Policing Corruption

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The word 'corrupt' is defined in the Twenty-first Century Dictionary as "morally evil, involving bribery, dishonest". The word 'corruption' is defined as "the process of corrupting or condition of being corrupt, dishonesty". In India, as one supposes in every country in the world, the taking or giving of a bribe or indulging in a corrupt practice is a crime, an offence and is liable to action before a criminal court of justice as per the law in this behalf. The Prevention of Corruption Act was enacted by Parliament in 1988, but the Indian Penal Code was enacted in 1860 and subsequently amended from time to time without diluting the basic format and contents of the Act of 1860. Chapter IX of the Indian Penal Code came into effect in 1860 and though sections 161 to 165A were repealed by the Prevention of Corruption Act 1988 and the offences therein transferred to the P.C. Act, even under the 1860 Act corruption was a criminal offence. Now all matters relating to corruption have been codified under one law, the Prevention of Corruption Act, 1988. The purpose of this Act is to ensure that if there is any corrupt practice by a public servant or member of the public who, in his dealings with a public servant, commits a corrupt act, then he or she would be liable for penal action under the Prevention of Corruption Act.

Under law the power to investigate an offence vests in the police, though other agencies of government can, by law, be given the power to investigate specific offences under particular Acts. Under the Indian Forest Act officers of the Forest Department are empowered to investigate offences relating to the forests and to wildlife and to prosecute the offenders in a court of law. Similar powers are vested in officers of the Excise Department in relation to excise offences. However, so far as the major part of criminal law is concerned the power to investigate an offence vests in the police. Under Entries 1 and 2 of List 2 of the Seventh Schedule of the Constitute public order and police fall exclusively within the jurisdiction of the State Legislature, which can enact laws in this behalf. However, because criminal law and criminal procedure fall in Entries 1 and 2 of List 3 of the Seventh Schedule, Parliament and State Legislatures have concurrent legislative jurisdiction, with the laws of Parliament prevailing in case of conflict. Because investigation of offence is a part of criminal procedure, therefore, Parliament has legislated in this behalf, especially through the Code of Criminal Procedure. Chapter XII Cr. P.C. lays down the procedure that the police is bound to follow when investigating an offence. The police acquires jurisdiction for such investigation only after a First Information Report relating to the commission of a cognisable offence is reduced to writing and the officer incharge of a police station, on the basis of the information received, is of the view that a cognisable offence might have been committed, which calls for police investigation. This point is important because under section 155(2) the police cannot investigate a noncognisable offence without the order of a competent Magistrate. Under section 156, Cr.P.C. a police officer acquires jurisdiction to investigate a cognisable offence. Under section 157 the police officer may either proceed with the investigation or, for reasons to be recorded in writing, may decide not to investigate the matter either because the FIR does not suggest a case of a serious nature, or the police officer finds that there is no sufficient ground for continuing with the investigation. Subject to this the police officer is required to investigate the matter, examine witnesses, collect evidence, including material evidence, carry out searches for recovery of objects relating to the offence and taking of other measures to bring the investigation to completion, resulting either in a challan being put up against the accused or a final report being

submitted to a Magistrate seeking permission to close the case. This procedure applies to every police force in this country, including the Delhi Special Police Establishment, which is the legally constituted investigating arm of an executive agency called the Central Bureau of Investigation (CBI). It is made amply clear by section 22 of the Prevention of Corruption Act that, subject to certain modifications, the provisions of the Code of Criminal Procedure, 1973 will apply to all matters relating to investigation and trial of cases under the Prevention of Corruption Act.

This brings us to the machinery for taking action under the Prevention of Corruption Act. In 1946, largely emanating from widespread complaints about corruption in purchases, etc., during the Second World War, Government of India enacted the Delhi Special Police Establishment Act 1946, constituted a special police force for investigating notified offences in Union Territories, with the power to enlarge the jurisdiction of DSPE in the matter of area of investigation, both in terms of types of offences and in terms of territory. However, under section 6 of the Act the jurisdiction of DSPE cannot be extended to a State without the consent of the State Government. Following in the wake of the Central Government many State Governments also enacted similar laws for creating a special police force for dealing with corruption and other notified cases. In Madhya Pradesh the M.P. Special Police Establishment Act, 1947, created a Special Police Establishment for the State, superintendence over which was vested in the Lokayukt appointed under section 3 of the M.P. Lokayukt Evam Uploakayukt Adhiniyam, 1981. In the case of DSPE government has vested superintendence in the Central Vigilance Commission through the Chief Vigilance Commissioner. This, then, is the sum total of the special police force which has jurisdiction under the Prevention of Corruption Act. What, then, is CBI?

Entry 8 of List 1 of the Seventh Schedule empowers Parliament to enact legislation for the setting up of a Central Bureau of Intelligence and Investigation. In other words, Parliament can enact a law creating the Intelligence Bureau and CBI, determine the structure of these two agencies, prescribe the jurisdiction and state how and to whom there will be accountable. From the date of adoption of the Constitution to the present date Parliament has not been requested by government to enact such legislation, nor has Parliament taken any initiative in this behalf. Instead government chose to issue a notification on 1.4.1963 creating, by executive order, an organisation called the Central Bureau of Investigation (CBI). This bureau has six divisions, one of which is DSPE, its police investigating arm. DSPE has legal sanction, whereas CBI is just another government office. This point is laboured because in the environment created by Anna Hazare CBI has been projected as something bigger than life, a supra government organisation which has the right to interfere in just about everything relating to government. It is unfortunate that in the process the Supreme Court itself has failed to take a balanced view of the legal position of CBI, which has encouraged CBI and its officers to behave as if through one of its divisions the organisation as a whole has police powers and that in addition its officers are the executive superiors of every officer of every rank in government from whom they can demand accountability for their executive decisions.

It is neither the purport of the Constitution nor the intention of the Legislature to use CBI as a substitute for executive government, to reduce the autonomy of the executive government in the matter of separation of powers or to place in judgement over the executive government an agency which is itself a creation of the executive government and only a very small part of it. By encouraging the CBI to think along these lines the Supreme Court has done grave injustice to officers of government placed in high positions, where they are required to take important

decisions and in the process the Supreme Court has reduced the stature of the Executive as an equal partner in the scheme of separation of powers. These are harsh words but they are being stated because it is expected of the Supreme Court that it will always take an objective, dispassionate, rational and balanced view of matters in which the decisions of the court can either enhance what the Constitution intended or weaken the basic concept of the separation of powers, CBI is an executive organ of the State and must comply with all requirements that the Constitution makes of such an organ, that is, it must be a part of the whole and not larger than the whole.

Before commenting further on the issue let us look at the Prevention of Corruption Act, 1988, in particular Chapter 3 which defines offences and prescribes penalties therefor. Section 13 which deals with criminal misconduct by public servants is the critical issue. Under section 13 (1) (d) (iii) a public servant commits the offence of criminal misconduct if he "while holding office as a public servant obtains for any person any valuable thing or pecuniary advantage without public interest…" This is the clause which CBI uses to question, harass and even prosecute senior officers, the classical cases being those of Shyamal Ghosh, then Communications Secretary and P.C. Parakh, then Coal Secretary. Both are officers of known probity, professionally competent and completely straight forward. Shyamal Ghosh is facing prosecution and P.C. Parakh is under questioning and subject to harassment on account of decisions they took or did not take when holding office. According to CBI both officers took decisions which gave persons or companies pecuniary advantage. CBI very conveniently forgets the total provision of this particular section of the law which reads "pecuniary advantage without any public interest". No one will undertake a project or accept a contract unless he has estimated that it would bring him reasonable profit. Is it the case of CBI that all government work should be awarded on the basis of zero profit? It is obvious that a person will undertake a project or accept a contract in order to get some pecuniary advantage. If this becomes an offence no government officer will ever accept a tender or issue a work order and this will bring the entire work of government to a halt. Even the CBI Director will not be able to issue an order for purchase of the very stationery on which the most unreasonable orders of CBI itself are written because if he purchases the stationery the supplier will earn some profit and this, according to CBI, would be an offence under section 13(1)(d)(iii) of the Prevention of Corruption Act. It cannot be the case of CBI that mining for coal or promotion of mobile telephony is not in the public interest. Where is the offence made out against these officers? Unfortunately this particular provision of law is the one must misused by CBI to harass senior officers who are asked to explain their executive action to a police officer who is neither their superior nor is really competent to sit in judgement. Perhaps the section needs amendment by adding the word "undue" so that it now reads "any valuable thing or <u>undue</u> pecuniary advantage without any public interest".

CBI has no legal status and cannot override the provisions of the Constitution. Article 53 (1) states that the President will exercise the executive power of the Union through officers subordinate to him. Under Article 74 the President is aided and advised by his Council of Ministers, but the manner in which the executive power will be exercised and the business of the Government of India will be conducted would be governed by rules framed under Article 77. The Rules of Business allocate and divide business between different Ministries and give the powers, functions and working procedures of Ministers and Secretaries to Government. In this process a Secretary to Government is accountable to his Minister, to the Prime Minister through the Cabinet Secretary and to the Council of Ministers which, in turn, is collectively accountable to Parliament.

A Secretary to Government is not accountable to CBI. If there is criminality in any of his actions, then certainly a FIR can be recorded and the CBI as a police force can investigate the offence. Subject to that this nonsense about CBI summoning executive officers and asking them to explain their executive decisions must stop. In other words, let it be made very clear to CBI through an Act to be framed in this behalf, that it enjoys certain police powers but it is neither an Ombudsman nor an agency to which senior officers are accountable. The Prime Minister must make this very clear to CBI and if its officers do not fall in line they must be immediately removed and if the worst comes to the worst the CBI in its present form should be abolished, to be replaced by a fully accountable, fully empowered agency constituted under law. One finds it strange that for so many years politicians and civil servants have avoided bringing CBI under a statute, with a defined structure and clearly stated jurisdiction, authority and powers. Does a CBI with no legal status find favour with politicians because an amorphous mass is more amenable to manipulation than a properly structured organisation? Narendra Modi has promised us firm government and effective governance. Why not start with a law which gives us a well organised, focused and empowered CBI?

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