India's Janus-faced Approach in Tackling Corruption

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ABSTRACT*

India's approach in tackling the age-old problem of corruption has been Janus-faced. On the one hand, being responsive to public clamour for eradication of corruption of all kinds, grand or petty, India's Parliament has been steadily engaged in legislation commencing with the extension of the powers granted to the war-time Special Staff in 1942 until the enactment in 2014 of the Lokpal and Lokayuktas Act. On the other hand, lawmakers, public servants, and law enforcement agencies, who can count among their lot the vast majority of perpetrators of corruption, have been seeking loop-holes in the law and avenues to avoid punishment.

INTRODUCTION

Combatting corruption has been a challenge in all countries from time immemorial. Kautilya, author of India's classical text on governance titled *Arthashastra* (believed to have been written after 300 BCE and embellished around 200 BCE), is credited with having made the following observations about how difficult it is to detect corrupt public officials: [1]

> *Just as it is not possible not to taste honey or poison put on the surface of the tongue, so it is not possible for the Government servants dealing with money not to taste it, in howsoever small a quantity.*

Just as fish moving under water cannot possibly be found out either as drinking or not drinking water, so Government servants employed in Government work cannot be found out to be taking money.

It is possible to mark the movements of birds flying high up in the sky but it is not possible to ascertain the clandestine movements of Government servants.[2]

British Rule in India[3]

The advent of British rule in India resulted in a radical change in the laws and pattern of governance in much of India. The East India Company, which came to control great swathes of territory, by conquest and deceit, was notoriously corrupt. 'The corruption, venality, nepotism, violence, greed of money of the early generations of British Rule in India', said Jawaharlal Nehru, India's first Prime Minister, 'is something, which passes comprehension'.

It is significant that one of the Hindustani words, which has become part of the English language is 'loot'. As a result of their misdoings, our country was ruined and her people, who were once known for pure and honest living, were forced to do many a mean work to keep their body and soul together.[4]

In 1858 the rule of the East India Company ended after an uprising in 1857, variously described as 'The Great Rebellion', 'Sepoy Mutiny' or 'First War of Independence'. During the rule of the East India Company, disciples of the British philosopher-guru of utilitarianism, Jeremy Bentham strived to make true his proud boast that he would be the 'dead legislative of British India' (Bentham 1782 in Bowring 1843). Thomas Babington Macaulay, the chief draftsman of the Indian Penal Code (IPC) (1860) (Council of the Governor General of India, 1860), was the most prominent English utilitarian in India (Stokes 1959). Macaulay was appointed to the East India Company's ruling council in 1835 and chairman of the first Law Commission. Macaulay noted in his oft-quoted *Minute on Indian* Education (1835:2):

[I]t is impossible for us, with our limited means, to attempt to educate the body of the people. We must at present do our best to form a class who may be interpreters between us and the millions whom we govern; a class of persons, Indian in blood and colour, but English in taste, in opinions, in morals, and in intellect…

This was 'the attitude of English liberalism in its clear, untroubled dawn, and its most representative figure in both England and in India was Macaulay' (Stokes

1959:xiii-xiv). Macaulay's greatest achievement was drafting the IPC. The IPC was enacted on 6 October 1860 and came into operation on 1 January 1862, after Macaulay died in 1859.

The IPC is the longest serving criminal law code in the common law world. It contains the earliest anti-corruption provisions in Indian law. Chapter IX, sections 161–171 of the IPC deals with 'offences by or relating to public servants'. This chapter does not deal with misconduct and abuse of power by the public servant. The IPC defines a 'public servant' as a government employee, officers in the military, navy or air force; police, judges, officers of Court of Justice, and any local authority established by a central or state Act.

Sections 161 to 165 of the IPC deal with various offences of corruption and this is the first step to fight against corruption committed by the public servants. Section 161 of the IPC deals with a public servant; who accepts, or obtains, or agrees to accept, from any person for himself or for any other person, any gratification other than the legal remuneration. Section 162 of the IPC deals with a person; who accepts or obtains, or agrees to accept or attempts to obtain, for himself or for any other person, any gratification, by corrupt or illegal means, to influence a public servant. Section 169 pertains to a public servant unlawfully buying or bidding for property. Section 163 of the IPC deals with a person who accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person any gratification for inducing and by exercise of personal influence with any public servant. Section 164 of the IPC deals with abetment of offence of sections 162 and 163 of the IPC.

Section 165 of IPC deals with a public servant who accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person any valuable thing without any consideration or less consideration. Criminal breach of trust by public servant, or by banker, merchant or agent is covered in Section 409.

Genesis of the Central Bureau of Investigation and the Central Vigilance Commission

Even though the IPC defined a 'public servant' and identified offences that can be classified as 'corruption', the British Raj did not demonstrate any great anxiety about prosecuting its officials for abusing their authority and robbing the public. The onset of World War II forced the Government of India, the chief supporter of Britain's war effort, to draw urgent attention to different forms of corruption prevalent in the War Department.

In April 1941, the War Resources Committees created an outfit called the Special Staff to investigate and check bribery and corruption in various supplying departments. By June 1942 it had tackled dozens of cases. These results were impressive and the Railways were included in the remit of this outfit. The government enhanced its numerical strength, territorial jurisdiction, and gave it a new

name, the Special Police Section (SPS). But there were cases challenging the powers of this organisation to investigate offences, which necessitated the government to promulgate Ordinance XXII (1943) to give a new avatar to the SPS and place it on a firm legal footing.

The 1943 Ordinance gave the anti-corruption entity a new name – the Special Police Establishment (SPE). Its powers were defined and it was authorised to exercise throughout British India the powers and jurisdiction exercisable in a Province by members of the Police Force of the Province. It could investigate the offences or classes of offences committed in connection with Departments of the Central Government, or any particular offence committed in connection with a Department of the Central Government.

The Governor-General promulgated the Special Criminal Law Amendment Ordinance in September 1943 by which three Tribunals were set up to try corruption cases. As a result, the trial of cases took less time and the guilty persons received effective punishment. A new Prosecution Section was added. When the war ended, emergency laws enacted during its duration lapsed but because the anti-corruption record of the SPE was so impressive the government issued a new Ordinance XXV (1946) extending its continuance by six months. The SPE became the Delhi Special Police Establishment (DSPE). The DSPE got full powers to investigate throughout the Chief Commissioner's Province of Delhi, such offences and arrest of persons concerned in such offences, which police officers of that province have in connection with the investigation of offences committed therein. It could reach any area (including Railways areas) in British India–outside the Chief Commissioner's Province of Delhi–for the investigation of any offences or classes of offences specified. But in places outside Delhi, DSPE had to seek permission from Provincial Governments for Governor's Provinces and of the Chief Commissioners in case of the Chief Commissioners' Provinces. The Princely States were kept outside the jurisdiction of DSPE. The Delhi Special Police Establishment Act XXV (1946) confirmed all the provisions of the Ordinance XXII (1946) in full. DSPE was shifted in March 1947 from Lahore to New Delhi. Post-war shortages of essential commodities increased the incidence of corruption with little prospect of the DSPE becoming redundant.

Post-Independence Developments

The partition of British India into India and Pakistan, and independence, in August 1947, posed serious challenges to the governments of both the countries. India found that many of the staff of DSPE opted to be in Lahore and this very substantially depleted the personnel attached to the DSPE. In 1949, the Government of India set up a six member Committee, headed by Justice Sir Bakshi Tek Chand (senior retired judge of the Punjab High Court) to assess the amount of success

achieved by the DSPE in combating corruption and to make recommendations regarding the continuance, strengthening, curtailment or abolition of the DSPE. Following the report of this committee, the Government of India legislatively enlarged the scope of the DSPE to cope with the new situation when new institutions and financial concerns arose and developmental activities expanded. DSPE was empowered to investigate corruption in statutory corporations and entities administered directly or indirectly by the Union government.

In 1953, the Enforcement Wing was added to the organisation, which handled offences relating to breaches of import, export regulations as provided in the Import and Export Control Act (1950) (UGI 1950). The DSPE began to investigate offences under 91 different sections of the IPC and 16 other Central Acts, apart from the offences under the Prevention of Corruption Act (1947) (UGI 1947). In 1956, the state of Jammu and Kashmir, which was excluded from the DSPE's remit hitherto was included, and also the Union territories of Goa, Daman and Diu, in 1962, Dadra and Nagar Haveli and Pondicherry in 1963.

In 1962, in the aftermath of a high profile corruption scandal (Mundhra scandal – see Subramanian 2012), which led to the resignation of the then Finance Minister in 1958, the Government appointed a committee under the chairmanship of Mr K Santhanam (former Minister and Member of Parliament) to:

- suggest measures calculated to produce a social climate both among public servants and in the general public in which bribery and corruption may not flourish;
- suggest steps for securing public support for anti-corruption measures.[5]

In the first of its two reports, submitted in 1963, the Santhanam Committee recommended the creation of a Central Vigilance Commission (CVC) headed by a Central Vigilance Commissioner with considerable autonomy and status so as to consolidate the fragmented anti-corruption work that was being performed by the various Ministries of the Union government. In the Committee's view, the two main tasks of the CVC were: (i) prevention of corruption and maintenance of integrity; and (ii) ensuring just and fair exercise of administrative powers vested in various authorities by statutory rules or by non-statutory executive orders.

In April 1963, the Government set up the Central Bureau of Investigation (CBI) to investigate not only cases of bribery and corruption, but also violations of central fiscal laws, and serious crimes committed by organised gangs and thugs, besides collecting supporting intelligence, statistics of crime, and conducting research to inform policy-making. The CBI drew its power of investigation from the DSPE Act (1946). The number of offences which the CBI was authorised to investigate was widened. It could now deal with most of the major offences covered by Acts relating to corruption – 69 Central Acts and 14 State Acts, and 231 IPC offences. Presently, the CBI has the following eight divisions:

- Anti-Corruption Division
- Economic Offences Division
- Special Crimes Division
- Legal Division
- Technical Division
- Policy and Coordination Division
- Administration Division; and
- Central Forensic Science Laboratory.

Central Vigilance Commission

The CVC was established in 1964. The Santhanam Committee recommended that the CVC be vested with jurisdiction and power, inter alia, to inquire into and investigate: (a) complaints against acts or omissions, decisions or recommendation, or administrative procedures or practices on the grounds that they are: (i) wrong or contrary to law; (ii) unreasonable, unjust, oppressive or improperly discriminatory; (iii) in accordance with a rule of law or a provision of any enactment or a practice that is or may be unreasonable, unjust, oppressive or improperly discriminatory; or (iv) based wholly or partly on a mistake of law or fact.

The Santhanam Committee, in effect, recommended that the CVC should also function as an ombudsman in India, taking cognisance of cases of maladministration as well as corruption. The Government of India ruled out accepting this recommendation and tabled a statement in Parliament stating:

> *The importance and urgency of providing machinery for looking into grievances of citizens against the administration and for ensuring just and fair exercise of administrative power is fully recognised. But it is considered that the problem is big enough to require a separate agency or machinery and that apart from this the Central Vigilance Commission would be overburdened if this responsibility were to be placed upon it, and the Commission might as a result be less effective in dealing with the problem of corruption.*[6]

The CVC advises the Union government on all matters pertaining to the maintenance of integrity in administration. It exercises superintendence over the working of the CBI–the principal investigating agency of the Union government in anti-corruption matters–and also over the vigilance administration of various Ministries and other organisations of the Union government.

Anti-corruption Legislation

The Prevention of Corruption Act (PCA) (1988) (UGI 1988) consolidated the provisions of the Prevention of Corruption Act (1947) (UGI 1947), the Criminal

Law Amendment Act (1952) and sections 161 to 165 of the IPC. The definition of a 'public servant' in this law is broader than that in the IPC. The Act covers 12 categories of persons who are 'public servants' including any person in the service or pay of a local authority; any person in the service or pay of a corporation established by or under a Central, Provincial or State Act; any judge, including any person empowered by law to discharge, whether by himself or as a member of any body of persons, any adjudicatory functions; any person who holds an office by virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election; any person who is the President, Secretary or other office bearer of a registered cooperative society engaged in agriculture, industry, trade or banking, receiving or having received any financial aid from the Central Government or a State Government; any person who is a Vice-Chancellor or member of any governing body, professor, reader, lecturer or any other teacher or employee, by whatever designation called, of any university and any person whose services have been availed of by a university or any other public authority in connection with holding or conducting examinations, etc.

The Act also introduced the concept of 'public duty', which means a duty in the discharge of which the State, the public or the community at large has an interest. The Act prescribed a minimum sentence of six months for offences. If the prosecution proves that specific actions of the public servant implies presumption of misconduct under the Act, a duty is cast upon the public servant to explain his actions, modifying the presumption of 'innocent till proven guilty' to some extent.

Offences and Penalties under the PCA

Various acts of omission and commission defined as offences under the PCA can be broadly divided into the following categories:

- Bribery of Public Servants: [sections 7, 10, 11 and 12 of the Act]
  Section 7 punishes a public servant or a person expecting to be a public servant, who accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act. Mere demand of bribe or agreeing to accept a bribe is an offence. A willing bribe giver is also punishable under Section 12 of the PCA. Public servants who do not take a bribe directly, but through middlemen or touts, and those who take valuable things from a person with whom they have or are likely to have official dealings, are also punishable, under sections 10 and 11, respectively. All these offences are punishable with a minimum imprisonment of six months which is extendable up to five years along with a fine.
- Embezzlement, Misappropriation of Property by Public Servants: [section 13(l) (c)]

Section 13(1)(c) punishes public servants who dishonestly or fraudulently misappropriates or converts to their own use any property entrusted to them as a public servant which is punishable with a minimum imprisonment of one year, extendable up to seven years along with a fine.

- Trading in Influence: (sections. 8 and 9)
  Sections 8 and 9 punish middlemen or touts, who accept or obtain or agree to accept or attempt to obtain, gratification as a motive or reward for inducing by corrupt or illegal means, or by exercise of personal influence, any public servant, to do or forbear to do any official act respectively. These offences are punishable with a minimum imprisonment of six months, extendable up to five years, along with a fine.
- Abuse of position by Public Servants [sec. 13 (1) (d) of the Act]
  Section 13 (1) (d) punishes public servants who abuse their official position to obtain for himself or herself or for any other person, any valuable thing or pecuniary advantage (*quid pro quo* is not an essential requirement). This offence is punishable with a minimum imprisonment of one year extendable up to seven years, and also with a fine.
- Illicit Enrichment of Public Servants: [sec. 13(1)(e) of the Act]
  Section 13(1) (e) punishes public servants, or any person on their behalf, who are in possession, or who have been in possession of pecuniary resources or property disproportionate to their known sources of income, at any time during the period of their office. Known sources of income have further been explained as income received from a lawful source only. This is an important provision, particularly for booking public servants in senior positions because often there are not many complaints against them related to bribe seeking or abuse of official position. This offence is also punishable with a minimum imprisonment of one year, extendable up to seven years, and also with a fine.
- Habitual bribe seekers [sec. 13 (l)(a)and (b) of the Act]
  Section 13 (l) (a) and (b) punishes persons who habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person any gratification other than legal remuneration or any valuable thing without due consideration. They are punished with minimum imprisonment of one year, extendable up to seven years, and also with a fine.
- Habitual middlemen [sec. 14 of the Act]
  Section 14 punishes habitual middlemen or touts, or who pay bribes under section 8, 9, or 12 with a minimum imprisonment of two years, extendable up to seven years, and also with a fine.
- Attempt at Certain Offences by Public Servants: [sec. 15 of the Act]
  Section 15 punishes an attempt at committing offences pertaining to criminal misappropriation of property or abuse of official position by a public servant with imprisonment for up to three years and also with a fine.

Other laws relevant to anti-corruption that are in force in India are:

- Article 311 of the Constitution of India (UGI 1949)
- Prevention of Money Laundering Act (2002) (UGI 2002)
- Right to Information Act (2005) (UGI 2005)

Article 311 Constitution of India reflects a provision in the previous Prevention of Corruption Act (1947) (UGI 1947) that no civil servant can be prosecuted and punished by an authority subordinate to the one which made the original appointment.

Further guarantees are provided for civil servants such as the right to be heard when charged with corruption during the investigation (but not when penalties are being imposed). The appointing authority is empowered to make the final determination whether an inquiry is warranted at all (by giving its reasons in writing). The President of India or the Governor of a State may prevent an inquiry in the name of national security. While this provision was originally intended to protect the civil servants from harassment, it has become a hindrance to tackling corruption because often no consent was given by the appointing authority, or if given, it came too late.

The Prevention of Money Laundering Act (PMLA) (UGI 2002) – amended in 2013 – is aimed at combating money laundering in India with three main objectives – to prevent and control money laundering, to confiscate and seize the property obtained from laundered money, and to deal with any other issue connected with money laundering in India.

The Act provides that whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime and projecting it as untainted property, shall be guilty of offences of money laundering. For the purpose of money laundering, the PMLA identifies certain offences under the IPC, the Narcotic Drugs and Psychotropic Substances Act, the Arms Act, the Wild Life (Protection) Act, the Immoral Traffic (Prevention) Act and the Prevention of Corruption Act, the proceeds of which would be covered under this Act. A Financial Intelligence Unit (FIU-IND) has been constituted as a multi-disciplinary unit for establishing links between suspicious or unusual financial transactions and underlying criminal activities. This entity coordinates and supports efforts of national and international intelligence, investigation and enforcement agencies in pursuing the global efforts against money laundering and related crimes. Through its research and analysis functions, it monitors and identifies strategic key areas on money laundering trends, methods and developments.

The Right to Information Act (RTIA) was passed by Parliament on 11 May 2005 and came into effect on 12 October 2005 replacing the erstwhile Freedom of Information Act (2002). The Supreme Court of India had, in several judgments

prior to enactment of both Acts, interpreted the Constitution to read Right to Information as an integral part of fundamental rights pertaining to freedom of speech and expression. The RTIA provides a procedure to guarantee this right. Under this law all government bodies or government funded agencies have to designate a Public Information Officer (PIO). The PIO's responsibility is to ensure that information requested is disclosed to the petitioner within 30 days, or within 48 hours in case of information concerning the life or liberty of a person.

The RTIA has enabled a number of high profile disclosures about corruption in various government schemes including the public distribution system for subsidised food grains, disaster relief, implementation of national employment guarantee programme, other social security programmes, etc. It is a landmark in the push towards more openness and accountability. The RTIA though has certain weaknesses. There is often lack of speedy appeal against non-compliance to requests. Officials working in close proximity with the government are normally appointed as PIOs. They are likely to be biased in favour of not disclosing damaging information, thereby creating conflict of interest.

India's Anti-corruption Laws: A Critical Appraisal

In September 2010, the CVC released the Draft National Anti-Corruption Strategy (UGI 2010), which deserves more attention than it seems to have received. It contains a thoughtful critique of shortcomings in India's legislative framework. The CVC Act (2003) (UGI 2003) gives the CVC powers to inquire into alleged offences committed by officials under the PCA (1988). The CVC does not have direct powers to investigate and must depend on the CBI for that.

The requirement of obtaining prior sanction of an appropriate authority before any court takes cognisance of an offence by a public servant is a serious limitation. There have been long delays before sanction is accorded. The provision serves to protect public servants though a wrong has been committed because the sanctioning authority is normally a senior officer of the 'accused' officer. A sanction after having been accorded can be challenged at the trial stage and cases have been discharged on the basis that the sanctioning authority had not applied its mind while according sanction. This provision goes beyond the protection offered under the Criminal Procedure Code (1973) (UGI 1973) (which only protects actions in discharge of official duty).

It is desirable to remove the prior sanction requirement in cases where a public servant officer is caught red-handed. A time limit should be prescribed for decisions sanctioning prosecution.

However, the power of public servants in India is vast and strong. Instead of easing up the prior sanction requirements, the Prevention of Corruption (Amendment) Bill–tabled in Parliament in August 2013 (UGI 2013)–increases

protection of public servants from prosecution. The amendment seeks to extend the prior sanction requirement to retired public officials as if they were in office at the time of the alleged offence. The Amendment Bill seeks to delete the entire clause (d) of sub-section (1) of section 13. This section, as noted above, penalises criminal misconduct through abuse of office and other corrupt or illegal means leading to pecuniary benefit either to the public servant or any other person. Establishing *quid pro quo* or giving details of the transaction is not mandatory for prosecution. This section is particularly important in cases of grand or high level corruption. Transactions in such cases are shrouded in secrecy and often the proceeds of crime are paid into banks outside the country and subsequently laundered.

In the case of possession of assets disproportionate to known sources of income, the Amendment Bill proposes two major changes. It places a burden on the prosecution to prove that the said disproportion is on account of 'intentional enrichment by the public servant in an illicit manner' (borrowing language from Article 20 of the UNCAC). It restricts definition of 'known sources of income' to income received from any lawful source. Even under the existing provisions of the PCA, disproportionate assets cases have been difficult to prove.

If these amendments are adopted, corrupt public servants would be able to dodge the law by deliberately concealing facts. Proving there was an element of intention in disproportionate asset cases poses additional burden upon the anti-corruption agencies to prove in the court of law. The inability of the public servant to reasonably explain the source of disproportionate assets in relation to their lawful income should be sufficient grounds for prosecution rather than questioning the intention of the public servant.

Under the PCA, when it is proven that a public servant has accepted any advantage for themselves or another, then it shall be presumed that they did so in return for the improper performance of the public function. This applies to offences related to taking of a bribe, transactions including business proceedings and criminal intimidation. The Amendment Bill changes this provision to include the presumption of wrongdoing for the offence of taking of a bribe only as one of its avowed aims is to protect public servants from the risk of being prosecuted for offences that may be inadvertent and not done with malice aforethought.

The Amendment Bill also seeks to delete section 24 of the PCA. This section gives protection to bribe-givers against prosecution if they made a statement against an accused public servant. Deleting this section will have serious implications on victims of coercive corruption. In trap cases, transactions are allowed in a controlled environment to enable the investigating officer to catch the bribe-taker red-handed. Without the protection of section 24, complainants would hesitate to come forward and depose against the bribe-seekers because they would be liable to be prosecuted as bribe-givers.

Appraisal of the CVC and CBI Performance

The CVC is mandated to deal strictly with public sector corruption at the Union Government level, as opposed to state level. Out of the 36,101 reports of corruption in 2013, approximately 1,300 of them were sent by the CVC for investigation or factual report. However, the government does not always act on the CVC's findings. Between 2005 and 2009, only 6% of cases in which the CVC found corruption were prosecuted by the government.[7]

CVC appears to have little control over the investigations of CBI or over government departments. This is clear given the serious delays in sanctions for prosecution, inquiring into complaints as well as completion of various stages of departmental inquiries.

By giving superintendence to the CVC (as directed by the Supreme Court) over investigations by CBI only in matters falling under the PCA, the government has effectively placed CBI under dual control of the government and the CVC. CBI's investigating mandate extends far beyond corruption cases. CBI also investigates conventional crimes as well as economic crimes, cybercrimes, etc. The Supreme Court had directed that appointment should be made from a panel of outstanding civil servants and others with impeccable integrity. The CVC Act 2003 (UGI 2003), however, mentions only civil servants, without qualifying adjectives, and omits 'others'.

Presently, the CVC oversees the vigilance work of the central government departments and the public sector undertakings within the framework of existing government policy. This is also at variance with the global standards and the requirements of the UNCAC.

The Supreme Court had earlier struck down the 'single directive' that had provided immunity to the senior civil servants from *suo moto* action of the CBI.[8] Government has restored this provision through statute and entrusted the authority of pre-enquiry scrutiny to the secretary of the administrative department. This has diluted the powers of superintendence of the CVC and the CBI. There is a system of dual control over the CBI – one exercised by the CVC in respect of corruption cases only and the other by the central government in respect of all its other work.

Administrative control of CBI by the central government makes it vulnerable to the criticism that the agency often compromises its corruption investigations of government officials. During the last decade, at least four former directors of the agency have been given high-level government positions such as appointments as state governors. There is criticism of CBI high-handedness and lack of sensitivity to loss of reputation of senior members of the bureaucracy against whom it announced inquiries. There have also been selective leaks to the media of material gathered by the CBI in the course of investigation.

In a scathing indictment of the government's deliberate absentmindedness about the CBI's need to be liberated from the limitation of the DPSE Act, Mr GP Joshi (n.d.), former police officer, states:

> *The government's reluctance to enact separate legislation for such an important organisation is inexplicable. The only way one can explain it is that it does not want the CBI to be professionally efficient, transparently fair and impartial in its functioning, working according to the tenets of the rule of law and not according to what the government wants it to do.*

The Lokpal and Lokayuta Act, 2013: A Saga of Several Decades

In 1965, Dr LM Singhvi, an independent parliamentarian in the Lok Sabha made a statement on the necessity for India to establish a powerful institution to tackle corruption and give redress to citizens adversely affected by maladministration. He said:

> *…an institution such as the Ombudsman must be brought into existence in our country. It is for the sake of securing justice and for cleansing the public life of the augean stable of corruption, real and imaginary, that such an institution must be brought into existence. It is in order to protect those in public life and those in administration itself that such an institution must be brought into existence. It is to provide an alternative to the cold and protracted formality of procedure in course of law that such an institution should be brought into existence. There is every conceivable reason today which impels to the consideration that such an institution is now overdue in our country....*[9]

D. LM Singhvi, reportedly reacting to Prime Minister Nehru's remark about *ombudsman* ("*To what zoo does this animal belong*?") indigenised its nomenclature to *Lokpal* and *Lokayukta*.

In October 1966, the Chair of the first Administrative Reforms Commission (ARC), Mr Morarji Desai, submitted to Prime Minister Indira Gandhi an interim report on problems of redress of citizens' grievances (Desai 1966). The ARC recommended creating an authority dealing with complaints against Ministers and Secretaries to Government, designated as 'Lokpal', and other authorities at the Centre and in the States empowered to deal with complaints against other officials, designated as 'Lokayukta'. To give effect to the recommendations of the First Administrative Reforms Commission, eight Bills were introduced in the Lok Sabha from time to time. All these Bills lapsed consequent upon the dissolution of the respective Lok Sabhas, except in the case of the 1985 Bill which was subsequently withdrawn after its introduction. The last three versions of the Bill in 1996, 1998 and 2001, focused only on corruption; defined corruption only in terms of PCA;

defined 'public functionaries' to include Prime Minister, Ministers and MPs; and did not include bureaucrats within their ambit.

The 2011 Bill was forced upon the government and Parliament by the Gandhian-style movement led by Anna Hazare. On 30 January 2011, the anniversary of Mahatma Gandhi's martyrdom, thousands marched in New Delhi to demand an effective Lokpal law.

The 74-year old Anna Hazare, veteran of many previous fasts in a long struggle against corruption in his native Maharashtra state, became the centre of civic attention in India. He fasted in April 2011 and forced the government to include members of his team in a committee constituted to draft the Lokpal law. But the government's draft Bill introduced earlier in 2011 left out the Prime Minister, the judiciary, and the conduct of members of Parliament from the ambit of the new anti-corruption entity and covered less than 0.5% of all public servants.

Anna Hazare threatened to go on a fast again in August 2011. The government arrested him on 16 August and unleashed widespread public anger. Hazare capitalised on the situation and refused to leave jail and continued his hunger strike. Parliament was forced by public opinion to adopt a nonbinding 'sense of the House' resolution agreeing to consider some of the key issues raised by Anna Hazare. But when the Hazare agitation reached a lull, the government again insisted having its way and managed to push its version of the Bill in the Lok Sabha. But it failed to have its way in the Rajya Sabha and the government decided to adjourn Parliament without the Bill having been passed.

During 2012 little was done with the Lokpal Bill except for the proceedings of the Rajya Sabha committee. The United Progressive Alliance government, led by the Congress Party, meanwhile lost assembly elections in Chhattisgarh, Delhi, Madhya Pradesh and Rajasthan, forcing it to yield ground on the Lokpal Bill, accept all amendments adopted by the upper house, and pass the Bill on 17 December 2013 (UDI 2013a). The Lokpal law came into force on 16 January 2014.

In brief, the Lokpal is empowered to investigate complaints against the Prime Minister, other ministers, current and former legislators, government employees, employees of firms funded or controlled by Centre, societies and trusts that collect public money, receive funds from foreign sources, and have an income level above a certain threshold. Bodies creating endowments for or performing religious or charitable functions have been excluded from the Lokpal's purview. Inquiries are to be completed within 60 days and investigation to be completed within six months. The Lokpal shall order a probe only after hearing the public servant. Inquiry against the Prime Minister has to be held in-camera and approved by two-thirds of a full bench of Lokpal. Lokpal will exercise superintendence over the CBI in relation to the cases referred by it. CBI officers investigating cases referred by Lokpal can be transferred without its approval. Lokpal can initiate prosecution through its Prosecution Wing before the Special Court. Lokpal initiated trials are

to be completed within two years. States are expected to set up Lokayuktas by law within 365 days and have the freedom to determine powers and functions of the Lokayukta.

The Lokpal has not yet been constituted. The Lokpal chairperson and its eight members are to be selected by a committee consisting of the Prime Minister, the Speaker of the Lok Sabha, the leader of opposition in the Lok Sabha, the Chief Justice of India (CJI) or a judge of the Supreme

Court nominated by the CJI, and one eminent jurist, as recommended by the other four members of the committee. A search committee of at least seven members was to be constituted to shortlist a panel of eligible candidates for the post of chairperson and members of the Lokpal. This panel would be submitted to the selection committee. At least half the members of the search committee, and of the Lokpal, must be from among persons belonging to the scheduled castes, the scheduled tribes, other backward classes, minorities and women. Some nominees to the search committee questioned the need for a two-stage process and refused to assume the task.

It remains to be seen how the new government, which took office in May 2014, proceeds to constitute a historic Lokpal and get it to function, after its chequered history of failures and bad faith (see Johri, Bhardwaj and Singh 2014).

The Little Done and Vast Undone

In its twilight time (Hegel observed that the owl of Minerva spreads her wings before the fall of dusk) before an impending gloom of defeat set in, the government led by Dr Manmohan Singh managed to get legislation to protect whistleblowers passed into law, but not other complementary laws, including the Judicial Accountability Bill of 2010, Grievance Redress and Citizens' Charter Bill of 2011, the Public Procurement Bill of 2012, the Prevention of Corruption (Amendment) Bill (2013) (UDI 2013b), and the Prevention of Foreign Bribery Bill of 2011.

The last mentioned Bill is important for the process of India's ratification of the United Nations Convention against Corruption (UNCAC). The convention requires its signatories to enact and enforce strong anti-corruption measures, enhance transparency in government, and cooperate in international law enforcement and crime prevention efforts. Among UNCAC's provisions is a requirement that each 'State Party' to the treaty adopts legislative and other measures to establish as criminal offenses the giving to or taking by a public official or an official of a public international organisation, directly or indirectly, an undue advantage, for the official himself or herself or another person, or entity, in order that the official acts – or refrain from acting – in the exercise of his or her official duties, in order to obtain or retain business or other undue

advantage in relation to the conduct of international business. The introduction of the Bill in the lower House of Parliament earlier in 2011 enabled India to ratify the UN Convention on 1 May 2011. Actual implementation of the treaty awaits enactment of the Bill.

CONCLUSION

There is the famous quote attributed to the Roman historian, Cornelius Tacitus (56–117 CE):

> *And now bills were passed, not only for national objects but for individual cases, and laws were most numerous when the commonwealth was most corrupt.*[10]

In simpler form, the more corrupt the state, the more laws! A strong state, Debroy and Bhandari (2011) remind us, does not require more laws; it requires fewer laws that are enforced.

NOTE

* This article forms part of the ACCERUS-BRICs research project – University of Stellenbosch (South Africa) – on the nature and scale of corruption.

ENDNOTES

1 Kautilya refers to no less than forty ways of embezzlement practiced by treasury officers in his time, including, *pratibandha* or obstruction, *prayoga* or loan, *vyavahara* or trading, *avastara* or fabrication of accounts, *pariahapana* or causing less revenue and thereby affecting the treasury, *upabhoga* or embezzling funds for self-enjoyment, and *apahara* or defalcation.

2 All these three quotations from Kautilya are included in a book commemorating the Central Bureau of Investigation (CBI), the institution responsible for investigation and prosecution of corruption cases in India. http://cbi.nic.in/coffeetable/1.pdf. (Accessed on 2 October 2017)

3 For details of legislation in this section see https://books.google.co.in/books?id=QK6CXIlCeEICandpg=PA37andlpg=PA37anddq=india+Ordinance,+XXII+of+1943andsource=blandots=5U7PXPJrbQandsig=Ty9o0YC8bn_OxSu4wDaUNQ72kHAandhl=enandsa=Xandved=0ahUKEwiSh9r057vXAhVMuY8KHabUAoEQ6AEINDAD#v=onepageandq=india%20Ordinance%2C%20XXII%20of%201943andf=false. (Accessed on 14 November 2017)

4 Nehru as quoted in the CBI book, *supra*.

5 See **http://www.yourarticlelibrary.com/essay/corruption-essay/prevention-of-corruption-in-india/44027/**. (Accessed on 6 October 2017)

6 Statement laid by the Government of India on the tables of the Lok Sabha and Rajya Sabha about the scheme on 16 December 1963; Paragraph 3.

7 See Public Anti-Corruption Initiatives (n.d.) Available at **http://www.business-ant-corruption.com/counry-profiles/south-asia/india/initiatives/public-anti-corruption-initiatives.aspx**. (Accessed on 9 November 2017)

8 Directive 4.7 (3), issued sometime in 1986, prohibited the CBI from undertaking any inquiry or investigation against any officer of the rank of Joint Secretary and above in the central government, including those in public sector undertakings and nationalised banks without the prior sanction of the head of the ministry or department. Without such sanction, no inquiry, not even one the CBI calls PE (Preliminary Enquiry) can be conducted. The Directive is applicable to 'any person who is or has been a decision-making level officer'.

9 Dr. L.M. Singhvi's statement in the Lok Sabha on 23rd April 1965, quoted by Dr. Abhishek Manu Singhvi, Chair of the Department Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, in the Fortieth-Eighth Report on the Lok Pal Bill, tabled in both houses of parliament on 9th December 2011. Dr. Singhvi remarks that it ironic that something described as overdue in 1965 was still being considered in 2011.

10 See **https://glosbe.com/la/en/%22corruptissima%20re%20publica%20plurimae%20leges%22**. (Accessed on 4 October 2017)

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