Corruption: Fast Becoming the Rule?

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Corruption is eating into the values on which our democracy is built. It is high time the government deals with the issue otherwise the faith of common man in our democratic institutions will continue to dwindle.

As India takes giant strides in achieving its highest and fastest GDP growth seen in its short independence, an old cancer raising its ugly head once again threatens to derail the striking development that we are in the midst of – the cancer of corruption.

Corruption is universal. It is not limited to India or even other developing countries for that matter. In its numerous forms, corruption exists across humanity. In today's dynamic and ever-changing environment, forms of corruption can and do vary. In its most common forms, 'corruption' includes bribery, cronyism, nepotism and embezzlement. Corruption is the perversion of integrity. Political corruption refers to the use of official powers by government officials for their own illegitimate and private gain.

India is in the midst of its own personal crisis. As the power of media grows, it brings to the fore a slew of facts and instances of such misuse that would normally have been swept under the carpet and remained largely unknown to the common man.

That corruption exists, was widely known to all. However, the quantum and size of corruption that exists today has shocked the common man. That it exists in every decision (rather than the odd one) is now suspected. That it is no longer the exception, but the rule, has made the common man question the very fabric of the country we live in. Upon looking at the shocking degeneration, he asks - "Is there any hope?"

Legislation against Corruption: inherently flawed?

Legislation against corruption in India can be found in the Prevention of Corruption Act, 1988 ("the Act"). Significantly, the Act provides an adequate definition of a public servant and a public duty to encompass most of today's requirements. Amongst other things, the Act specifically provides for imprisonment and/or fine for taking gratification (i) in respect

of any official act (other than legal remuneration); (ii) in order to influence a public servant by corrupt or illegal means; (iii) for exercise of personal influence with a public servant; (iv) abetment by a public servant of offences; (v) for a public servant obtaining, without consideration, a valuable thing; (vi) for criminal misconduct; and even provides for punishment for habitual offenders for offences under the Act.

The Act provides for the prior sanction of the government to prosecute certain cases as well as investigations by police officers not below a designated rank. The trial of an offence must be continued on a day-to-day basis and the procedure set forth under the Criminal Procedure Code, 1973 must be followed.

If that is the case and the legal provisions that are required to deal with this kind of a menace do exist, why is the situation we find ourselves in so grave? Why is the law not doing its bit, as designed? The answer, possibly, lies in its implementation.

Where any offence is punishable under the Act, the Central and the State Government are empowered to appoint Special Judges[1] by placing a Notification in the Official Gazette, to try such offences. That, probably, is one of the fundamental flaws that stand between the Act doing its bit for India, working as envisaged and the state of utter chaos prevailing today. Power in the hands of the Government (whether Central or State) for such matters, appears to be a contradiction in itself! It is no wonder that most of the issues that exist stem from the failure of the government to act in the very first place, in spite of adequate information and being made aware of the existence of such issues. It is a well-established principle of natural justice that no person can judge a case in which they have an interest. The rule is very strictly applied to any appearance of a possible bias, even if, in fact, there is none: After all **"Justice must not only be done, but must be seen to be done"**.

Which brings one to ask a logical question, "Why was this power given to the government in the very first place?" One must appreciate the fact that such power is susceptible to significant misuse, if not utilized in the correct manner. The reason such power under the Act was handed over to the government was, possibly, to prevent its misuse. Thus, in a utopian world, the law is clear and effective. Practically, there exists an issue in its implementation.

WHY APPROACH THE JUDICIARY?

This apparent failure to act by the Government, in spite of adequate information and power, forces the common man to seek redress from the judiciary, which is mainly done through Public Interest Litigations ("PIL"). Due to the failure of the government (the executive) to act as envisaged under the Constitution of India and other prevailing laws, the judiciary is forced to take on the role of a watch dog and, at times, even direct the government to act in a particular manner.

It is pertinent to note that the Constitution of India does envisage such a relationship between the executive and the judiciary, where each arm checks and balances the actions and inactions of the other. The truth in reality is far different and instead of performing their roles as envisaged, this relationship has now assumed the role of a 'turf war', with each arm accusing the other of stepping on its turf at some point in time, a situation never envisaged by the framers of our Constitution. This has led to a seemingly strained relationship between the executive and the judiciary.

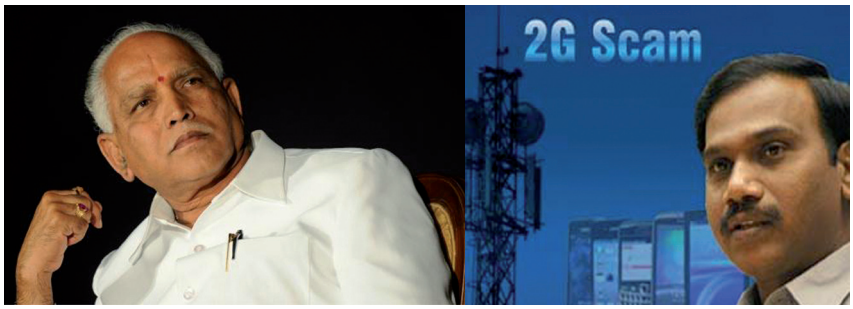
In such a backdrop and the apparent failure of the government to act, the weapon of PIL available to the common man is one that remains significantly under-utilized. For understandable reasons, the judiciary treads cautiously and appears to entertain only those matters which have swelled into gigantic proportions and warrant immediate action. It would not be untrue to assume that there exist a far greater number of smaller matters which remain unaddressed and are passing by unnoticed.

CONSEQUENCES OF THIS INACTION: SCAMS GALORE

There is probably not one Indian, in this country of over a billion individuals, who has not been touched by a scam. Some of them are as under:

a) One hears of ludicrous numbers i.e. 176,379 Crore (US$38.27 billion) as the estimated loss to the exchequer in the 2G Scam, which actually came to public notice when the Indian Income Tax Department investigated a political lobbyist, Nira Radia. It was also alleged that Nira Radia had acted as a spy. Investigations are on in full swing and the fallout has been disastrous. A Cabinet Minister has had to resign and an entire session of parliament has gone by without any work being permitted due to political gimmickry.

b) In the Adarsh Housing Society scam, questions were raised on the manner in which apartments in a high-rise building, located in a sensitive coastal area housing several defence establishments, were allocated to bureaucrats, politicians and army personnel who had nothing to do with Kargil War, which was supposed to be the reason on which the plot of land was allotted for development in the first place! The political fallout of the scam led to the resignation of the then Chief Minister of Maharashtra.



c) B. S. Yeddyurappa, the Chief Minister of Karnataka, was alleged to have (i) used his position as Chief Minister to help his family get certain lands under the MLA quota; and (ii) getting Rs. 40 crore into his son's account for granting a mining lease. After these allegations were made by the opposition, the B. S. Yeddyurappa appointed a committee consisting of a retired judge to investigate this matter.

d) The now well-known Commonwealth Games Scam is currently being investigated by a number of authorities including the Enforcement Directorate and the Central Bureau of Investigation. The Central Vigilance Commission, an anti-corruption agency, has reportedly released a report highlighting financial irregularities in various projects. Preliminary findings include, as expected, (i) award of work contracts at significantly higher prices (ii) poor quality management; and (iii) award of work contracts to ineligible agencies. Suresh Kalmadi, Chairman of Commonwealth Games Organising Committee, was asked to resign as a consequence.

Each scam involves a number of elements including (i) politicians (who are alleged to misuse certain powers); (ii) bureaucrats (who implement and influence policy decisions); (iii) corporations/individuals (who benefit from such misuse of powers); and (iv) shockingly enough, media professionals (who are said to mediate between the politicians and the corporations).

Whilst there is usually no smoke without a fire, in certain cases, it is entirely possible that false charges are trumped up by politicians with a view to engage in confrontational politics and political one upmanship. This, of course, comes at a significant cost. Newspapers today are rife with stories on scams, some conjecture and surmises without any proof, which can cost an honest politician his entire career.

THE SITUATION ABROAD: US PERSPECTIVE

In the United States of America ("United States"), regulation of corruption (public and private) and enforcement of laws applicable thereto require the assistance and collaboration of several government agencies, such as the Federal Bureau of Investigation, the Department of Justice and the Office of the Attorney General. Though the United States has implemented several anti-corruption, anti-bribery and like legislation governing the conduct of private and public individuals, such laws are not without critics commenting on their legal ambiguity, overly sweeping language and constitutionality.

Laws pertaining to corruption are enforced by the United States Department of Justice. The process and procedure of federal criminal cases in the United States are governed by the Federal Rules of Criminal Procedure.[2] Typically, cases commence with an investigation of the alleged crimes conducted by an agency of the government, usually a federal agency. If the applicable district attorney assigned to the case finds that there is sufficient evidence to proceed with prosecution of the defendant, the district attorney's office will seek an indictment (i.e. formal charges) against the defendant in federal court. In the United States, a federal grand jury (of between 16-23 members) hears federal indictments, listens to the evidence and votes on whether to indict the defendant.[3] At least 12 jurors must agree to indict.[4]

While the prosecutor's office is expected by the public to maintain impartiality, sceptics of the process may scrutinize the prosecutor's true independence, however, the grand jury and jury process provides for a level of public participation, so long as the case itself reaches such stages. It seems that currently, the federal prosecutor's office enjoys a reputation of being "free of political influence" but checks and balances on the activities of all government offices should be implemented to the extent not there.[5]

The Constitution:

The framers of the United States Constitution contemplated the need to address corruption within the government as the Constitution itself provides for the impeachment of any officer of the United States, including the President and the Vice President for "treason, bribery or other high crimes and misdemeanours.[6] The Constitution further provides Congress with the sources to enact legislation for fighting corruption at the federal level to address more specific acts of corruption beyond those addressed within the four corners of the Constitution.

US CODE - SECTION 201: BRIBERY OF PUBLIC OFFICIALS AND WITNESSES:

This statute, inter alia, prohibits the bribery by non-public individuals of federal employees and

those "acting for or on behalf of the United States…in any official function.[7] Section 201 of Title 18 applies the same restrictions on all federal employees and criminalizes the offer and receipt of bribes and illegal payments by federal officials.

A "public official" is defined as a Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror.[8]

Interestingly, in Dixson v. United States[9], the Supreme Court stated that the relevant inquiry for determining whether one is a public official is to determine "whether the person occupies a position of public trust with official federal responsibilities", an extremely wide and all-encompassing definition.

Racketeer Influenced and Corrupt Organizations Act ("RICO"): Enacted in 1970, Congress passed RICO to "eradicat[e] . . . organized crime by… establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."[10] RICO provides that it is unlawful for any person, including a public official "employed by or associated with any enterprise engaged in, or the activities of which affect interstate or foreign commerce, to conduct or participate…in the conduct of such enterprise's affairs through a pattern of racketeering activity."[11]

RICO provides for the forfeiture of any interest received in violation of the act, any interest in any business operated in violation of the act and any property "constituting, or derived from, the proceeds of racketeering activity in violation of" the act.

William J. Jefferson, a former Louisiana congressman, well known for hiding US$ 90,000 in cash in his freezer, was sentenced on November 13, 2009[12] to 13 years in prison and 3 years of supervised release thereafter for soliciting bribes through corrupt use of his office[13] as well as substantive convictions of bribery, honest services by wire fraud and a violation of 18 U.S.C. § 1962(c) (a provision of RICO making it unlawful for "any person through a pattern of racketeering activity…to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce").[14]

During his trial, evidence was presented showing that from 2000 to 2005, Jefferson sought and directed "things of value" to be paid to him and his family by using his status as a congressman in the United States House of Representatives in exchange for official acts performed by him to further the interests of the people and businesses (located in Africa) who offered him the bribes.[15] He received hundreds of thousands of US dollars in a wide variety of forms, including stock ownership in companies that sought his official assistance.[16]

ACKNOWLEDGING THE DIFFERENCES: IS THERE A SOLUTION?

A bare perusal of the prevailing scenario in the two countries, both having adequate legal provisions encompassing largely the same issue, will show an altogether different level of success in dealing with the same issue. Whilst it cannot be said that the United States has managed to weed out corruption completely, it appears that they have been far more successful in dealing with it than India.

Why is that? What must India do to ensure that corruption is weeded out of the system? Some recommendations are as under:

- It is apparent that the laws in India, whilst existent, are not implemented due to an inherently faulty system of implementation. This issue requires to be addressed immediately. It is important that the Special Judges under the Act are not appointed by the Central or State governments, but by an independent third party, possibly the judiciary.

- Any investigation under the Act must be completed within a specified time-frame and the investigative process must be overseen by a High Court Judge. Any extension must be applied for and approved by the Chief Justice of India, who must be satisfied on the reasons put forth for the delay. The old adage '**Justice delayed is justice denied' has not arisen out of the blue** and every effort must be made to ensure that completion of any investigation and the resultant prosecution, if any, is quick and efficient.

- Appointment of bureaucrats must be done strictly on merit basis by an independent and separate authority created for this purpose. This will bring in accountability and transparency.

- Investigative agencies like the police and the Central Bureau of Investigation, whilst being operated under the auspices of the government, must be allowed to investigate freely and without any interference. Long-pending reforms for the police force must be implemented which will make

appointments and therefore investigations transparent.

- Effective utilization of Information Technology ("IT") can help identify manners in which corruption exists and therefore, help weed it out. The Ministry of Corporate Affairs and the Income Tax Department have had extensive success after embracing IT.

- Discretionary quotas in various resources given to politicians must be abolished. Land and mines are such resources where tremendous corruption has been alleged. It is wisely said that power corrupts and absolute power corrupts absolutely!

- Stringent penalties existing under the Act must be utilized effectively in order to send out a deterrent effect. The Act should also additionally specifically encompass bribe-givers.

- As more Indian companies venture overseas, the government should consider implementing law similar to the Foreign Corrupt Practices Act, 1977 ("FCPA") prevalent in the United States of America. Interestingly, FCPA has extra territorial effect, which provides an adequate deterrent.

- The government must take steps and enact a law to protect whistleblowers. Confidentiality of the identity of whistleblowers is of paramount importance and failure to maintain such confidentiality would render the whistleblower's personal safety and security in danger. Any person divulging such confidential information must be punished stringently. The Government should consider enacting provisions like the "Witness Protection Program" existent in the United States.

The Right to Information Act, 2005 ("the RTI Act"), represents one of India's most critical achievements in the fight against corruption. The RTI Act entitles a citizen to request information from a "public authority", which is required to reply to such request within a specified time-frame (30 days). The RTI Act has shown that the effectiveness (even of such onerous) obligations is not impossible and the answer lies in the effective implementation of the provisions. An amendment is proposed seeking to water down the provisions. This must not be allowed in any circumstances. Information is key in seeking out corruption.

The fact remains that the above steps may be too little and too late to deal with the issue of corruption as it has evolved to humungous proportions and is now widely accepted as a way of life in India. These recommendations are merely a step in the right direction. The implementation of the above recommendations should enable the tide to turn against corruption and the nation to regain its integrity as a whole over the course of time. One must understand that this is one tide that will not change overnight.

Whilst it would be fair to say that the judiciary is forced to assume the role of a watch dog, recent statements emanating from the Supreme Court point to the rot in the system even enveloping the judiciary. One also now reads of senior and well-respected lawyers pointing fingers at a large number of former Judges including former Chief Justices of India and some current Judges of the Supreme Court pointing to other High Courts to clean up their affairs. Whilst it is fair to say that a Judge must, like Ceasar's wife, always remain above suspicion, we remain in hope of times where we can say that justice was not only done but was also seen to be done. It appears that the judiciary is currently in self-cleansing mode. '

Unless the government pulls up its socks and deals with the issues, the judiciary will have its hands full and PIL's are likely to continue for some time more. The common man now awaits the day where the judiciary has purged the system of its filth and the relationship and the institution that is the government is respected and justice is upheld on the basis of mutual respect and the highest standards of personal integrity and morality.

[1] The qualification for the Special Judge is that he should be or should have been a Session Judge or an Additional Session Judge or Assistant Session Judge under the Code of Criminal Procedure, 1973;

[2] "Defending a Public Official Against Charges of Public Corruption in the United States and The Model Case of United States v. McDonough, William J. Dreyer (American Bar Association publication) (http://www.abanet.org/rol/publications/asia_raca_mr_dreyer_defending_official.pdf) (last visited January 12, 2011), page 7.

[3] Id.

[4] Fed. Rule of Crim. Proc. Rule 6(f)

[5] Id. at note 2.

[6] U.S. Const., Art. III, Section 4.

[7] 92 KYLJ 75 quoting at 95

[8] 18 USC 201(a)(1)

[9] Dixson v. United States, 465 U.S. 482, 496 (U.S.)

[10] United States v. Turkette, 452 U.S. 576, 589 [1981]).

[11] 18 USC 1962(c)

[12] Note: an appeal filed by Jefferson on November 15, 2010 is pending.

[13] Press Release, United States Department of Justice, November 13, 2009 (09-1231), http://www.justice.gov/opa/pr/2009/August/09-crm-775.html (last visited January 10, 2011).

[14] Id.; William J. Jefferson Appellate Brief, Case No. 09-5130, United States Court of Appeals for the Fourth Circuit, filed November 15, 2010; 18 U.S.C. § 1962

[15] Id.

[16] Id.

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