Anti Corruption Law and Its Implementation

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During the Second World War there was a huge expansion of government expenditure, in particular pertaining to purchases for the purposes of pursuing the war. The temptation to make money illegally was greatly enhanced and unscrupulous people, both government servants and in the private sector, tried to take advantage of this. The spate of corruption led to government setting up, by executive order, the Special Police Establishment, under the command of a Deputy Inspector General of Police, in 1942 to investigate cases of corruption. This executive order was challenged before the High Court and in 1943 it was replaced by an Ordinance giving legal sanction to the newly created SPE. In 1946 the Ordinance was replaced by an Act called the Delhi Special Police Establishment Act. The DSPE had limited jurisdiction, only relating to acts of corruption and other misconduct by Central Government employees. Gradually the scope of DSPE has been enlarged to make it the principal investigating agency of the Central Government. Thereafter by executive order government set up the Central Bureau of Investigation (CBI) which, like an octopus, has subsumed all the vigilance agencies, including DSPE. However, CBI has no legal standing and all its criminal investigation is done only through the Delhi Special Police Establishment. The Seventh Schedule of the Constitution in List 1, the Union List, Entry 8 permits our Parliament to legislate for the creation of a Central Bureau of Investigation, but this has not happened so far. On the highest priority Parliament must now give a legal status to CBI defining its structure, superintendence and supervision and its jurisdiction so that this organisation has the sanction of law.

The position today is that CBI not only functions as an agency to investigate corruption but has also expanded into the realm of investigating a huge range of offences, either directly within DSPE jurisdiction or referred to it by Central and State Governments. However, the CBI has adopted investigating methodologies in which without registering an FIR, which gives the police jurisdiction to investigate an offence as per the provisions of Chapter XII Cr.P.C, it registers a preliminary inquiry and proceeds to hold a pre-investigation. Neither the Delhi Special Police Establishment Act, nor the Prevention of Corruption Act, nor the Code of Criminal Procedure recognises a preliminary inquiry as having any legal sanction. However, CBI has used this particular method to place itself in a position where it questions officials and calls them to account for their action as if CBI were the administrative superior of the officer in question. This is not the role of CBI.

The scheme of governance in India is that there are three constituents of the State, the Executive, the Legislature and the Judiciary. The Constitution vests in the Legislature, both Union and State, the power to legislate, the power to sanction expenditure from the Consolidated Fund of India and the Consolidated Fund of the State concerned, the power to impose taxes and the power to oversee how government spends the money and is thus able to maintain financial control over the State. India being a society of laws the government is bound to function according to law and if there is no law then government has no jurisdiction. It is the Legislature which calls government to account through various parliamentary practices in this behalf and, therefore, government becomes accountable to the people

through the Legislature. In fact the Council of Ministers at the Centre and the State is collectively responsible to the House of the People and the State Legislative Assembly as the case may be.

Within the mandate given by law and subject to the Council of Ministers discharging its collective responsibility to the House, the executive has its own autonomous area of operation in which it is expected to function without let or hindrance. Under Article 53 the Executive Government vests in the President and Executive power is exercised by him through officers subordinate to him, but in accordance with the Constitution. Article 74 has similar provision vis-à-vis the government of a State. The President or the Governor, as the case may be, is required to act on the aid and advice of his Council of Ministers as per Article 154 as is the Governor under Article 163. The Executive power of the Union or State is not merely something written on a piece of paper. It is to be exercised and the exercise of this power has to be for the welfare of the people as mandated by the Preamble of the Constitution which requires the republic to secure to all its citizens social, economic and political justice, liberty of thought, expression, belief, faith and worship, equality of status and opportunity and the promotion of fraternity assuring the dignity of the individual and unity and integrity of the nation. The exercise of Executive power for the welfare of the people is guided by the Directive Principles of State Policy laid down in Part IV of the Constitution, Article 38 of which reads "State to secure a social order for the promotion of the welfare of the people". If, therefore, the officers appointed by the President or the Governor and the Council of Ministers on whose aid and advice the Executive power is to be wielded do not perform the function of governance, then this amounts to dereliction of duty and is a betrayal of the public interest. This point is very important in the context of further deliberations in this paper.

Article 77 in the case of the Union and Article 166 in the case of a State requires the President or the Governor, as the case may be, to make rules for the allocation of business to different departments and ministries of government, that is, the ministers, as also the Rules of Business of the Executive Government, whereby government at different levels will function. It is these constitutional rules which not only lay down how government will function but also make it mandatory for every level of official, appointed or elected, to perform the functions allotted to him. Not to perform the function would be tantamount to dereliction of duty and this would be an act of misconduct. In the performance of one's duty a public servant has to take decisions all the time. This may take the form of advice to the ministers, or it could be a decision on file in the area within the officers' competence, it could be the approval of a tender and granting of a contract, making purchases or even adjudicating between two parties, of which one would be government, in which on merit the decision could go in favour of the applicant. Many government decisions do relate to financial matters and in all such cases pecuniary or other benefit would definitely come to the party in whose favour a decision is taken. For example, a contractor may complain of improper withholding of payment due to him and if the decision is to release payment then certainly the party would have the benefit of the payment. The issue here should be whether the payment is unjustified, deliberately so and results in undue benefit to the party. Unfortunately that is not how section 13 of the Prevention of Corruption Act reads. Its wording is

"(13) (1) A public servant is said to commit an offence of criminal misconduct:-

(d) (iii) if he, while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest".

This section has been subjected to a great deal of misinterpretation and misuse. Investigating agencies such as CBI feel free to subject every decision to the criteria of public interest. Public interest is not defined by the Prevention of Corruption Act. However, section 2 (a) states "public duty means a duty in the discharge of which the State, the public or the community at large has an interest". This means that every public servant doing his public duty is in fact serving the public interest. His not doing his duty would, therefore, be a public disservice. Therefore, when a public servant, in the normal course of things, takes decisions it has to be presumed that the outcome of such decisions is ipso facto in the public interest, unless it can be proved otherwise. The burden of proof, as per the Indian Evidence Act, will rest on the person or authority alleging that undue advantage has been given by the public servant, contrary to public interest. A conscientious public servant, keeping in mind the wording of section 2 (a) of the Act and the provisions of the Constitution itself which require him to function and perform, will do his duty diligently and take the decisions he is empowered to do and render fearless advice as is expected of him. In doing do it is possible that in hindsight the decision may not appear to be the best option, but people are not gifted with hindsight and, therefore, in their day-to-day functioning are guided by the context in which they take a decision. Here the test of public interest has to be whether the decision was taken without prejudice and after considering those factors which are available at the time of decision making. The bona fides of the officer taking the decision must also be beyond controversy. Under these circumstances there can be no criminality and accountability would be to the superior of the officer in the administrative hierarchy and not to a vigilance organisation.

At the political level government does and must take decisions which appear to be the best at a given moment of time even if later it is argued that another option was available. Let us take the notorious 2 G spectrum allocation case. At the time when the matter was first under consideration India had a very poor telecommunication system and certainly mobile telephony was in its infancy. Government had to encourage the widest participation by industry in promoting mobile telephony and its policy of liberal allocation of spectrum was both appropriate and essential. As a result thereof India is today a world leader in the matter of mobile telephony coverage and application. The decision by government not to look on it as something which could be milked for huge sums of money was the only one which made any sense. Subsequently A. Raja, the Communications Minister, did manipulate the spectrum allocation contrary to the decisions in this behalf by government and bypassing the Ministry of Finance. This was improper and even criminal and CBI intervention was appropriate. However, the harassment by CBI of the officers concerned, the CAG's audit speculation about the extent of loss by not ab initio auctioning spectrum, was pure nonsense. However, the entire government came under suspicion of financial scandal and muddle and it certainly weakened decision making. The subsequent so called coal block allocation scandal or corruption in the Commonwealth Games were instrumental in bringing government into disrepute, as also a public agitation led by Anna Hazare and the CBI stepping up its assumed role of calling officers into account for administrative actions.

The result of all this was that government officers, especially the honest ones, suddenly found that they could be accused of wrongdoing for every decision taken by them. Many of them started playing safe and by not taking decisions or committing themselves on file, they virtually brought government to a

standstill. The Manmohan Singh government developed a kind of paralysis because officers just refused to take the initiative in anything. On becoming Prime Minister Narendra Modi expected the bureaucracy to become hyperactive. It did nothing of the kind because the fear lurked that if not today, then certainly tomorrow, the officer would be vulnerable to questioning by CBI and even to being harassed and hounded. The bureaucratic paralysis of the previous government carried over to the new government. Fortunately the Prime Minister realised that unless government servants could be reassured that they were expected to work and be positive and for this they would be fully protected they would not function. Two or three statements of government are encouraging. The first is that administrative officers would be accountable for their actions to their own superiors only. If there was an act of criminality then certainly the police in the form of CBI or any other vigilance agency would step in and the officer might have to face criminal proceeding. However, bona fide mistakes would be rectified and the officer would not be held guilty of misconduct. It is nonperformance which would be punished rather than performance in which a mistake or two might have been made. The Prevention of Corruption Act would be suitably amended to remove all ambiguity and the investigating organisations such as CBI would come into the picture only if a prima facie case of criminality was made out. Otherwise government servants would be fully protected so that they could function in an environment of security.

What government has now done or is in the process of doing is a step in the right direction and, hopefully, without in any way relaxing the fight against corruption, would still enable government servants to function freely, without prejudice and without fear.

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