systems within the eco-system all operate at their own pace and in their own direction. Their respective developments have also been irregular. Some sub-systems are more structured while the others are still rudimentary. Then the sub-systems when better developed establish silos around them and drop the linkages. Anti-corruption however is never a task for just the ACAs but is a product of networked governance but that network is still far away from being realized.

4. Institutional Gap

The ACA have internal gap when it comes to working of their institutions. The institutional gap is basically the capacity gap which is present in both logistics and human resource. On the logistics side, the biggest gap is in the use of technology and information systems. Then the role of forensics and databases is either non-existent or at very basic level. The other

forms of logistics are the offices, conference rooms, interrogation centers, lock-ups and evidence record rooms etc.

Human resource gap is more pronounced in the old ACAs i.e., FIA and ACE. The position of human resource is better in NAB though not really perfect. Human resource gap exists because of lack of professionalism, training, performance measurement and team building. Motivation and incentives also contribute in the human resource gap. Despite the FIA and NAB being better paid in the public sector, the level of motivation remains low due to number of other institutional factors.

5. Police-Prosecution Gap

Police prosecution gap is most pronounced and most significant amongst the system gaps affecting the working of ACAs. The ultimate test of ACA is in the court where the convictions are awarded, assets seized and properties recovered. Pakistan ACAs score the lowest in any comparison when it comes to convictions, seizures and recoveries. Even the NAB which has access to resourceful prosecution also has many cases faltering when reaching the appeal stages. The blame is laid on the prosecution who has to plead the cases in court.

Prosecution has number of issues which date back to the original setting up of ACAs when scant attention was paid to prosecution. NAB being the later day ACA had an elaborate system for the prosecution but the other two face quiet dismal scenario when it comes to

prosecution. The gap is more obvious when it comes to professionalism, ownership, trust and even the day-to-day coordination.

D. Gaps in the Prosecution of Anti-Corruption Cases

Pakistan being the follower of the common law system has strict distinction between the defense and prosecution and strict neutrality of the court/judge. Legally speaking, the job of prosecution is mainly to assist the court in arriving at the judgment while representing their client i.e the state/government/department. More often than not, the observation comes that the government or the ACA in our case, is in-adequately represented resulting in the acquittals and undue waste of time and resources.

The ACAs have different levels of the prosecution arrangement, with the NAB being the most structured with better paid prosecutors hired from the market. The other two ACAs have to rely on the in-house government lawyers or the public prosecutors who report to the separate department. These arrangements result in the following gaps;

1. Professionalism:

The analysis of the prosecution gap invariably points towards the weakness in professionalism based on the consensus opinion of anyone associated with the anti-corruption cases including the prosecutors themselves. The professionalism gap emerges out of the asymmetric level of legal representation between defense and prosecution. The

defense is invariably better equipped and more professional just like the private sector is more professional than the public sector.

In the legal profession, the experience and professionalism translates into 'standing' which does not mean just the experience in years but the profile that's built over the years in certain branch law through appearing, arguing and defending the cases successfully in senior courts. Most of the ACAs are not able to engage and retain the prosecutors of standing who can actively and successfully represent them.

2. Ownership;

Anti-corruption cases are high stake and high-pressure tasks and demand high pressure involvement. The common observation that emerges from the investigators is lack of ownership from prosecution. This has in turn got to do with the status within the ACAs, with the investigators being the permanent employees and the prosecutors either hired on contract (NAB) or engaged from other departments (FIA and ACE). The lack of ownership or the perception creates a disconnect, and blame game ensues between the two partners who should otherwise be one team.

3. Trust:

Linked with ownership is the trust. The perception of lack of ownership leads to erosion of trust. The investigators feel that their hard-work goes to waste due to the inefficiency and even malafide of the prosecutors, while the prosecutors blame the investigators for lack of

preparation and defending the indefensible in the court. Investigators have routine complain that the prosecutors become their monitors and judge instead of team members while the prosecutors complain of alienation. Overall an environment of mistrust exists on both sides.

4. Lack of Monitoring & evaluation

The antic-corruption cases tend to take even more time than investigation once landed in court. Investigators have only one link to the court in the shape of prosecutors but keeping in view the lack of ownership and trust, the consequence is lack of monitoring and evaluation of under-trial cases. Hardly any follow up is taken on the delay in the court and the reasons of acquittals. NAB has better functioning system of follow up of cases but the FIA and ACEs pay negligible attention to the cases under prosecution.

5. High turnover and work load

Prosecution also faces acute problem of workload just like the investigation. One prosecutor invariably handles hundreds of cases and is hardly in the position to prepare for the case or provide valuable input even if he has the capacity.

E. Areas of improvement; Better rules and better prosecution

1. Better Rules for the ACAs

The better rules should have following attributes

i) Expansive

Better rules extend the scope of the law instead of limiting it. They should not

deviate from the express provision or purpose of the parent legislation or create a new law (excessive legislation) but the better rules should anticipate and cater to the situations arising out in future. The law by its nature is more general and broad cannot include every possibility. Better rules serve the purpose of expanding the scope of law without losing the spirit.

ii) Clear

Clarity is the essence of any effective communication. In law this attains an added significance. Language has a greater role to exhibit clarity. Latin is still considered the clearest language for law just for the reason that it explains the concept unambiguously and clearly. Better rules are drafted in the clearest language and thus leave no room for confusion and ambiguity.

iii) Balance

Rules are made by the ACAs and government so there is always possibility and apprehension for being one-sided in the favour of prosecution. Better rules are devoid of such bias and cater to the needs and expectations of all sides including the defense and prosecution. The balance requirement is linked with the fairness requirement. Fairness is a requirement for the adjudication of cases while the balance is necessary for a well-functioning system.

iv) Flexible

Laws are made in a static environment and tend to be stuck in time. Better rules should have enough flexibility to cater for the occasions and situations which are

supposed to happen in future. Too rigid and narrow rules limit the functions of the enforcement and investigations. The technologies and business processes are changing rapidly as are the techniques and tools of investigations. Better rules should have the capacity to incorporate those changes.

v) Relevant:

Relevance is an essential concept of law when it comes to framing of issues and linking of evidence with the issues. In case of rules, the relevance will ensure the proximity of rules with both the parent law and department functions. Thus, the rules will remain focused to the core areas and will not lead to distraction into the areas which are not of concern to the department i.e., are irrelevant.

vi) Progressive

Too often the rules are made for the requirement occurring in the past. The rule making also consumes a lot of time and the gap for which the rules are drafted is either covered or not relevant anymore. At best, the rules only anticipate the immediate future. Better rules on the hand are progressive and made with keeping the future in mind that is not yet seen or anticipated.

2. Better Prosecution for Anti-Corruption Agencies

i). Better representation

As already discussed, the prosecution's core task is legal representation. Right now, the level of representation has been below par both qualitatively and quantitatively. To start with, the ratio of

prosecutors to cases or to the investigator is on the lower side. Too few prosecutors are found handling too many cases. At the same time the quality of the available prosecutors leaves much to be desired. The quality can only come with better incentives and service structure.

ii). Coordination

Coordination is a chronic issue between investigation and prosecution, in both instances of in-house legal representation and external arrangement, though slightly better in the former case. The coordination does not just mean having an information system but implies meaningful input and mutual consideration. In better systems, prosecution is engaged with the investigation from day one; right from collection of evidence to the presentation in court. The experiment of having both legal consultant and prosecutor separately at NAB has been proven to be effective though the issues of ownership remain.

iii) Ownership

Ownership is the state of mind and is created by a sense of purpose and mission. Prosecutors need to be inculcated with the notion of public service, which does not require extra remuneration and perks. All over the world, those who work in the public sector are moved by the duty, sacrifice and commitment. These attributes even lack in the permanent members of the ACAs and hardly ever considered on the part of prosecution. Ownership is an area

which requires some work but is nothing impossible or unfathomable.

iv). Autonomy

Prosecution is most concerned about their autonomy. The best practice around the world is indeed autonomy and authority of prosecution over enforcement and investigation. The prosecutors in US are elected and thus answerable to their electorate only. In UK, the crown prosecution service is autonomous and has dedicated units for various kinds of crimes. One important area of improvement is the autonomy of prosecution with improved coordination and ownership. Autonomy is also necessary for the professionalism and fairness.

v) Judicial linkages

Judicial system in Pakistan operates on the concepts of neutrality, autonomy and isolation. While the first two are desirable and necessary in the interests of justice, the isolation works against the access and comprehension of the cases which are mostly technical and complicated in nature. An important area of improvement is the extension of prosecution's reach to the judiciary. This can be ensured by keeping the neutrality in the decision of cases by focusing on joint trainings, better coordination, evidence appraisal and guidance on precedents.

3. Policy options with respect to the prosecution gaps

a. The Bridge Model

The bridge model implies that the prosecution serves as the bridge between the investigation and judiciary while being part of neither. Prosecution will thus be independent and autonomous in its actions and will enjoy more credibility and impartiality. Another advance option can be to have private lawyers on retainer and then get their advice as and when required. Government has also set up an entire department who operate as a bridge in the normal criminal cases and just like the hired prosecutors; the major challenge is to maintain the ownership and interest in the cases and not to alienate the investigation.

b. The Insider Model

In the insider model, the prosecutors become employees of the ACA and work under the head for performance and conduct. The investigators prefer such model for the reason that the investigation is able to dictate and have sway over the prosecution. Most of the ACA members are of the opinion that this improves the prosecution because of better ownership and heightened level of trust. The flip side is that courts are not receptive to the prosecutors who operate outside the court system and within the departments.

c. The Hybrid Model

The hybrid model has two sets of prosecutors, one in-house and the others solely for the litigation in the court. NAB follows this model and has a group of legal consultants who advise the cases in-house and another set of prosecutors

who fight the cases in courts. The hybrid model appears the most feasible but is also the most expensive for the quality lawyers on both fronts are hard to come by.

d. The Pool Model

The pool model goes beyond the ACAs and focuses on developing a pool of lawyers outside the agency. The lawyers’ pool will thus be developed in the specialized area of anti-corruption cases and will be engaged on the basis of requirement or on retainer but will be otherwise free to pursue their own practice as well. The pool can be operated as panel as well which can provide advice to the ACAs. The pool model is also an expensive model and requires resources. The other option within the pool model is to have a pool of prosecutors in the public sector who are available to all the ACAs. These prosecutors will be trained and groomed on the ACA cases and will be incentivized better than the normal prosecutors.