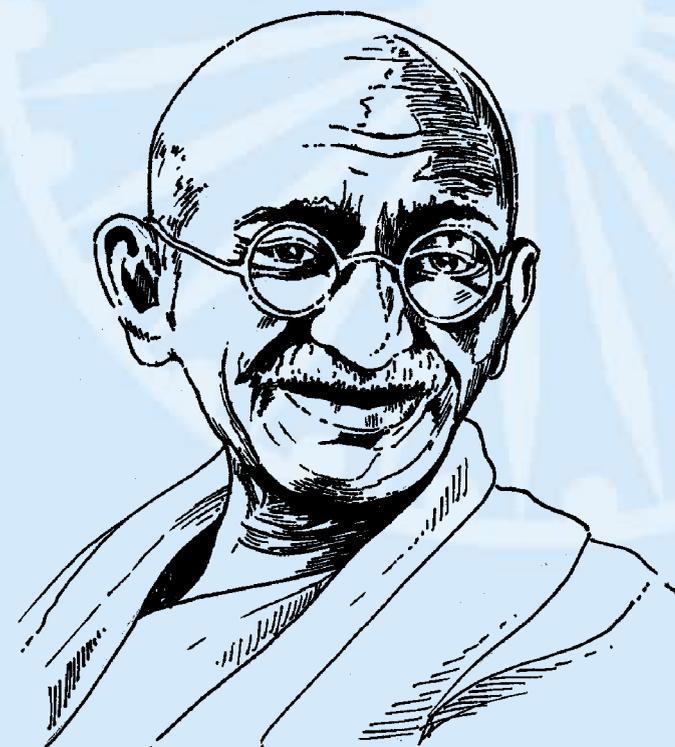




## SECOND ADMINISTRATIVE REFORMS COMMISSION

### ETHICS IN GOVERNANCE

### ETHICS IN GOVERNANCE



*“You must be the change  
you wish to see in the world.”*

*Mahatma Gandhi*

**JANUARY 2007**



Second Administrative Reforms Commission  
Government of India

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GOVERNMENT OF INDIA

SECOND ADMINISTRATIVE REFORMS COMMISSION

FOURTH REPORT

ETHICS IN GOVERNANCE

JANUARY 2007

## PREFACE

*“As human beings, our greatness lies not so much in being able to remake the world - that is the myth of the atomic age - as in being able to remake ourselves”*

Mahatma Gandhi

The Mahatma’s vision of a strong and prosperous India - Purna Swaraj - can never become a reality if we do not address the issue of the stranglehold of corruption on our polity, economy and society in general.

Governance is admittedly the weak link in our quest for prosperity and equity. Elimination of corruption is not only a moral imperative but an economic necessity for a nation aspiring to catch up with the rest of the world. Improved governance in the form of non-expropriation, contract enforcement, and decrease in bureaucratic delays and corruption can raise the GDP growth rate significantly. The six perceived governance quality measures, each an aggregate of a number of sub-measures, are: voice and accountability; absence of political instability and violence; government effectiveness; reasonableness of the regulatory burden; the rule of law; and the absence of graft. Of these, the last two are the most directly significant in the context of ethical governance. ‘Rule of law’ measures whether crime is properly punished or not; enforceability of contracts; extent of black market; enforceable rights of property; extent of tax evasion; judiciary’s independence; ability of business and people to challenge government action in courts etc. ‘Absence of graft’ measures relative absence of corruption among government, political and bureaucratic officials; of bribes related to securing of permits and licences; of corruption in the judiciary; of corruption that scares off foreign investors.

There is a perception that the public services have remained largely exempt from the imposition of penalties due to the complicated procedures that have arisen out of the Constitutional guarantee against arbitrary and vindictive action. Those Constitutional safeguards have in practice shielded the guilty against the swift and certain punishment for abuse of public office for private gain. A major corollary has been the erosion of accountability. The huge body of jurisprudential precedents has crowded out the real intent of Article 311, and created a heap of roadblocks in reducing corruption. Such a provision is not available in any of the democratic countries including the UK. While the honest have to be protected, the dishonest seem to corner the full benefit of Article 311. Hence there is need for a comprehensive examination of the entire corpus of administrative jurisprudence to rationalise and simplify the procedures. One of the indicators of lax enforcement is delay in sanctioning prosecution of a delinquent by the competent authority. Reference may be made to the Annual Report of the Central Vigilance Commission for the year 2004. Out of 153 cases for sanction, 21 cases were pending for more than 3 years, 26 cases between 2-3 years, 25 between 1-2 years. The departmental enquiries are soft-pedalled either out of patronage or misplaced compassion.



*“You must be the change you wish to see in the world.”*

Mahatma Gandhi

Integrity is much more than financial honesty. Public office should be treated as a trust. There are two facets to corruption: (1) the institution which is highly corrupt; (2) individuals who are highly corrupt. There is a need to work on public profiteering and also value to be attributed to the services rendered by officers. Interlocking accountability is a process by which evaluation could be done easily and accountability ensured.

Building trust and confidence requires an environment where there is a premium on transparency, openness, boldness, fairness and justice. We should encourage this.

Clearly, the absence of rules is not the problem. One cannot mandate honesty. The rule of law can only defeat the perverse mind. However, it cannot defeat the perversity of the heart. In the words of Aleksandr Solzhenitsyn: "The line separating good and evil passes not between states nor between classes... but through the middle of every human heart". We have no destinies other than those we forge ourselves. He who administers government by means of his virtues may be compared to the Pole star which keeps its place and all other stars turn towards it. When the ruler himself is right, the people naturally follow him in his right course. If governance is by men who are derelict, the governed will suffer. We have to keep in mind Plato's injunction:

**"The punishment suffered by the wise who refuse to take part in government, is to suffer under the government of bad men"**

Good governance must be founded on moral virtues ensuring stability and harmony. Confucius described righteousness as the foundation of good governance and peace. The art of good governance simply lies in making things right and putting them in their right place. Confucius's prescription for good governance is ideally suited for a country like India where many of our present day players in governance do not adhere to any principle and ensure only their own interests.

Confucius emphasizes the righteousness for life and character building. This is in conformity with Dharma or righteousness as taught by all religions in the world and preached in Buddhism very predominantly in its fourth noble truth. He also emphasizes that man himself must become righteous and then only there shall be righteousness in the world. This is comparable with what Gandhiji said, "Be the change you wish to see in the world".

So, in the ultimate analysis, it is a question of ethics. Ethics is a set of standards that helps guide conduct. One of the problems is that the present codes of conduct are not direct and to the point. They are full of vague sermons that rarely indicate prohibitions directly. For formulating a code of ethics, it would be useful to keep in mind the advice of

Napoleon who said, 'Law should be so succinct that it can be carried in the pocket of the coat and it should be so simple that it can be understood by a peasant'.

While it may not always be possible to establish the criminal offence of misappropriation in a court of law, the Government servant can still be removed from service for causing serious monetary loss to the State. An engineer may have deliberately permitted the construction of a defective irrigation dam or building. It may not be possible to get him convicted in court on charges of corruption but he could be removed from service on grounds of incompetence. A tax official may have connived to allow the leakage of revenue for return favours in the future. Such conduct may not provide the ingredients of a criminal offence but can lead to his exit from service.

The standard for probity in public life should be not only conviction in a criminal court but propriety as determined by suitable independent institutions specifically constituted for the purpose. We have broadly copied the British model of governance. Ministers in Tony Blair's government have had to resign on such minor improprieties as a telephone call to the concerned person to fast track the issue of a visa for the 'nanny' of the Minister's child or the grant of British citizenship to a generous contributor to a cause supported by the Government. Such principles were upheld and pronounced by Jawaharlal Nehru in the Mudgal case in which the said Lok Sabha Member was expelled by Parliament on 24<sup>th</sup> September, 1951 even when the Member volunteered to resign. The Mudgal case is often cited as the noblest example of the early leadership's efforts at setting high standards of conduct in parliamentary life.

We need to reverse the slide by prescribing stringent standards of probity in public life instead of providing shelter to public figures of suspect integrity behind the argument of their not having been convicted in a court. The standard should be one of not only the conduct of Caesar's wife but of Caesar himself.

The solution to the problem of corruption has to be more systemic than any other issue of governance. Merely shrinking the economic role of the state by resorting to deregulation, liberalization and privatization is not necessarily the solution to addressing the problem. Prevalent institutional arrangements have to be reviewed and changes made where those vested with power are made accountable, their functioning made more transparent and subjected to social audit with a view to minimize discretionary decisions. All procedures, laws and regulations that breed corruption and come in the way of efficient delivery system will have to be eliminated. The perverse system of incentives in public life, which makes corruption a high return low risk activity, need to be addressed. In this context, public example has to be made out of people convicted on corruption charge

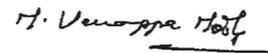
and the legal process in such cases has to be expedited. This hopefully, will also address the growing permissiveness in the society, in the more recent times, to the phenomenon of corruption. In addition, with changes in economic policy regime, regulatory bodies that guide and monitor the functioning of the relevant economic agents, lay down the rules of conduct in the interest of consumers and devise such practices that help in efficient functioning of the system, will have to be established in many sectors of the economy that are now being opened up. At the same time, social monitoring through empowered autonomous and credible structures will have to be established even for the highest of the public offices. Right to information has to be the starting point for some of these changes.

The focus should be on e-governance and systemic change. An honest system of governance will displace dishonest persons. As Gladstone so aptly said, "The purpose of a government is to make it easy for people to do good and difficult to do evil".

We always find alibi for our lapses by quoting trespass from other democratic institutions, by resorting to a blame game. The executive/civil services blame interference by the political executive or legislatures and vice versa; legislators blame the judiciary and vice versa – the main problem lies in each one leaving space for others to occupy. If any of the democratic institutions leaves space, the mafia or extra-constitutional authority occupies that space. Realization of its own authority and discharging its sphere of responsibility, developing accountability and responsiveness are the real solutions to the conflicting situations of eroding democratic polity. I conclude by quoting an ancient subhashit (good message) -

**"Rivers do not drink their waters themselves, nor do trees eat their fruit, nor do the clouds eat the grains raised by them. The wealth of the noble is used solely for the benefit of others."**

New Delhi  
January 16, 2007

  
(M. Veerappa Moily)  
Chairman

**Government of India**  
**Ministry of Personnel, Public Grievances & Pensions**  
**Department of Administrative Reforms and Public Grievances**

**Resolution**

New Delhi, the 31<sup>st</sup> August, 2005

No. K-11022/9/2004-RC. — The President is pleased to set up a Commission of Inquiry to be called the second Administrative Reforms Commission (ARC) to prepare a detailed blueprint for revamping the public administration system.

2. The Commission will consist of the following :
  - (i) Shri Veerappa Moily - Chairperson
  - (ii) Shri V. Ramachandran - Member
  - (iii) Dr. A.P. Mukherjee - Member
  - (iv) Dr. A.H. Kalro - Member
  - (v) Dr. Jayaprakash Narayan - Member
  - (vi) Smt. Vineeta Rai - Member-Secretary
3. The Commission will suggest measures to achieve a proactive, responsive, accountable, sustainable and efficient administration for the country at all levels of the government. The Commission will, inter alia, consider the following :
  - (i) Organisational structure of the Government of India
  - (ii) Ethics in governance
  - (iii) Refurbishing of Personnel Administration
  - (iv) Strengthening of Financial Management Systems
  - (v) Steps to ensure effective administration at the State level
  - (vi) Steps to ensure effective District Administration
  - (vii) Local Self-Government/Panchayati Raj Institutions
  - (viii) Social Capital, Trust and Participative public service delivery
  - (ix) Citizen-centric administration
  - (x) Promoting e-governance

- (xi) Issues of Federal Polity
- (xii) Crisis Management
- (xiii) Public Order

Some of the issues to be examined under each head are given in the Terms of Reference attached as a Schedule to this Resolution.

4. The Commission may exclude from its purview the detailed examination of administration of Defence, Railways, External Affairs, Security and Intelligence, as also subjects such as Centre-State relations, judicial reforms etc. which are already being examined by other bodies. The Commission will, however, be free to take the problems of these sectors into account in recommending re-organisation of the machinery of the Government or of any of its service agencies.
5. The Commission will give due consideration to the need for consultation with the State Governments.
6. The Commission will devise its own procedures (including for consultations with the State Government as may be considered appropriate by the Commission), and may appoint committees, consultants/advisers to assist it. The Commission may take into account the existing material and reports available on the subject and consider building upon the same rather than attempting to address all the issues ab initio.
7. The Ministries and Departments of the Government of India will furnish such information and documents and provide other assistance as may be required by the Commission. The Government of India trusts that the State Governments and all others concerned will extend their fullest cooperation and assistance to the Commission.
8. The Commission will furnish its report(s) to the Ministry of Personnel, Public Grievances & Pensions, Government of India, within one year of its constitution.

*Sd/-*  
(P.I. Suvrathan)  
Additional Secretary to Government of India

**Government of India**  
**Ministry of Personnel, Public Grievances & Pensions**  
**Department of Administrative Reforms**  
**and Public Grievances**

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**RESOLUTION**

New Delhi, the 24<sup>th</sup> July, 2006

No. K-11022/9/2004-RC (Vol.II) – The President is pleased to extend the term of the second Administrative Reforms Commission by one year upto 31.8.2007 for submission of its Reports to the Government.

*Sd/-*  
(Rahul Sarin)  
Additional Secretary to the Government of India

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#### LIST OF ABBREVIATIONS

Abbreviation	Full Form
ADB	Asian Development Bank
AIR	All India Reporter
APS	Australian Public Service
CAT	Central Administrative Tribunal
CBI	Central Bureau of Investigation
CJI	Chief Justice of India
CLB	Company Law Board
CrPC	Code of Criminal Procedure
CVC	Central Vigilance Commission
CVO	Chief Vigilance Officer
DDA	Delhi Development Authority
DySP	Deputy Superintendent of Police
IPC	Indian Penal Code
MCOCA	Maharashtra Control of Organised Crime Act
MLA	Member of Legislative Assembly
MLALADS	Member of Legislative Assembly Local Area Development Scheme
MP	Member of Parliament
MPLADS	Member of Parliament Local Area Development Scheme
NCRWC	National Commission to Review the Working of the Constitution
NGO	Non Governmental Organisation
NJC	National Judicial Council
OECD	Organization for Economic Cooperation and Development
PIL	Public Interest Litigation
PSU	Public Sector Undertaking
RBI	Reserve Bank of India
SEBI	Securities and Exchange Board of India
SFIO	Serious Frauds Investigation Office
SFO	Serious Frauds Office
SPE	Special Police Establishment
UK	United Kingdom
UN	United Nations
UPSC	Union Public Service Commission
US	United States

## INTRODUCTION

1.1 Ethics is a set of standards that society places on itself and which helps guide behaviour, choices and actions. The Commission is painfully aware that standards do not, by themselves, ensure ethical behaviour; that requires a robust culture of integrity. The crux of ethical behaviour does not lie in bold words and expressions enshrined as standards, but in their adoption in action, in sanctions against their violations, in putting in place competent disciplinary bodies to investigate allegations of violations and impose sanctions quickly and in promoting a culture of integrity.

1.2 Corruption is an important manifestation of the failure of ethics. The word 'corrupt' is derived from the Latin word '*corruptus*', meaning 'to break or destroy'. The word 'ethics' is from the original Greek term *ethikos*, meaning 'arising from habit'. It is unfortunate that corruption has, for many, become a matter of habit, ranging from grand corruption involving persons in high places to retail corruption touching the everyday life of common people.

1.3 Anti-corruption interventions so far made are seen to be ineffectual and there is widespread public cynicism about them. The interventions are seen as mere posturing without any real intention to bring the corrupt to book. They are also seen as handy weapons for partisan, political use to harass opponents. Corruption is so deeply entrenched in the system that most people regard corruption as inevitable and any effort to fight it as futile. This cynicism is spreading so fast that it bodes ill for our democratic system itself.

1.4 There are two, somewhat contrary, approaches in dealing with corruption and abuse of office. The first is overemphasis on values and character. Many people lament the decline in values and the consequent rise in corruption. The implicit assumption is that until values are restored, nothing much can be done to improve the conduct of human beings. The second approach is based on the belief that most human beings are fundamentally decent and socially conscious, but there is always a small proportion of people, which cannot reconcile individual goals with the good of society. Such deviant people tend to pursue personal gain at the cost of public good and the purpose of organized government is to punish such deviant behaviour. If good behaviour is consistently rewarded and bad behaviour consistently punished, the bulk of the people follow the straight and narrow path. However, if good

behaviour is not only not rewarded, but is actually fraught with difficulties and bad behaviour is not only not punished, but is often extravagantly rewarded, then the bulk of the people tend to stray from the honourable path.

1.5 In the real world, both values and institutions matter. Values are needed to serve as guiding stars, and they exist in abundance in our society. A sense of right and wrong is intrinsic to our culture and civilization. But values need to be sustained by institutions to be durable and to serve as an example to others. Values without institutional support will soon be weakened and dissipated. Institutions provide the container, which gives shape and content to values. This is the basis of all statecraft and laws and institutions. While incentives and institutions matter for all people, they are critical in dealing with the army of public servants – elected or appointed – endowed with authority to make decisions and impact on human lives and exercising the power to determine allocation of resources. Public office and control over public purse offer enormous temptation and opportunity to promote private gain at public cost. Therefore, creation of institutions and designing of incentives are of utmost importance in promoting ethical conduct of public servants.

1.6 In our society, corruption and abuse of office has been aggravated by three factors. First, there is a colonial legacy of unchallenged authority and propensity to exercise power arbitrarily. In a society which worships power, it is easy for public officials to deviate from ethical conduct. Second, there is enormous asymmetry of power in our society. Nearly 90% of our people are in the unorganized sector. Quite a number of them lead a precarious existence, depending on subsistence wages with no job security. And nearly 70% of the organized workers with job security and regular monthly wage are employed by the state directly or through public sector undertakings. Almost all these employees are 'educated' in a largely illiterate and semiliterate society and economically even the lowliest of public servants are better off than most people in the country. What is more, their employment in government comes with all the trappings of power. Such asymmetry of power reduces societal pressure to conform to ethical behaviour and makes it easy to indulge in corruption.

1.7 Third, as a conscious choice, the Indian state in the early decades after Independence chose a set of policies whose unintended consequence was to put the citizen at the mercy of the State. Over regulation, severe restrictions on economic activity, excessive state control, near-monopoly of the government in many sectors and an economy of scarcity all created conditions conducive to unbridled corruption. In addition, many state subsidies and beneficiary-oriented programmes in a situation of asymmetry of power converted the public servant into patron and master and reduced most citizens into mendicants. This at once enhanced opportunities to indulge in corruption and reduced the citizens' capacity to resist extortionary demands.

1.8 The experience of the past six decades in our country and elsewhere offers us valuable lessons in curbing corruption. It is generally recognized that monopoly and discretion increase the propensity to corruption while competition and transparency reduce corruption. This has been dramatically witnessed in India in the wake of economic liberalization. As competition came in and choice expanded, corruption plummeted. Telephones, steel, cement, sugar and even two-wheelers are among the many sectors, which have seen enhanced supply and choice, reducing or even eliminating corruption. Similarly, wherever technology and transparency have been introduced, corruption has been significantly contained. Computerization and access to information have made many services from railway reservation to issuing of driving licenses increasingly free from corruption.

1.9 A factor which increases corruption is over-centralization. The more remotely power is exercised from the people, the greater is the distance between authority and accountability. The large number of functionaries between the citizen and final decision-makers makes accountability diffused and the temptation to abuse authority strong. For a large democracy, India probably has the smallest number of final decision makers. Local Government is not allowed to take root and power has been concentrated both horizontally and vertically in a few hands. The net results are weakened citizenry and mounting corruption.

1.10 It is well recognized that every democracy requires the empowerment of citizens in order to hold those in authority to account. Right to Information, effective citizens' charters, opportunity and incentives to promote proactive approach of citizens, stake-holders' involvement in delivery of public services, public consultation in decision making and social auditing are some of the instruments of accountability that dramatically curbed corruption and promoted integrity and quality of decision making.

1.11 In the ultimate analysis, the state and a system of laws exist in order to enforce compliance and promote desirable behaviour. Therefore, enforcement of rule of law and deterrent punishment against corruption are critical to build an ethically sound society. A detailed analysis of our anti-corruption mechanisms and the causes of their failure is necessary in order to strengthen the forces of law and deter the corrupt public servants.

1.12 Perhaps the most important determinant of the integrity of a society or the prevalence of corruption is the quality of politics. If politics attracts and rewards men and women of integrity, competence and passion for public good, then the society is safe and integrity is maintained. But if honesty is incompatible with survival in politics, and if public life attracts undesirable and corrupt elements seeking private gain, then abuse of authority and corruption become the norm. In such a political culture and climate, desirable initiatives will not yield

adequate dividends. Competition and decentralization certainly reduce corruption in certain sectors. But if the demand for corruption is fuelled by inexhaustible appetite for illegitimate funds in politics, then other avenues of corruption will be forcibly opened up. As a result, even as corruption declines in certain areas, it shifts to other, sometimes more dangerous, areas in which competition cannot be introduced and the state exercises a natural monopoly. What is needed with liberalisation is corresponding political and governance reform to alter the incentives in politics and public office and to promote integrity and ethical conduct.

1.13 All forms of corruption are reprehensible and we need to promote a culture of zero-tolerance of corruption. But some forms of corruption are much more pernicious than others and deserve closer attention. In a vast majority of cases of bribery, the citizen is a victim of extortion and is compelled to pay a bribe in order to get a service to which he is entitled. Experience has taught most citizens that there is a vicious cycle of corruption operating and they often end up losing much more by resisting corruption. Delays, harassment, lost opportunity, loss of precious time and wages, uncertainty and, at times, potential danger of loss of life or limb could result from resistance to corruption and non-compliance with demands. In such cases, the citizen is an unwilling victim of coercive corruption. But there are several cases of collusion between the bribe giver and corrupt public servant. In such cases of collusive corruption, both parties benefit at immense cost to society. Awarding of contracts for public works and procurement of goods and services, recruitment of employees, evasion of taxes, substandard projects, collusive violation of regulations, adulteration of foods and drugs, obstruction of justice and concealing or doctoring evidence in investigation are all examples of such dangerous forms of corruption. As the economy is freed from state controls, extortionary corruption declines and collusive corruption tends to increase. We need to fashion strong and effective instruments to deal with this growing menace of collusive corruption, which is undermining the very foundations of our democracy and endangering society.

1.14 Corruption is a global phenomenon and has also become a serious global concern. The United Nations Convention against Corruption was adopted by the UN General Assembly in October 2003, providing an international instrument against corruption. The ADB-OECD Anti-Corruption Action Plan, which has been signed by the Government of India, is a broad understanding to further the cause of inter-regional cooperation in the matter of prevention of corruption. The World Bank has also declared war against corruption by refusing to fund projects whose implementation is tainted by corrupt practices. At the annual meeting of the International Monetary Fund and the World Bank Group in Singapore in 2006, a joint statement was issued with major multilateral financial institutions agreeing on a framework for preventing and combating fraud and corruption in the activities and operations of their institutions.

1.15 In India, some recent anti-corruption initiatives are steps in the right direction. The Supreme Court has ruled that candidates contesting elections should file details regarding their wealth, educational qualifications and criminal antecedents along with their nomination papers. The Right to Information Act, which has recently been enacted, is a potent weapon to fight corruption. The introduction of information communication technologies, e-governance initiatives and automation of corruption prone processes in administration have succeeded in reducing corruption.

1.16 Much more remains to be done however, and beyond the realm of existing regulation. The escalating levels of corruption in various segments of our economy resulting in large-scale generation of black money, serious economic offences and fraud, and money laundering leading even to the funding of terrorist activities against the State, have created a grave situation which needs to be dealt with severely. Benami properties of corrupt public servants need to be forfeited, as also the assets illegally acquired from corrupt practices. Whistleblower legislation has to be put in place to protect informants against retribution. Also, we have to suitably strengthen the institutional framework for investigating corrupt practices and awarding exemplary punishment to the corrupt thereby raising the risk associated with corrupt behaviour.

1.17 Ethics in governance, however, has a much wider import than what happens in the different arms of the government. An across-the-board effort is needed to fight deviations from ethical norms. Such an effort needs to include corporate ethics and ethics in business; in fact, there should be a paradigm shift from the pejorative 'business ethics' to 'ethics in business'. There is need for ethics in every profession, voluntary organization and civil society structure as these entities are now vitally involved in the process of governance. Finally, there should be ethics in citizen behaviour because such behaviour impinges directly on ethics in government and administration.

1.18 One of the terms of reference of the Administrative Reforms Commission pertains to ethics in governance, specifically the following aspects:-

A. *Vigilance and Corruption:*

- *Strengthening pro-active vigilance to eliminate corruption and harassment to honest civil servants including, wherever necessary, limiting executive discretion.*
- *Addressing systemic deficiencies manifesting in reluctance to punish the corrupt.*
- *(a) Identify procedures, rules and regulations and factors which lead to corruption  
(b) suggest measures to combat corruption and arbitrary decision making, and*

*(c) suggest a framework for their periodical review in consultation with the stakeholders.*

*B. Relationship between Political Executive and Permanent Civil Service:*

- *To suggest improvements in the institutional arrangements for smooth, efficient and harmonious relationship between civil service and the political executive.*

*C. Code of Conduct for different organs of Government :*

- *Political Executive, Civil Services, etc.*

1.19 While the Commission has examined items A & C in considerable detail in this Report; item B will be dealt with comprehensively in the ARC's report on Civil Services Reforms. The Commission has examined the relevant laws, codes and manuals, which deal with ethics and corruption. It has critically studied the institutional framework that investigates corruption and brings the corrupt to book. It has also looked at the corruption prone processes in government and examined the systems, rules and procedures, which govern these processes.

1.20 In order to ascertain views from different stakeholders on ethics in governance, the Commission organized a National Colloquium at the National Judicial Academy, Bhopal in September 2006. The Commission expresses its deep gratitude to the then Chief Justice of India, Mr. Justice Shri Y K Sabharwal who delivered the valedictory address<sup>1</sup>, the Minister of State for Personnel Public Grievances & Pensions and Parliamentary Affairs Shri Suresh Pachouri who presided over the inaugural function<sup>2</sup> and to Mr. Justice S.B.Sinha for his valuable suggestions. The Chairman ARC addressed the gathering<sup>3</sup>. The list of participants at the National Colloquium organized by the Commission on the subject is at Annexure I(4). The recommendations of the Colloquium are at Annexure I(5). The questionnaire circulated to various stakeholders is at Annexure I(6).

1.21 The Commission would like to place on record its gratitude to the Lokayuktas, representatives of CVC and the state anti corruption wings, members of 'citizens' initiatives', officers of Government of India and the State Governments for their active participation in the workshop. The Commission also expresses its deep gratitude to Mr Justice J S Verma, former CJI; Mr Justice M N Venkatachaliah, former CJI; Mr. Justice Santosh Hegde, former Judge, Supreme Court; Mr Justice N Venkatchala, former Lokayukta Karnataka; Shri Fali Nariman; Shri B V Acharya, former Advocate General, Karnataka; Shri K R Chamayya, former Law Secretary, Government of Karnataka; Shri K Eshwara Bhat, former Law Secretary, Government of Karnataka and Admiral R H Tahiliani (Retd), Chairman, Transparency International, India, whose views and suggestions have been of

<sup>1</sup> Speech at Annexure I(1)

<sup>2</sup> Speech at Annexure I(3)

<sup>3</sup> Speech at Annexure I(2)

immense help to the Commission in articulating its recommendations. The Commission expresses its appreciation for the valuable contribution made by Shri S K Das, Consultant ARC in drafting this Report.

1.22 As issues relating to ethics in governance cut across other terms of reference, an attempt has been made to deal with the major issues in this Report. The Report is organized in nine chapters dealing with different aspects of ethics in governance. The recommendations range from those seeking to change the legal framework to those which could be implemented through executive directions within a short time frame. Recommendations which could be implemented immediately through executive direction are identified by prefixing a symbol '\*', in the Summary of Recommendations.

## 2 ETHICAL FRAMEWORK

### 2.1 Ethics and Politics

#### 2.1.1 Introduction

2.1.1.1 Any discussion on an ethical framework for governance in a democracy must necessarily begin with ethical values in politics. Politics and those engaged in it, play a vital role in the legislative and executive wings of the State whose acts of commission and omission in working the Constitution and the rule of law become the point of intervention for the judiciary. While it is unrealistic and simplistic to expect perfection in politics in an ethically imperfect environment, there is no denying the fact that the standards set in politics profoundly influence those in other aspects of governance. Those in politics have a clear and onerous responsibility. India was fortunate that high standards of ethical conduct were an integral part of the freedom struggle. Unfortunately, ethical capital started getting eroded after the transfer of power. Excesses in elections (in campaign-funding, use of illegitimate money, quantum of expenditure, imperfect electoral rolls, impersonation, booth-capturing, violence, inducements and intimidation), floor-crossing after elections to get into power and abuse of power in public office became major afflictions of the political process over the years. Political parties, governments and more importantly the Election Commission and the Supreme Court have taken several steps since the late 1980s in an attempt to eliminate the gross abuses that had virtually become the norm. Yet, there is a widespread view that much more needs to be done to cleanse our political system. Along with that of corruption, this issue was raised in every public hearing held by the Commission during its visits to the States.

2.1.1.2 Criminalization of politics – ‘participation of criminals in the electoral process’ - is the soft underbelly of our political system. The growth of crime and violence in society (to the point of encouraging ‘mafia’ in many sectors) is due to a number of root causes. Flagrant violation of laws, poor quality of services and the corruption in them, protection for law-breakers on political, group, class, communal or caste grounds, partisan interference in investigation of crimes and poor prosecution of cases, inordinate delays lasting over years and high costs in the judicial process, mass withdrawal of cases, indiscriminate grant of parole, etc., are the more important of the causes. The Commission will deal with these

issues in detail in its ensuing Report on Public Order. It only needs to be stated here that, in this situation, the criminal who, paradoxically, is able to ensure speedy justice in some cases becomes almost a “welcome character”! On his part, the criminal builds on this “acceptance” and is emboldened to enter politics and elections. The opportunity to influence crime investigations and to convert the policemen from being potential adversaries to allies is the irresistible magnet drawing criminals to politics. The elected position and the substantial protection that it can give, helps him either to further and expand his activities or to evolve into an entity with higher political ambitions. As for political parties, such individuals bring into the electoral process, their ability to secure votes through use of money and muscle power.

#### Box 2.1: Ethics in the UK

Over 80 years ago, the first Labour Government led by Ramsey Mc Donald in the U.K, fell in the wake of the “Campbell Affair”, because the government decided to withdraw criminal charges in a case of sedition for purely political reasons. The resultant outcry led to the government being voted out of office and to fresh polls. Since then, British Ministers and high officials, it is said, have rarely dared to interfere in crime investigation or prosecution.

2.1.1.3 This is a short-term win-win situation for all, except for public good and good governance. All this has not taken place everywhere, but to the extent that it did, it led to a situation when the Election Commission formally stated that one in six legislators in India faced grave criminal charges. It was then time for urgent corrective steps.

2.1.1.4 Large, illegal and illegitimate expenditure in elections is another root cause of corruption. While there are formal limits to expenditure and some steps have been put in place in an attempt to check them, in reality, actual expenditure is alleged to be far higher. Abnormal election expenditure has to be recouped in multiples to sustain the electoral cycle! This results in ‘unavoidable’ and ubiquitous corruption altering the nature of political and administrative power and undermining trust and democracy. Cleansing elections is the most important route to improve ethical standards in politics, to curb corruption and rectify maladministration.

#### 2.1.2 Recent Improvements

Despite all the flaws in the functioning of a democracy, it has a measure of self correction. As stated earlier, significant efforts have been made over the last two decades to bring about meaningful electoral reforms. Some have observed that the past decade has seen more political reform in India than in any other large democracy after the Second World War. Briefly stated, the more important of the reforms relate to :

##### 2.1.2.1 Improvement in Accuracy of Electoral Rolls:

- The Election Commission has made efforts to make voter registration more accessible to voters and involve, to some extent, post offices in revision of Electoral rolls.

- Printed electoral rolls/CDs have been made available for sale.
- Computerisation of entire electoral rolls of over 620 million voters has been initiated.
- The provision of photo-identity cards for all voters has been started.

Studies by civil society organizations like Loksatta have shown considerable improvement and reduction in errors in electoral rolls between 1999 and 2004.

#### *2.1.2.2 Disclosure of Antecedents of Candidates:*

- The Supreme Court has directed that a candidate should declare any conviction by a court or whether a criminal case is pending against him;
- The direction to file a declaration of assets and liabilities of the candidate and family members would enable a check at the time of the next elections.

#### *2.1.2.3 Disqualification of Persons Convicted of Criminal Offence:*

- The Supreme Court ruled in 2005 that Section 8(4) of the Representation of the People Act was unconstitutional as it violated equality before law. Now all convicted candidates stand at an election on the same footing, whether at the time of conviction they were incumbent legislators or not. (However, during the term of a legislator, exemption from disqualification does apply if an appeal is pending and sentence is stayed).

#### *2.1.2.4 Enforcement of the Code of Conduct:*

- Using its over-all powers to “superintend, control and direct” elections under Article 324 of the Constitution, the Election Commission has made the Code of Conduct for elections binding in all respects, issuing directions regarding timings of campaigns, prohibition of festoons/cutouts, insistence on daily expenditure statements, appointment of a large number of observers, ordering of re-poll in specific polling booths and other such steps.

#### *2.1.2.5 Free and fearless polling:*

- Policing arrangements have been improved, including greater use of Central Forces and holding of elections for more than one day in a State, and measures like sealing of borders, etc.
- Electronic voting machines have been introduced throughout the country (in the parliamentary elections of 2004).

- It has been decided that the death of an independent candidate would not lead to the cancellation of an election.

#### *2.1.2.6 Reduction in size of Council of Ministers:*

A recommendation to restrict the size to 10% was made by the first Administrative Reforms Commission more than three decades ago. The Constitution (Ninety-first Amendment) Act, 2003 restricts the size of the Council of Ministers to 15% of the strength of the Lower House in Parliament/State legislature. The amendment is a step towards moderating the number of Ministers to some extent.

### **2.1.3 Issues in Political Reforms**

Despite the measures taken, improvements are marginal in the case of important problems of criminalization, the use of money in elections, subtle forms of inducements and patronage in the form of chairmanships and memberships of public units and the anomaly of legislators functioning as disguised executives. More effective steps have, therefore, been suggested and the Commission would like to deal with the more important of them.

#### *2.1.3.1 Reform of Political Funding*

2.1.3.1.1 In India, one of the sources of funding of political parties has been through private donations. Internationally, there are three broad patterns of state funding for political parties and elections. One is the minimalist pattern, wherein elections alone are partially subsidized usually through specific grants or state rendered services. Candidates are accountable to the public authority for observance, reporting and disclosure of expenditure for the limited election period. The UK, Ireland, Australia, New Zealand and Canada are examples of this pattern, while the US is a variant of the same with election funding being largely private and subjected to strict reporting and disclosure requirements as well as limits on contributions.

2.1.3.1.2 The second, maximalist pattern of state funding involves public funding not merely for elections but even for other party activities, as in Sweden and Germany. This pattern involves less detailed regulation of contributions and expenditure because parties are dependent largely on state support and local requirements enforce internal democracy as well as general transparency.

In between, there are a variety of mixed patterns involving partial reimbursement for public funding of elections on a matching grant basis such as in France, Netherlands and South Korea.

2.1.3.1.3 While the Representation of the People Act puts limits on election expenditure, company donations to political party were banned in 1969 but later allowed by an amendment of the Companies Act in 1985. The Dinesh Goswami Committee on Electoral Reforms set up in 1990 recommended limited support, in kind, for vehicle fuel, hire charges of

microphones, copies of electoral rolls etc., while simultaneously recommending a ban on company donations. Subsequent developments include parties being forced to file returns under the Income Tax and Wealth Tax Acts after the Supreme Court issued notices and also passed an order on 4<sup>th</sup> April, 1996 which effectively repealed Explanation-I of Section 77 of the Representation of People Act and clubbed expenditure by third party(s) as well as by the political party under the expenditure ceiling limits prescribed under the Representation of People Act. Another Committee, the Indrajit Gupta Committee on State Funding of Elections has recommended partial state-funding mainly in kind. However, the National Committee for Review of the Constitution has expressed the view that until better regulatory mechanism for political parties can be developed in India, state funding of elections should be deferred.

2.1.3.1.4 Parliament in 2003 unanimously enacted the Election and Other Related Laws (Amendment) Act in a spirit of bipartisanship. It took into consideration the recommendations of the Committee on Electoral Reforms (Dinesh Goswami Committee, 1990), the Committee on State Funding of Elections (Indrajit Gupta Committee, 1999) and the Law Commission of India (170th report on Reform of Electoral Laws, 1999). The Law Minister while introducing the Bill, acknowledged the recommendations of the Dr. Manmohan Singh Committee on Party Finances set up by the Indian National Congress in 2002. The Act contains the following key provisions:

- Full tax exemption to individuals and corporates on all contributions to political parties.
- Effective repeal of Explanation I under Section 77 of the Representation of the People Act. Expenditure by third parties and political parties now comes under ceiling limits, and only travel expenditure of leaders of parties is exempt.
- Disclosure of party finances and contributions over Rs.20,000.
- Indirect public funding to candidates of recognized parties – including free supply of electoral rolls (already in vogue), and such items as the Election Commission decides in consultation with the union government.
- Equitable sharing of time by the recognized political parties on the cable television network and other electronic media (public and private).

2.1.3.1.5 In order to eradicate the major source of political corruption, there is a compelling case for state funding of elections. As recommended by the Indrajit Gupta Committee on State Funding of Elections, the funding should be partial state funding mainly in kind for certain essential items.

#### 2.1.3.1.6 Recommendation:

- a. **A system for partial state funding should be introduced in order to reduce the scope of illegitimate and unnecessary funding of expenditure for elections.**

#### 2.1.3.2 Tightening of anti-defection law:

2.1.3.2.1 Defection has long been a malaise of Indian political life. It represents manipulation of the political system for furthering private interests, and has been a potent source of political corruption. The anti-defection legislation that was enacted to combat this malaise, fixed a certain number above which defection in a group was permitted. Legalising such selective defection however, provided opportunities for transgressing political ethics and opportunism. There is no doubt that permitting defection in any form or context is a travesty of ethics in politics.

2.1.3.2.2 The 91<sup>st</sup> Amendment to the Constitution was enacted in 2003 to tighten the anti-defection provisions of the Tenth Schedule, enacted earlier in 1985. This Amendment makes it mandatory for all those switching political sides – whether singly or in groups – to resign their legislative membership. They now have to seek re-election if they defect and cannot continue in office by engineering a ‘split’ of one-third of members, or in the guise of a ‘continuing split of a party’. The Amendment also bars legislators from holding, post-defection, any office of profit. This Amendment has thus made defections virtually impossible and is an important step forward in cleansing politics. Besides, the Election Commission has also insisted on internal elections in political parties to elect their leaders.

2.1.3.2.3 The Election Commission has recommended that the question of disqualification of members on the ground of defection should also be decided by the President/Governor on the advice of the Election Commission. Such an amendment to the law seems to be unfortunately necessary in the light of the long delays seen in some recent cases of obvious defection.

#### 2.1.3.2.4 Recommendation:

- a. **The issue of disqualification of members on grounds of defection should be decided by the President/Governor on the advice of the Election Commission.**

#### 2.1.3.3 Disqualification:

2.1.3.3.1 It has been suggested that disclosure of past acquittals in respect of serious criminal charges will be of value. Given the delays in our criminal justice system, disqualification

after conviction for crimes may be an insufficient safeguard. There are candidates who face grave criminal charges like murder, abduction, rape and dacoity, unrelated to political agitations. In such cases, there is need for a fair reconciliation between the candidate's right to contest and the community's right to good representation. As a rule, it would be rash and undemocratic to disqualify candidates on some pretext or other. An election outcome must be decided by the people who are the ultimate sovereigns through the ballot box. Election by indiscriminate disqualification is a stratagem sometimes resorted to by dictatorships to pervert the democratic process. However, in the present situation, on balance, in cases of persons facing grave criminal charges framed by a trial court after a preliminary enquiry, disallowing them to represent the people in legislatures until they are cleared of charges seems to be a fair and prudent course. But care must be exercised to ensure that no political vendetta is involved in such charges and people facing charges related to political agitations are not victimized. The draft Ordinance of July 2002 relating to disclosure of candidate details following a Supreme Court judgment provided for disqualification of candidates facing charges related to grave and heinous offences. The heinous offences listed were murder, abduction, rape, dacoity, waging war against India, organised crime and narcotics offences. It also seems reasonable to disqualify persons facing corruption charges, provided the charges have been framed by a judge/magistrate after prima facie evidence. The Election Commission<sup>4</sup> has suggested that as a precaution against motivated cases, it may be provided that only cases filed six months before an election would lead to such disqualification.

#### 2.1.3.3.2 Recommendation:

- a. **Section 8 of the Representation of the People Act, 1951 needs to be amended to disqualify all persons facing charges related to grave and heinous offences and corruption, with the modification suggested by the Election Commission.**

#### 2.1.3.4 False Declarations:

2.1.3.4.1 The Election Commission has recommended that all false declarations before the Returning Officer, Electoral Officer, Chief Electoral Officer or the Election Commission should be made an electoral offence under Section 31 of the Representation of the People Act (now restricted to statements relating to preparation/revision, inclusion/exclusion in electoral rolls). The proposed amendment will act as an effective deterrent against false statements.

#### 2.1.3.5 Publication of Accounts by Political Parties:

2.1.3.5.1 Political parties have a responsibility to maintain proper accounts of their income and expenditure and get them audited annually. The steps taken in the Election and Other

Related Laws (Amendment) Act, 2003, following various reports mentioned in para 2.1.3.1.4 will be strengthened if this is made mandatory under law. The Election Commission has reiterated this proposal. This needs to be acted upon early. The audited accounts should be available for information of the public.

#### 2.1.4 Coalition and Ethics

2.1.4.1 The phenomenon of coalition politics has emerged as a strong presence in the Indian polity in recent years. The very diversity and complexity of the Indian electorate and our vibrant democracy has made this a familiar aspect of our electoral process. Coalitions are often necessitated by the fact that, in a multiparty system such as ours, it is difficult today for a single party to obtain a clear majority in the Legislature. In order to make coalitions legitimate, it is necessary for the coalition partners to reach an understanding based on broad-based programmes to ensure that the goals of socio-economic development are met. Such an understanding needs to be translated into a common minimum programme and announced either prior to the election or before the formation of the coalition government.

2.1.4.2 The ethics of coalition government is, however, seriously strained when the coalition partners change partnerships mid-stream and new coalitions are formed, primarily driven by opportunism and craving for power in utter disregard of the common minimum programme agreed to for the realization of the goal of socio-economic development. The common programme, which has been explicitly mandated by the electorate prior to the election, or implicitly after the election but before the formation of the government, becomes non-existent, and the power given by the people is abused. To maintain the will of the people, it is necessary to lay down an ethical framework to ensure that such exercises in opportunism, through redrawing of coalitions between elections, do not take place.

#### 2.1.4.3 Recommendation:

- a. **The Constitution should be amended to ensure that if one or more parties in a coalition with a common programme mandated by the electorate either explicitly before the elections or implicitly while forming the government, realign midstream with one or more parties outside the coalition, then Members of that party or parties shall have to seek a fresh mandate from the electorate.**

#### 2.1.5 Appointment of the Chief Election Commissioner/Commissioners

2.1.5.1 The present procedure of appointment of the Chief Election Commissioner and other Election Commissioners, is laid down in Article 324 of the Constitution and stipulates that they are to be appointed by the President on the advice of the Prime Minister.

2.1.5.2 During debates in the Constituent Assembly on the procedure for appointment, there were suggestions that the person appointed as the Chief Election Commissioner should enjoy the confidence of all parties and therefore his appointment should be confirmed by a 2/3 majority of both the Houses. Thus even at that stage, there was a view that the procedure for appointment should be a broad based one, above all partisan considerations. In recent times, for statutory bodies such as the National Human Rights Commission (NHRC) and the Central Vigilance Commission (CVC), appointment of Chairperson and Members are made on the recommendations of a broad based Committee. Thus, for the appointment of the Chief Vigilance Commissioner, the Committee consists of the Prime Minister, the Home Minister and the Leader of the Opposition in the Lok Sabha, whereas for the NHRC, the Committee is chaired by the Prime Minister and has as its members, the Speaker of the Lok Sabha, the Home Minister, the Leader of the Opposition in the Lok Sabha, the Leader of the Opposition in the Rajya Sabha and the Deputy Chairman of the Rajya Sabha.

2.1.5.3 Given the far reaching importance and critical role of the Election Commission in the working of our democracy, it would certainly be appropriate if a similar collegium is constituted for selection of the Chief Election Commissioner and the Election Commissioners.

#### 2.1.5.4 Recommendation:

- a. A collegium headed by the Prime Minister with the Speaker of the Lok Sabha, the Leader of Opposition in the Lok Sabha, the Law Minister and the Deputy Chairman of the Rajya Sabha as members should make recommendations for the consideration of the President for appointment of the Chief Election Commissioner and the Election Commissioners.

#### 2.1.6 Expediting Disposal of Election Petitions

2.1.6.1 Election petitions in India are at present to be filed in the High Court. Under the Representation of the People Act, such petitions should be disposed of within a period of 6 months. In actual practice however, such petitions remain pending for years and in the meanwhile, even the full term of the House expires thus rendering the election petition infructuous. There have been suggestions from other high level committees and eminent persons that a separate judicial set-up may be required. The National Commission to Review the Working of the Constitution (NCRWC) recommended that special election benches should be constituted in the High Courts earmarked exclusively for the disposal of election petitions.

2.1.6.2 The Commission is of the view that given the huge existing case load in the High Courts, it would be possible to ensure speedy disposal of election petitions only by setting

up Special Tribunals as provided for under Article 323B of the Constitution. While doing so, it would have to be specifically ensured that the decisions of such tribunals are final with appeal jurisdiction being restricted to the Supreme Court alone as already provided in the Constitution. Such Tribunals may have two members, one a Judge of the High Court, and the other, an administrative member. In case of difference of opinion between the two, the matter may be referred to the High Court.

#### 2.1.6.3 Recommendation:

- a. Special Election Tribunals should be constituted at the regional level under Article 323B of the Constitution to ensure speedy disposal of election petitions and disputes within a stipulated period of six months. Each Tribunal should comprise a High Court Judge and a senior civil servant with at least 5 years of experience in the conduct of elections (not below the rank of an Additional Secretary to Government of India/Principal Secretary of a State Government). Its mandate should be to ensure that all election petitions are decided within a period of six months as provided by law. The Tribunals should normally be set up for a term of one year only, extendable for a period of 6 months in exceptional circumstances.

#### 2.1.7 Grounds of Disqualification for Membership

2.1.7.1 Article 102 of the Constitution provides for disqualification for membership of either House of Parliament under certain specific circumstances, which are as follows:-

- (1) *A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament -*
  - (a) *if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder;*
  - (b) *if he is of unsound mind and stands so declared by a competent court;*
  - (c) *if he is an undischarged insolvent;*
  - (d) *if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgement of allegiance or adherence to a foreign State;*
  - (e) *if he is so disqualified by or under any law made by Parliament.*

#### Box 2.2: Corruption and Hypocrisy

Corruption and hypocrisy ought not to be inevitable products of democracy, as they undoubtedly are today.

*Mahatma Gandhi*

*Explanation - For the purpose of this clause a person shall not be deemed to hold an*

*office of profit under the Government of India or the Government of any State by reason only that he is a Minister either for the Union or for such State.*

- (2) *A person shall be disqualified for being a member of either House of Parliament if he is so disqualified under the Tenth Schedule.*

2.1.7.2 It is evident from Article 102(e) that Parliament has also been authorized to pass a law to include any further conditions for such disqualification. So far, no such law has been enacted. In view of recent development leading to expulsions of some Members of Parliament, it may be desirable to comprehensively spell out other circumstances under which the Members of Parliament can be disqualified. This could be done by enacting such a law under Article 102 (e). This would remove any ambiguity in the matter and also re-affirm the supremacy of Parliament in all such matters.

#### 2.1.7.3 Recommendation:

- a. **Appropriate legislation may be enacted under Article 102(e) of the Constitution spelling out the conditions for disqualification of membership of Parliament in an exhaustive manner. Similarly, the States may also legislate under Article 198 (e).**

2.1.8 The proposals highlighted in the preceding paragraphs require serious discussion amongst our political parties. Whether these are adopted sooner or later, will depend upon them. We are among a handful of democracies which sustained freedom and stability for six long decades among nations liberated after the Second World War. Democratic maturity needs time, patience, and genuine efforts to find rational answers to complex problems and willingness to reconcile conflicting views. All great democracies went through the tortuous process of democratic transformation. The power of ideas, high quality of leadership, inspiration and a spirit of idealism are the necessary conditions to build a great democracy free from major distortions. India has the strength and resilience to build such a democracy and our political parties should rise to the occasion.

#### Box 2.3: Need for Ethical Code

Senator Fulbright identified a problem of government employees who committed ethical lapses not amounting to criminal conduct. He asked-

What should be done about men who do not directly and blatantly sell the favors of their offices for money and so place themselves within the penalties of the law? How do we deal with those who, under the guise of friendship, accept favors, which offend the spirit of the law but do not violate its letter?

He further elaborated-

One of the most disturbing aspects of this problem of moral conduct is the revelation that among so many influential people, morality has become identical with legality. We are certainly in a tragic plight if the accepted standard by which we measure the integrity of a man in public life is that he keep within the letter of the law.

Source: Senate Ethics Manual 2003 Editions:page-6; retrieved from - ethics.senate.gov/downloads/pdffiles/manual.pdf

## 2.2 Ethics in Public Life

2.2.1 Ethics is grounded in the notion of responsibility and accountability. In democracy,

every holder of public office is accountable ultimately to the people. Such accountability is enforced through a system of laws and rules, which the elected representatives of the people enact in their legislatures. Ethics provides the basis for the creation of such laws and rules. It is the moral ideas of people that give rise to and shapes the character of laws and rules. Our legal system emanates from a shared vision of what is good and just.

2.2.2 The fundamental principle in a democracy is that all persons holding authority derive it from the people; in other words, all public functionaries are trustees of the people. With the expansion of the role of government, public functionaries exercise considerable influence over the lives of people. The trusteeship relationship between the public and the officials requires that the authority entrusted to the officials be exercised in the best interest of the people or in 'public interest'.

2.2.3 The role of ethics in public life has many dimensions. At one end is the expression of high moral values and at the other, the specifics of action for which a public functionary can be held legally accountable. Any framework of ethical behaviour must include the following elements:

- Codifying ethical norms and practices.
- Disclosing personal interest to avoid conflict between public interest and personal gain.
- Creating a mechanism for enforcing the relevant codes.
- Providing norms for qualifying and disqualifying a public functionary from office.

2.2.4 A system of laws and rules, however elaborate, cannot provide for all situations. It is no doubt desirable, and perhaps possible, to govern the conduct of those who occupy positions in the lower echelons and exercise limited or no discretion. But the higher the echelon in public service, the greater is the ambit of discretion. And it is difficult to provide for a system of laws and rules that can comprehensively cover and regulate the exercise of discretion in high places.

2.2.5 One of the most comprehensive statements of what constitutes ethical standards for holders of public office came from the Committee on Standards in Public Life in the United Kingdom, popularly known as the Nolan Committee, which outlined the following seven principles of public life:

- Selflessness: Holders of public office should take decisions solely in terms of public interest.*

*They should not do so in order to gain financial or other material benefits for themselves, their family or their friends.*

2. *Integrity: Holders of public office should not place themselves under any financial or other obligation to outside individuals or organizations that might influence them in the performance of their official duties.*
3. *Objectivity: In carrying out public business, including making public appointments, awarding contracts or recommending individuals for rewards and benefits, holders of public office should make choices on merit.*
4. *Accountability: Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.*
5. *Openness: Holders of public office should be as open as possible about all the decisions and actions they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.*
6. *Honesty: Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.*
7. *Leadership: Holders of public office should promote and support these principles by leadership and example.*

**Box 2.4: An Extract from the Code of Good Governance of Spain**

Nonetheless, at the present juncture, it is necessary for public authorities to offer citizens an undertaking that all the senior offices must satisfy not only the obligations laid down by law, but, in addition, their conduct must be inspired and be guided by principles of ethics and good conduct which have not yet been expressly stated in the regulations – although they are no doubt implicit – and which offer a code of good governance....

First. *Basic principles* — Members of the Government and the senior officers of the General State Administration shall carry out their activities in accordance with the Constitution and the rest of the legal system, following the following principles of ethics and good conduct developed in this Code: objectivity, integrity, neutrality, responsibility, credibility, impartiality, confidentiality, dedication to public service, transparency, exemplary conduct, austerity, accessibility, efficiency, honesty and promotion of the cultural and environmental environment and of equality between the sexes....

Source: <http://www.oecd.org/dataoecd/17/35/35521364.pdf>; retrieved on 7-12-06

2.2.6 These principles of public life are of general applicability in every democracy. Arising out of such ethical principles a set of guidelines of public behaviour in the nature of a code of conduct becomes essential for public functionaries. Indeed any person who is privileged to guide the destiny of the people must not only be ethical but must be seen to practice these ethical values. Although all citizens are subject to the laws of the land, in the case of public servants there must be standards of behaviour more stringent than those for an ordinary

citizen. It is at the interface of public action and private interest that the need arises for establishing not just a code of ethics but a code of conduct. A code of ethics would cover broad guiding principles of good behaviour and governance while a more specific code of conduct should, in a precise and unambiguous manner, stipulate a list of acceptable and unacceptable behaviour and action.

### 2.3 International Approach

2.3.1 By its Resolution 58/4 of 31<sup>st</sup> October, 2003, the General Assembly adopted the United Nations Convention against Corruption<sup>5</sup>. Article 8 of the Resolution states:

*“Codes of conduct for public officials*

1. *In order to fight corruption, each State Party shall promote, inter alia, integrity, honesty and responsibility among its public officials, in accordance with the fundamental principles of its legal system.*
2. *In particular, each State Party shall endeavour to apply, within its own institutional and legal systems, codes or standards of conduct for the correct, honourable and proper performance of public functions.*
3. *For the purposes of implementing the provisions of this article, each State Party shall, where appropriate and in accordance with the fundamental principles of its legal system, take note of the relevant initiatives of regional, interregional and multilateral organizations, such as the International Code of Conduct for Public Officials contained in the annex to General Assembly resolution 51/59 of 12 December 1996.*
4. *Each State Party shall also consider, in accordance with the fundamental principles of its domestic law, establishing measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions.*
5. *Each State Party shall endeavour, where appropriate and in accordance with the fundamental principles of its domestic law, to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials.*
6. *Each State Party shall consider taking, in accordance with the fundamental principles of its domestic law, disciplinary or other measures against public officials who violate the codes or standards established in accordance with this article.”*

2.3.2 Various countries have, from time to time, addressed the issue of prescribing a Code of

<sup>5</sup> India is a signatory to the Convention, but yet to ratify it.

Conduct/Ethics for its Ministers, legislators and civil servants. There is a Ministerial Code in UK, in the US Senate a Code of Conduct and in Canada a 'Guide for Ministers'. In Belize, the Code of Conduct for public functionaries is prescribed in the Constitution itself<sup>6</sup>.

## 2.4 Ethical Framework for Ministers

2.4.1 As stated in the foregoing paragraph, a number of countries have prescribed a Code of Conduct/Ethics for Ministers. In Canada, the 'Guide for Ministers (2006)' sets out core principles regarding the role and responsibilities of Ministers. This includes the central tenet of ministerial responsibility, both individual and collective, as well as Ministers' relations with the Prime Minister and Cabinet, their portfolios, and Parliament. It outlines standards of conduct expected of Ministers as well as addressing a range of administrative, procedural and institutional matters<sup>7</sup>. In UK, the Ministerial Code provides guidance to Ministers on how they should act and arrange their affairs in order to uphold these standards. It lists the principles which may apply in particular situations drawing on past precedent. It also stipulates that:

*"Ministers are personally responsible for deciding how to act and conduct themselves in the light of the Code and for justifying their actions and conduct in Parliament. The Code is not a rulebook, and it is not the role of the Secretary of the Cabinet or other officials to enforce it or to investigate Ministers although they may provide Ministers with private advice on matters which it covers.*

*Ministers only remain in office for so long as they retain the confidence of the Prime Minister. He is the ultimate judge of the standards of behaviour expected of a Minister and the appropriate consequences of a breach of those standards, although he will not expect to comment on every allegation that is brought to his attention."*<sup>8</sup>

2.4.2 Government of India has prescribed a Code of Conduct which is applicable to Ministers of both the Union and State Governments. The Code of Conduct merits reproduction here.

1. In addition to the observance of the provisions of the Constitution, the Representation of

### Box. 2.5: The Constitution of Belize and Code of Conduct

Section 121(1): The persons to whom this section applies shall conduct themselves in such a way as not-

- (a) to place themselves in positions in which they have or could have a conflict of interest;
- (b) to compromise the fair exercise of their public or official functions and duties;
- (c) to use their office for private gain;
- (d) to demean their office or position;
- (e) to allow their integrity to be called into question; or
- (f) to endanger or diminish respect for, or confidence in the integrity of the Government.

*This section applies to the Governor-General, members of the National Assembly, members of the Belize Advisory Council, members of the Public Services Commission, members of the Elections and Boundaries Commission, public officers, officers of statutory corporations and government agencies, and such other officers as may be prescribed by law enacted by the National Assembly.*

*the People Act, 1951, and any other law for the time being in force, a person before taking office as a Minister, shall:*

- a. *disclose to the Prime Minister, or the Chief Minister, as the case may be, details of the assets and liabilities, and of business interests, of himself and of members of his family. The details to be disclosed shall consist of particulars of all immovable property and the total approximate value of (i) shares and debentures, (ii) cash holdings and (iii) jewellery;*
- b. *sever all connections, short of divesting himself of the ownership, with the conduct and management of any business in which he was interested before his appointment as Minister; and*
- c. *with regard to a business concern which supplies goods or services to the Government concerned or to undertakings of that Government (excepting in the usual course of trade or business and at standard or market rates) or whose business primarily depends on licenses, permits, quotas, leases, etc., received or to be received from the Government concerned, divest himself of all his interests in the said business and also of the management thereof.*

*Provided, however, that he may transfer in the case of (b) his interest in the management, and in the case of (c) both ownership and management, to any adult member of his family or adult relative, other than his wife (or husband, as the case may be), who was prior to his appointment as Minister associated with the conduct or management or ownership of the said business. The question of divesting himself of his interests would not arise in case of holding of share in public limited companies except where the Prime Minister, or the Chief Minister, as the case may be, considers that the nature or extent of his holding is such that it is likely to embarrass him in the discharge of his official duties.*

2. *After taking office, and so long as he remains in office, the Minister shall:-*

- (a) *furnish annually by the 31<sup>st</sup> March to the Prime Minister, or the Chief Minister, as the case may be, a declaration regarding his assets and liabilities;*
- (b) *refrain from buying from or selling to, the Government any immovable property except where such property is compulsorily acquired by the Government in usual course;*
- (c) *refrain from starting, or joining, any business;*

<sup>6</sup> Section 121(1), The Constitution of Belize, retrieved from [http://www.belize.gov.bz/e\\_library/constitution.html](http://www.belize.gov.bz/e_library/constitution.html), on 30-11-06

<sup>7</sup> Source: Accountable Government, a Guide for Ministers-2006; retrieved from [http://www.pm.gc.ca/grfx/docs/guide\\_e.pdf](http://www.pm.gc.ca/grfx/docs/guide_e.pdf), on 24-11-06

<sup>8</sup> Source: [http://www.cabinetoffice.gov.uk/propriety\\_and\\_ethics/publications/pdf/Ministerial\\_code.pdf](http://www.cabinetoffice.gov.uk/propriety_and_ethics/publications/pdf/Ministerial_code.pdf)

(d) ensure that the members of his family do not start, or participate in, business concerns, engaged in supplying goods or services to that Government (excepting in the usual course of trade or business and at standard or market rates) or dependent primarily on grant of licenses, permits, quotas, leases, etc., from that Government; and

(e) report the matter to the Prime Minister, or the Chief Minister as the case may be, if any member of his family sets up, or joins in the conduct and management of, any other business.

#### 3.1 No Minister should:-

(a) personally, or through a member of his family, accept contribution for any purpose, whether political, charitable or otherwise. If any purse or cheque intended for a registered society, or a charitable body, or an institution recognized by a public authority, or a political party is presented to him, he should pass it on as soon as possible to the organisation for which it is intended; and

(b) associate himself with the raising of funds except for the benefit of (i) a registered society, or a charitable body, or an institution recognised by a public authority and (ii) a political party. He should, however, ensure that such contributions are sent to a specified office bearer, etc. of the society or body or institution of party concerned and not to him. Nothing herein before shall prevent a Minister from being associated with the operation for disbursement of funds raised as above.

3.2 A Minister, including the Union Ministers, the Chief Ministers and other Ministers of State Governments/Union Territories, should not permit their spouse and dependents to accept employment under a Foreign Government, in India or abroad, or in a foreign organisation (including commercial concerns) without prior approval of the Prime Minister. Where the wife or a dependent of a Minister is already in such employment, the matter should be reported to the Prime Minister for decision whether the employment should or should not continue. As a general rule, there should be total prohibition on employment with a Foreign Mission.

#### 4.1 A Minister should-

(a) not accept valuable gifts except from close relatives, and he or members of his family should not accept any gifts at all from any person with whom he may have official dealings; and

(b) not permit a member of his family, contract debts of a nature likely to embarrass or influence him in the discharge of his official duties.

4.2 A Minister may receive gifts when he goes abroad or from foreign dignitaries in India. Such gifts fall into two categories. The first category will include gifts, which are of symbolic nature, like a sword of honour, ceremonial robes etc. and which can be retained by the recipients. The second category of gifts would be those which are not of symbolic nature. If its value is less than Rs. 5,000/- it can be retained by the Minister. If, however, there is any doubt about the estimated value of the gifts, the matter should be referred to the Toshakhana for valuation. If the value of the gift, on assessment is found to be within the prescribed limit of Rs. 5,000/- the gift will be returned to the Minister. If it exceeds Rs. 5,000/- the recipient will have the option to purchase it from the Toshakhana by paying the difference between the value as assessed by the Toshakhana and Rs. 5,000/-. Only gifts of household goods which are retained by the Toshakhana, such as carpets, paintings, furniture etc. exceeding Rs. 5,000/- in value, will be kept in Rashtrapati Bhavan, Prime Minister's House or Raj Bhavan as State property. (Note: The value of the gift refers to its approximate market value in the country of origin).

4.3 In case of grant of an award by any organisation to a Minister/a person holding the Minister's status/rank, the following procedure may be followed:-

(a) the credentials of the organisation giving award may be gone into;

(b) if the credentials of the body giving the awards are unimpeachable, the award as such, may be accepted but the cash part should not be accepted;

(c) if the awards relate to the work done by the individual prior to his holding the office of Minister, such awards may be accepted but in all such cases, specific approval of the Prime Minister or the Chief Minister as the case may be, should be obtained. The Chief Minister and other Ministers shall have to take permission of the Prime Minister and the Union Home Minister; and

(d) those instances, where a Minister is to receive any award by any organisation which has connections with any Foreign Agencies/Organisations, such a Minister/a person holding the Minister's status/rank, will have to seek prior approval of the Prime Minister of India.

4.4 A Minister should follow the instructions given from time to time by the Prime Minister in matters relating to attending functions arranged by foreign missions in India or abroad, and also for accepting the membership of any foreign trust, institution or organisation other than UN Organisations of which India is a Member.

5. *A Minister should-*
- (a) *while on official tour, as far as practicable, stay in accommodation belonging to himself or maintained by Government, Government undertakings, public bodies or institutions (such as circuit houses, dak bungalows etc) or in recognised hotels; and*
  - (b) *avoid attending, as far as possible, ostentatious or lavish parties given in his honour.*
6. *The authority for ensuring the observance of the Code of Conduct will be the Prime Minister in the case of Union Ministers, the Prime Minister and the Union Home Minister in the case of Chief Ministers, and the Chief Minister concerned in the case of State Ministers except where it is otherwise specified. The said authority would follow such procedure as it might deem fit, according to the facts and circumstances of each case, for dealing with or determining any alleged or suspected breach of this Code.*

*Explanation: In this code, a Minister's family shall include his wife (or husband, as the case may be) not legally separated from him (or her), minor children, and any other persons related by blood or marriage to, and wholly dependent on the Minister.*

2.4.3 The Code of Conduct is a starting point for ensuring good conduct by Ministers. However, it is not comprehensive in its coverage and is more in the nature of a list of prohibitions; it does not amount to a Code of Ethics. It is therefore necessary that in addition to the Code of Conduct, there should be a Code of Ethics to provide guidance on how Ministers should uphold the highest standards of constitutional and ethical conduct in the performance of their duties. The Code should be based on the overarching duty of Ministers to comply with the law, to uphold the administration of justice and to protect the integrity of public life. It should also lay down the principles of minister-civil servant relationship. The Code of Ethics should also reflect the seven principles of public life as enumerated in para 2.2.5. The Commission has examined the code of conduct in other countries and is of the view that a Code of Ethics and a Code of Conduct for Ministers should include the following:

- a. Ministers must uphold the highest ethical standards;
- b. Ministers must uphold the principle of collective responsibility;
- c. Ministers have a duty to Parliament to account, and be held to account, for the policies, decisions and actions of their departments and agencies;

- d. Ministers must ensure that no conflict arises, or appears to arise, between their public duties and their private interests;
- e. Ministers in the Lok Sabha must keep separate their roles as Minister and constituency member;
- f. Ministers must not use government resources for party or political purposes; they must accept responsibility for decisions taken by them and not merely blame it on wrong advice.
- g. Ministers must uphold the political impartiality of the Civil Service and not ask civil servants to act in any way, which would conflict with the duties and responsibilities of civil servants;
- h. Ministers must comply with the requirements which the two Houses of Parliament lay down from time to time;
- i. Ministers must recognize that misuse of official position or information is violation of the trust reposed in them as public functionaries;
- j. Ministers must ensure that public moneys are used with utmost economy and care;
- k. Ministers must function in such a manner as to serve as instruments of good governance and to provide services for the betterment of the public at large and foster socio-economic development; and
- l. Ministers must act objectively, impartially, honestly, equitably, diligently and in a fair and just manner.

2.4.4 The authority for ensuring the observance of the present Code of Conduct is the Prime Minister in the case of Union Ministers, the Prime Minister and the Union Home Minister in the case of Chief Ministers, and the Chief Minister concerned in the case of Ministers of the State Government. The Commission is of the view that dedicated units should be set up in the offices of the Prime Minister and the Chief Ministers of the states to monitor the observance of the Code of Conduct. An annual report indicating violations should be submitted to the appropriate legislature for consideration. Besides, the present Code of Conduct is not in the public domain and, as a result, members of the public are perhaps not aware that such a code exists. The Commission would like to recommend that the Code of Conduct for Ministers, duly amplified, should be put in the public domain as some other

countries have done.<sup>9</sup> As coalition politics has become the order of the day it is particularly appropriate to ensure that the ministers from the coalition partners both at the Centre and the State also adhere to the Code of Ethics/Conduct and the Prime Minister and the Chief Ministers are duty bound to put violation of these Codes in public domain.

#### 2.4.5 Recommendations:

- a. In addition to the existing Code of Conduct for Ministers, there should be a Code of Ethics to provide guidance on how Ministers should uphold the highest standards of constitutional and ethical conduct in the performance of their duties.
- b. Dedicated units should be set up in the offices of the Prime Minister and the Chief Ministers to monitor the observance of the Code of Ethics and the Code of Conduct. The unit should also be empowered to receive public complaints regarding violation of the Code of Conduct.
- c. The Prime Minister or the Chief Minister should be duty bound to ensure the observance of the Code of Ethics and the Code of Conduct by Ministers. This would be applicable even in the case of coalition governments where the Ministers may belong to different parties.
- d. An annual report with regard to the observance of these Codes should be submitted to the appropriate legislature. This report should include specific cases of violations, if any, and the action taken thereon.
- e. The Code of Ethics should *inter alia* include broad principles of the Minister-civil servant relationship and the Code of Conduct should stipulate the details as illustrated in para 2.4.3.
- f. The Code of Ethics, the Code of Conduct and the annual report should be put in the public domain.

## 2.5 Ethical Framework for Legislators

### 2.5.1 Ethical Framework for Legislators in Other Countries:

2.5.1.1 Among the four pillars of an ideal democratic structure, the legislature has the most important position. It is the expression of the will of the people and the executive is answerable to it. This demands that the requirement of ethical standards for the executive must be preceded by an equally emphatic requirement of ethical standards for legislators.

2.5.1.2 The US Constitution, in Article I, Section 5, grants broad authority to Congress to discipline its Members. However, the present Congressional Ethics Committees and formal rules governing the conduct of Members, officers, and employees did not exist until the 1960's. Earlier disciplinary actions by Congress against Members took place on an *ad hoc* basis. In 1964, the Senate adopted S. Res. 338, 88th Congress, which created the Senate Select Committee on Standards and Conduct. This six-member Committee was bipartisan with advisory functions and investigative authority to "receive complaints and investigate allegations of improper conduct which may reflect upon the Senate, violations of law, and violations of rules and regulations of the Senate." In 1968, the Senate adopted its first official code of conduct, with substantial revision and amendment of the Code occurring in 1977. The Committee's name was changed to the Select Committee on Ethics<sup>10</sup>. The Senate Code of Conduct regulates financial disclosures, gifts, travel reimbursements, conflicting interests, post employment restrictions, employment practices etc.

2.5.1.3 The UK House of Commons adopted the present Code of Conduct for its Members vide their Resolution dated 19<sup>th</sup> July, 1995. The purpose of this Code of Conduct is to assist Members in the discharge of their obligations to the House, their constituents and the public at large by providing guidance on the standards of conduct expected of Members in discharging their parliamentary and public duties. It is also stated that the obligations set out in this Code are complementary to those which apply to all Members by virtue of the procedural and other rules of the House and the rulings of the Chair.<sup>11</sup>

### 2.5.2 The Committee on Ethics of the Rajya Sabha:

2.5.2.1 Chapter XXIV of the Rules of Procedure and Conduct of Business in the Council of States, provides for constitution of the Committee on Ethics to oversee the moral and ethical conduct of Members. The Committee on Ethics was first constituted by the Chairman of the House on 4<sup>th</sup> March 1997. In its First Report, the Committee had, *inter-alia*, dealt with matters such as values in public life, criminalisation of politics and electoral reforms. It suggested a framework for a Code of Conduct for Members of the Rajya Sabha<sup>12</sup>. In its Second Report, the Committee emphasized the procedural aspects of enforcing the Code of Conduct suggested in the First Report, including maintenance of 'Register of Members' Interests', declaration of interests by Members, procedure for inquiry and penalties. In the Third Report, the Committee dealt with issues germane to the behaviour of Members in the House as well as outside of it. In the Fourth Report, the Committee dealt with discipline and decorum in the Council, declaration of assets and liabilities, registration of interests, Code of Conduct and the Committee's power to recommend sanctions.<sup>13</sup>

2.5.2.2 The following is the existing framework of the Code of Conduct for Members of the Rajya Sabha<sup>14</sup>:

<sup>9</sup> The UK Ministerial Code is available at [http://www.cabinetoffice.gov.uk/propriety\\_and\\_ethics/publications/pdf/Ministerial\\_code.pdf](http://www.cabinetoffice.gov.uk/propriety_and_ethics/publications/pdf/Ministerial_code.pdf)

<sup>10</sup> Source: <http://ethics.senate.gov/downloads/pdffiles/manual.pdf>

<sup>11</sup> Source: <http://www.publications.parliament.uk/pa/cm/code02.htm>; retrieved on 30-11-06

<sup>12</sup> Both, First and Second Reports of the Committee were discussed and adopted together by Rajya Sabha on the 15<sup>th</sup> December, 1999

<sup>13</sup> Extracted from the Sixth Report of the Committee on Ethics <http://rajyasabha.nic.in/book2/reports/ethics/6threport.htm>

<sup>14</sup> Source: <http://rajyasabha.nic.in/code.htm>; retrieved on 8-12-06

The Members of Rajya Sabha should acknowledge their responsibility to maintain the public trust reposed in them and should work diligently to discharge their mandate for the common good of the people. They must hold in high esteem the Constitution, the Law, Parliamentary Institutions and, above all, the general public. They should constantly strive to translate the ideals laid down in the Preamble to the Constitution into a reality. The following are the principles which they should abide by in their dealings:

- (i) Members must not do anything that brings disrepute to the Parliament and affects their credibility.
- (ii) Members must utilize their position as Members of Parliament to advance general well-being of the people.
- (iii) In their dealings if Members find that there is a conflict between their personal interests and the public trust, which they hold, they should resolve such a conflict in a manner that their private interests are subordinated to the duty of their public office.
- (iv) Members should always see that their private financial interests and those of the members of their immediate family do not come in conflict with the public interest and if any such conflict ever arises, they should try to resolve such a conflict in a manner that the public interest is not jeopardized.
- (v) Members should never expect or accept any fee, remuneration or benefit for a vote given or not given by them on the floor of the House, for introducing a Bill, for moving a resolution, putting a question or abstaining from asking a question or participating in the deliberations of the House or a Parliamentary Committee.
- (vi) Members should not take a gift, which may interfere with honest and impartial discharge of their official duties. They may, however, accept incidental gifts or inexpensive mementoes and customary hospitality.
- (vii) Members holding public offices should use public resources in such a manner as may lead to public good.
- (viii) If Members are in possession of confidential information owing to their being Members of Parliament or Members of Parliamentary Committees, they should not disclose such information for advancing their personal interests.
- (ix) Members should desist from giving certificates to individuals and institutions of which they have no personal knowledge and are not based on facts.
- (x) Members should not lend ready support to any cause of which they have no or little knowledge.

- (xi) Members should not misuse the facilities and amenities made available to them.
- (xii) Members should not be disrespectful to any religion and work for the promotion of secular values.
- (xiii) Members should keep uppermost in their mind the fundamental duties listed in part IV A of the Constitution.
- (xiv) Members are expected to maintain high standards of morality, dignity, decency and values in public life.

### 2.5.3 The Committee on Ethics of the Lok Sabha

2.5.3.1 There is a Committee on Ethics of the Lok Sabha to oversee the moral and ethical conduct of Members of that House<sup>15</sup>. The Committee on Ethics (Thirteenth Lok Sabha) in its First Report<sup>16</sup> observed that norms of ethical behaviour for members have been adequately provided for in the Rules of Procedure and Conduct of Business in the Lok Sabha, directions by the Speaker and in the conventions which have evolved over the years on the basis of recommendations made by various Parliamentary Committees. Apart from the existing norms, the Committee recommended that the members should abide by the following general ethical principles<sup>17</sup>:

- i. Members must utilize their position to advance general well being of the people.
- ii. In case of conflict between their personal interest and public interest, they must resolve the conflict so that personal interests are subordinate to the duty of public office.
- iii. Conflict between private financial/family interest should be resolved in a manner that the public interest is not jeopardized.
- iv. Members holding public offices should use public resources in such a manner as may lead to public good.
- v. Members must keep uppermost in their mind the fundamental duties listed in Part-IV of the Constitution.
- vi. Members should maintain high standards of morality, dignity, decency and values in public life.

2.5.3.2 As per available information, only a few State Legislatures such as Andhra Pradesh, Orissa etc. have adopted Codes of Conduct for their Legislators. A Resolution was unanimously adopted at the 'All India Conference of Presiding Officers, Chief Ministers, Ministers of Parliamentary Affairs, Leaders and Whips of Parties on Discipline and Decorum in Parliament

<sup>15</sup> The present Committee on Ethics was constituted by Speaker on 28<sup>th</sup> April, 2005.

<sup>16</sup> Presented to the Speaker on 31<sup>st</sup> August, 2001

<sup>17</sup> Adopted by the House on 16<sup>th</sup> May, 2002

and Legislatures of States and Union Territories' held at New Delhi on 25<sup>th</sup> November, 2001. The Resolution included adoption of a Code of Conduct for Legislators. It was also recommended that Ethics Committees be constituted in all Legislatures where these have not already been constituted for enforcing the Code of Conduct.

#### 2.5.4 Disclosure of Interest

2.5.4.1 One way of avoiding conflict between public and private interest is through disclosure of one's interest. This by itself cannot resolve the conflict of interest but is a good first step as it acknowledges the possibility of such a conflict. Legislatures in different countries have adopted different approaches to this issue. In some countries the automatic outcome of such a disclosure is abstention from participation in the decision making process, whereas in other countries, the decision is left to the Chair.

2.5.4.2 The disclosure of one's interest can be done in different ways and at different stages of a public service career. One system could be an ad-hoc disclosure of a private interest when such a clash is anticipated. The rules of the US Congress and the Australian and Canadian Parliaments do not allow a legislator to vote if they have a direct pecuniary interest. Another system is prior registration of interest. This again can cover a variety of personal and pecuniary interests including those of close family members.

2.5.4.3 In India, disclosure of interest is provided in both Houses of Parliament, in different ways. It has been ruled by the Chairman of the Rajya Sabha that a Member having a personal pecuniary or direct interest on a matter before the House is required, while taking part in the proceedings in that matter, to declare the nature of interest. *{Rulings and Observations from the Chair 1952-2000(469), p 338}*<sup>18</sup>.

2.5.4.4 The Rules of Procedure and Conduct of Business in the Lok Sabha prescribe that if the vote of a Member in a division in the House is challenged on grounds of personal, pecuniary or direct interest in the matter to be decided, the Speaker may examine the issue and decide whether the vote of the Member should be disallowed or not and his decision shall be final<sup>19</sup>. Furthermore, the Handbook for Members provides that a Member having personal, pecuniary or direct interest in a matter to be decided by the House is expected, while taking part in the proceedings on that matter, to declare his interest.

#### 2.5.5 Register of Interests

2.5.5.1 A specific mechanism for disclosure of private interests is maintenance of a 'Register of Interests'. Legislators are expected to record in the register all their interests periodically. In order to make the system practical, the types of interest, which require disclosure, are

prescribed. A closely related mechanism is declaration of the assets and liabilities of the members at regular intervals.

2.5.5.2 The Committee on Ethics (Thirteenth Lok Sabha), in its First Report (31-8-2001) recommended that it may be made mandatory for each Member of the Lok Sabha to disclose his/her income, assets and liabilities. It further recommended that a register of Members' Interests may be maintained in the Lok Sabha Secretariat, which should be treated as confidential and the information contained therein should be made available to any person only with the permission of the Speaker.<sup>20</sup> However in its Second Report (20-11-2002), the Committee observed that since the requirement of financial disclosures and declaration of interests by members, as recommended by them in their First Report, has been fully met with the promulgation of the Ordinance<sup>21</sup>, there was no need for further action at that stage by the Committee.

2.5.5.3 Rule 293 (Rules of Procedure and Conduct of Business in the Council of States) stipulates that a 'Register of Members' Interests' has to be maintained by the Committee on Ethics. The Committee on Ethics of the Rajya Sabha, in its Fourth Report, recommended that to start with the following interests of Members should be entered in the Register:<sup>22</sup>

- i) Remunerative Directorship;
- ii) Regular Remunerated Activity;
- iii) Shareholding of Controlling Nature;
- iv) Paid Consultancy; and
- v) Professional Engagement

#### 2.5.6 Filing Assets and Liabilities Statement

2.5.6.1 The Representation of the People Act, 1951, has been amended by the Representation of the People (Third Amendment) Act, 2002. A new Section, 75A, has been inserted which stipulates that every elected candidate for a House of Parliament or the Legislature of the State, shall, within ninety days from the date on which he/she makes and subscribes an oath or affirmation, files the details of his/her assets/liabilities to the Chairman of the Council of State or the Legislative Council, or the Speaker of Lok Sabha or the Legislative Assemblies as the case may be. Accordingly, the Members of the Lok Sabha (Declaration of Assets and Liabilities) Rules, 2004, and the Members of the Rajya Sabha (Declaration of Assets and Liabilities) Rules have been formulated.

<sup>18</sup> Source: <http://rajyasabha.nic.in/rulings/rulingmain.html>

<sup>19</sup> Rule 371, Rules of Procedure and Conduct of Business in Lok Sabha

<sup>20</sup> Adopted by the House on 16<sup>th</sup> May, 2002

<sup>21</sup> The Representation of the People (Amendment) Ordinance, 2002. Section 75A was inserted in the Representation of the People Act, 1951, which required every Member to file a statement of his/her assets and liabilities.

<sup>22</sup> The Report was adopted unanimously by the Council on the 20<sup>th</sup> April, 2005

2.5.6.2 From the above it is evident that both Houses of Parliament have provided for Codes of Conduct and also norms for disclosure of interest and declaration of assets and liabilities of their Members. The Committees on Ethics of both the Lok Sabha and the Rajya Sabha have been mandated to oversee the moral and ethical conduct of members.

### 2.5.7 Enforcement of Ethical Norms in Legislatures

2.5.7.1 In India, both Houses of Parliament have on occasions acted firmly against violation of ethical principles. As early as in 1951, an ad hoc Committee of the House was appointed by the Provisional Parliament to investigate into the conduct of Shri H G Mudgal. The Committee came to the conclusion that Shri Mudgal's conduct in accepting money and other benefits from the Bombay Bullion Association for extending certain favours to them in Parliament, was derogatory to the dignity of the House and inconsistent with the expected standards of behaviour. Prime Minister Nehru summarized the issue succinctly, as follows:-

*“The question arises whether in the present case this should be done or something else. I do submit that it is perfectly clear that this case is not even a case which might be called a marginal case, where people may have two opinions about it, where one may have doubts if a certain course suggested is much too severe. The case if I may say so, is as bad as it could well be. If we consider even such a case as a marginal case or as one where perhaps a certain amount of laxity might be shown, I think it will be unfortunate from a variety of points of view, more especially because, this being the first case of its kind coming up before the House, if the House does not express its will in such matters in clear, unambiguous and forceful terms, then doubts may very well arise in the public mind as to whether the House is very definite about such matters or not. Therefore I do submit that it has become a duty for us and an obligation to be clear, precise and definite. The facts are clear and precise and the decision should also be clear and precise and unambiguous. And I submit the decision of the House should be, after accepting the finding of this report, to resolve that the Member should be expelled from the House.”<sup>23</sup>*

2.5.7.2 Similar issues came to the fore again half a century later. In December, 2005, allegations of improper conduct, made in news telecasts of the 'Aaj Tak' (12<sup>th</sup> Dec. 2005) television channel, regarding the acceptance of money by ten Members of the Lok Sabha for asking questions or raising other matters in the House, were enquired into by an Enquiry Committee of the House (Committee to inquire into allegations of improper conduct on the part of some members). The Committee came to the conclusion that the conduct of the said Members was unbecoming of a Member of Parliament and also unethical. The Committee recommended the expulsion of the Members from the House, a proposal that was accepted by the House.

2.5.7.3 As already mentioned, the 'Rules of Procedure and Conduct of Business in the

Council of States' stipulate that the Committee on Ethics would oversee the moral and ethical conduct of Members and examine cases concerning the alleged breach of the Code of Conduct by Members as also cases concerning allegations of any other ethical misconduct of members. The Committee may also take up matters *suo motu*. If, upon enquiry, it is found that a Member has indulged in unethical behaviour or that there is other misconduct or that the Member has contravened the Code/Rules, the Committee may recommend the imposition of an appropriate sanction. The Chairman of the Rajya Sabha referred the incident regarding the telecast by 'Aaj Tak' channel, involving one Member of the House, to the Ethics Committee. The Committee came to the conclusion that the Member had contravened para 5 of the Code of Conduct for Members of the Rajya Sabha and acted in a manner, which seriously impaired the dignity of the House and brought the whole institution of Parliamentary democracy into disrepute. The Committee recommended the expulsion of the Member from the House and the House accepted the recommendation.

2.5.7.4 While the enunciation of ethical values and codes of conduct puts moral pressure on public functionaries, they need to be backed by an effective monitoring and enforcement regime. Legislatures the world over have adopted different models for this purpose. The Canadian Conflict of Interest and Post-Employment Code for public office holders (2006) relies on an Ethics Commissioner to oversee the Code and to provide advice. The Ethics Commissioner is an Officer of Parliament appointed under Section 72.01 of the *Parliament of Canada Act*. The Commissioner reports on the inquiries he conducts pursuant to the Members' Code and makes annual reports to the House of Commons on his activities in relation to its Members. Based on the recommendations of the Nolan Committee, the House of Commons has established the office of Parliamentary Commissioner for Standards. The Commissioner's main responsibilities are<sup>24</sup>:

- *Overseeing the maintenance and monitoring the operation of the Register of Members' Interests.*
- *Providing advice on a confidential basis to individual Members and to the Select Committee on Standards and Privileges about the interpretation of the Code of Conduct and Guide to the Rules relating to the Conduct of Members.*
- *Preparing guidance and providing training for Members on matters of conduct, propriety and ethics.*
- *Monitoring the operation of the Code of Conduct and Guide to the Rules and, where appropriate, proposing possible modifications of it to the Committee.*

<sup>23</sup> Observations made by Pandit Jawahar Lal Nehru, India's first Prime Minister while speaking on the motion for expulsion of Shri H D Mudgal on 24 September, 1951

<sup>24</sup> Source: [http://www.parliament.uk/about\\_commons/pcfs.cfm](http://www.parliament.uk/about_commons/pcfs.cfm), retrieved on 30-11-06

- *Receiving and investigating complaints about Members who are allegedly in breach of the Code of Conduct and Guide to the Rules, and reporting his findings to the Committee.*
- *In addition, the Commissioner's office is responsible for maintaining and monitoring the operation of various registers and lists; providing advice about them; and receiving and investigating complaints about them.*

2.5.7.5 The constitution of the Office of Parliamentary Commissioner for Standards has helped the House by bringing greater transparency in matters relating to ethical standards. It has also helped the Members by providing them timely advice in matters relating to the Code of Conduct. The Commission is of the view that both Houses of Parliament may consider creation of a similar office. It is envisaged that this Office would function under the Speaker. It could also assist the Ethics Committee in the discharge of its functions, provide advice to the Members when required and maintain records.

#### 2.5.7.6 Recommendations:

- An Office of 'Ethics Commissioner' may be constituted by each House of Parliament. This Office, functioning under the Speaker/Chairman, would assist the Committee on Ethics in the discharge of its functions, and advise Members, when required, and maintain necessary records.**
- In respect of States, the Commission recommends the following:**
  - All State legislatures may adopt a Code of Ethics and a Code of Conduct for their Members.**
  - Ethics Committees may be constituted with well defined procedures for sanctions in case of transgressions, to ensure the ethical conduct of legislators.**
  - 'Registers of Members' Interests' may be maintained with the declaration of interests by Members of the State legislatures.**
  - Annual Reports providing details including transgressions may be placed on the Table of the respective Houses.**
  - An Office of 'Ethics Commissioner' may be constituted by each House of the State legislatures. This Office would function under the Speaker/Chairman, on the same basis as suggested for Parliament.**

## 2.6 Office of Profit

2.6.1 The Constitution of India lays down that legislators would be disqualified for being chosen as, and for being, a member of the legislature if they were to hold any office of profit under the government other than an office declared by the legislature by law not to disqualify its holder. The underlying idea was to obviate a conflict of interest between the duties of office and their legislative functions. The principle debarring holders of office of profit under the government from being a legislator is that such a person cannot exercise his functions independently of the executive of which he is a part. The principle can be traced to developments in British constitutional history, in the course of which it came to be established that the Crown and its officers shall have no say in Parliament. The Constitution makers quite rightly wanted the legislative office to be insulated from executive influence and manipulation.

2.6.2 Constitutional theory envisages that the elected legislature exercises oversight functions over government. The making of laws, approval of the budget and monitoring of all government actions are within the purview of the legislature. The executive branch of government should implement the laws, utilize the public money for the approved purposes and be accountable to the legislature in its functioning. Therefore, if the legislators are beholden to the executive, the legislature can no longer retain its independence and loses the ability to control the Council of Ministers and the army of officials and public servants. From this perspective, the Constitutional embargo on office of profit for legislators is both necessary and welcome.

2.6.3 We accepted the Westminster model because of familiarity and historical association. In this model, the executive (Council of Ministers) is drawn from the legislature. While in theory, the legislature holds the government to account, in reality it is often noticed that the government controls the legislature as long it has a majority in the House. The key issue for the government's survival is sustaining its majority. Much of the struggle for power, compromise on cabinet composition, and patronage are linked to this need to satisfy the majority of legislators. This is the reason why the size of the Council of Ministers became unwieldy over the decades. Finally, the 91<sup>st</sup> Amendment to the Constitution enacted in 2003 limited the size of Council of Ministers to 15% of the Lower House. Chairmanships of Corporations, Parliamentary Secretaryships of various ministries, and other offices of profit are often sops to legislators to satisfy their aspirations for rank, status and privilege and a way of buying peace for the government. This is undoubtedly a perversion of the theory of separation of powers. But as long as such perversion is integral to our model of democracy, it would be very inadequate if we limited this discussion only to technical and legal issues relating to office of profit.

2.6.4 Constitutionally, a person cannot be a Minister unless he is an MP/MLA/MLC. Even if a non-MP/MLA/MLC is made a Minister, he must become an MP/MLA/MLC within six months. Given this context, the executive and legislature are fused in our system. But in countries like Britain and Germany, such fusion is not, by and large, leading to corruption or patronage. That is because a political culture has been evolved, in which public office is a means for promoting social good and not for private or family gain. In our case, at times public office is perceived to be an extension of one's property. That is why, sometimes, public offices are a source of huge corruption and a means of extending patronage.

2.6.5 Given this proclivity and the compulsions under which any government functions, there is need to re-examine the definition of office of profit. Articles 102 and 191 of the Constitution relating to office of profit have been violated in spirit over the years even when the letter is adhered to. As a result, the Legislatures kept on expanding the list of exemptions from disqualification under Articles 102 and 191. For instance, the Act 10 of 1959 listed scores of offices in the exemptions from disqualification under Article 102. There does not appear to be a clear rationale to such a list, except perhaps the expediency to protect holders of certain offices from time to time. Similar laws have been enacted by State Legislatures under Article 191, exempting hundreds of offices from disqualification for the State Legislature. Each time a legislator is appointed by the executive to an office which might be classified an office of profit, a law is enacted including that office in the list of exempted categories.

2.6.6 Often, the crude criterion applied is whether or not the office carries a remuneration. In the process, the real distinction of whether executive authority is exercised in terms of decision making or direct involvement in deployment of public funds is often lost sight of. The Supreme Court's clarification about the appointment and removal being in the hands of the executive branch of government does not help either, because many appointments made may be in advisory capacities.

2.6.7 Nor do the existing norms apply to Local Area Development Schemes under which legislators are empowered to sanction public works and authorize expenditure of funds granted under MPLADs and MLALADs schemes. Several party leaders and legislators feel the need for discretionary public funds at their disposal in order to quickly execute public

**Box 2.6: Edmund Burke on Parliament**

Over 230 years ago (in 1774!) Edmund Burke, while addressing his electors in Bristol, spoke as follows:

Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.

Parliament is not a congress of ambassadors from different and hostile interests; which interests each must maintain, as an agent and advocate, against other agents and advocates; but parliament is a deliberative assembly of one nation, with one interest, that of the whole; where, not local purposes, not local prejudices ought to guide, but the general good, resulting from the general reason of the whole. You choose a member indeed; but when you have chosen him, he is not member of Bristol, but he is a member of parliament.

works to satisfy the needs of their constituencies. However, these schemes do seriously erode the notion of separation of powers, as the legislator directly becomes the executive. The argument advanced that legislators do not directly handle public funds under these schemes, as these are under the control of the District Magistrate is flawed. In fact, no Minister directly handles public money. Even the officials do not personally handle cash, except the treasury officials and disbursing officers. Making day-to-day decisions on expenditure after the legislature has approved the budget, is a key executive function.

2.6.8 Several constitutional experts and legal luminaries have pointed out the unconstitutionality of the above schemes. A report, "MPLADS: Concept, Confusion and Contradictions", written by former Public Accounts Committee Chairman Era Sezhiyan, states that the scheme (MPLADS) distorted the MPs' role in the federal system and diverted funds which should have actually gone to agencies like the Panchayati Raj institutions. Apart from infringing on the rights of the local governments, the most serious objection to the scheme is the conflict of interest that arises when legislators take up executive roles. A similar issue was examined in 1959 by a committee of the Congress party in Parliament, chaired by V K Krishna Menon, which went into the question of parliamentary supervision for state undertakings. At that time the issue of nomination of Members of Parliament on governing bodies of Public Sector Undertakings came up. The V K Krishna Menon Committee held that "*the overwhelming weight of considerations*" must be against such appointments<sup>25</sup>.

2.6.9 Therefore it seems necessary to sharply define office of profit to ensure clearer separation of powers. Legislators who are not Ministers often do have significant expertise from their own personal or professional background. In addition, their experience in public service gives them unique insights and understanding of public policy. Such expertise and insights would be valuable inputs to the executive in policy making. Therefore, Committees and Commissions of a purely advisory nature can be constituted with legislators. The mere fact of such positions carrying certain remuneration and other perks does not make them executive offices. The Constitution recognized that holding of such offices in expert and advisory bodies does not violate separation of powers and left it to Parliament and State Legislatures to exempt such non-executive offices from disqualification. But appointment in statutory or non-statutory executive authorities with direct decision making powers and day-to-day control of field personnel, or positions on the governing boards of public sector undertakings or as government nominees in private enterprises clearly carry direct executive responsibilities and involve decision making powers. Such appointments would undoubtedly violate separation of powers. Giving discretionary powers to legislators to sanction or approve public works is clearly an exercise of executive function, whether or not the government appoints the legislators to a designated office. It is necessary to sharply distinguish executive functions and exercise of executive authority while defining office of profit, irrespective of whether such a role or office carries remuneration and perks.

<sup>25</sup> Extracted from: "A chronic aberration: a review of 'Members of Parliament Local Area Development Scheme (MPLADS): Concept, Confusion, Contradictions' by Era Sezhiyan", by V Ramachandran, *Economic and Political Weekly*, June 2005.

2.6.10 Given these circumstances, it would be appropriate to amend the law on the following lines:

- All offices in purely advisory bodies where the experience and insights of a legislator would be inputs in governmental policy will not be treated as offices of profit, irrespective of the remuneration and perks associated with such an office.
- All offices involving executive decision making and control of public funds, including positions on the governing boards of public undertakings and statutory and non-statutory authorities directly, deciding policy or managing institutions or authorizing or approving expenditure shall be treated as offices of profit, and no legislator shall hold such offices. (Discretionary funds at the disposal of legislators or the power to determine specific projects and schemes, or select the beneficiaries or authorize expenditure shall constitute discharge of executive functions and will invite disqualification under Articles 102 and 191, irrespective of whether or not a new office is notified and held).
- If a serving Minister, by virtue of office, is a member or head of certain organizations like the Planning Commission, where close coordination and integration between the Council of Ministers and the organization or authority or committee is vital for the day-to-day functioning of government, it shall not be treated as office of profit.

2.6.11 The Supreme Court has held that members of legislatures are public servants under the Prevention of Corruption Act<sup>26</sup>. The Commission feels that Members of Parliament and the Members of State Legislatures should be declared as 'Public Authorities' under the Right to Information Act except when they are discharging legislative functions.

#### 2.6.12 Recommendations:

- a. The Law should be amended to define office of profit based on the following principles:
  - i. All offices in purely advisory bodies where the experience, insights and expertise of a legislator would be inputs in governmental policy, shall not be treated as offices of profit, irrespective of the remuneration and perks associated with such an office.
  - ii. All offices involving executive decision making and control of public funds, including positions on the governing boards of public

undertakings and statutory and non-statutory authorities directly deciding policy or managing institutions or authorizing or approving expenditure shall be treated as offices of profit, and no legislator shall hold such offices.

- iii. If a serving Minister, by virtue of office, is a member or head of certain organizations like the Planning Commission, where close coordination and integration between the Council of Ministers and the organization or authority or committee is vital for the day-to-day functioning of government, it shall not be treated as office of profit.

(The use of discretionary funds at the disposal of legislators, the power to determine specific projects and schemes, or select the beneficiaries or authorize expenditure shall constitute discharge of executive functions and will invite disqualification under Articles 102 and 191, irrespective of whether or not a new office is notified and held.)

- b. Schemes such as MPLADS and MLALADS should be abolished.
- c. Members of Parliament and Members of State Legislatures should be declared as 'Public Authorities' under the Right to Information Act, except when they are discharging legislative functions.

## 2.7 Code of Ethics for Civil Servants

2.7.1 The Committee on Prevention of Corruption ('Santhanam Committee'-1964) had remarked:

*"For a country like India, development of her material resources and raising the standards of life of all classes are, indeed imperative. At the same time, the deterioration in the standards of public life has to be arrested. Ways and means have to be found to ensure that idealism and patriotism have the proper place in the ambition of our youth. The lack of moral earnestness, which has been a conspicuous feature of recent years, is perhaps the greatest single factor which hampers the growth of strong traditions of integrity and efficiency."*

2.7.2 The inculcation of values facilitating the subordination of the self to a larger, societal good, and engendering a spirit of empathy for those in need of ameliorative state interventions are not skills which could be easily imbibed after joining the civil services. Such attitudes need nurturing over not merely individual life-times, but through successive generations - the 'right'

ethos takes long to evolve. Nevertheless, it must be accepted that our civil service system has a tradition of attitudes and achievements which sets examples to be emulated by current and prospective civil servants. It must also be accepted that the existing framework for maintaining and promoting the norms of 'right conduct' cannot be enforced through a rigid mindless enforcement of laws and rules. It is all a question of striking the right balance. Within the civil services there are formal, enforceable codes setting out norms of expected behaviour with 'sanctions' prescribed for unacceptable departures from such norms. There are also inchoate conventions of propriety and acceptable behaviour without formal sanctions but with non-observance of such practices and conventions attracting social disapproval and stigma.

2.7.3 The current set of 'enforceable norms' are 'Conduct Rules', typified by the Central Civil Services (Conduct) Rules - 1964 and analogous rules applicable to members of the All India Services or employees of various State Governments. The norms prescribed in such rules are much older than the Rules themselves. Thus specific acts were proscribed from time to time through notifications under the Fundamental Rules and the Civil Service Regulations. Some examples are the disapproval of habitual lending and indiscriminate borrowing (1869), and the banning of various actions – accepting gifts (1876), buying and selling property (1881), making commercial investments (1885), promoting companies (1885) and accepting commercial employment after retirement (1920). The breach of such prohibitions entailed punitive actions like removal from service. There were, of course, provisions like 'illegal gratification' or bribery - Sections 161 to 165 of the IPC - or 'criminal breach of trust by a public servant' - Section 409 IPC - which provide for terms of imprisonment. In 1947, with the enactment of the Prevention of Corruption Act, a new set of offences was also created.

2.7.4 In the 1930s, a compendium of instructions containing 'do's and don'ts' was issued and collectively called 'Conduct Rules'. The compendium was converted in the form of distinct rules in 1955. The Santhanam Committee recommended considerable enlargement of such rules resulting in the 1964 version. These rules have subsequently been updated to include additional norms of behaviour. Some of the additions are: the requirement of observing courtesy, prohibiting demanding and accepting dowry, prohibiting sexual harassment of women employees, and, recently, prohibition to employ children below 14 years of age as domestic help. This is understandably a continuing process, and reflects the changing, often increasing expectations of society, from the civil services.

2.7.5 The code of behaviour as enunciated in the Conduct Rules, while containing some general norms like 'maintaining integrity and absolute devotion to duty' and not indulging in 'conduct unbecoming of a government servant', is generally directed towards cataloguing specific activities deemed undesirable for government servants. There is no Code of Ethics

prescribed for civil servants in India although such codes exist in other countries. What we have in India are several Conduct Rules, which prohibit a set of common activities. These Conduct Rules do serve a purpose, but they do not constitute a Code of Ethics. There is, of late, a concern that more 'generic norms' need to be added to the list of accepted conduct. In this context, conflict of interest is an important area which should be adequately addressed in these codes. It is necessary to build safeguards to prevent conflict of interest. A draft 'Public Service Bill' now under consideration of the Ministry of Personnel, Public Grievances and Pensions seeks to lay down a number of generic expectations from civil servants, which are referred to as "values". The salient 'values' envisaged in the Bill are:

- *Allegiance to the various ideals enshrined in the preamble to the Constitution*
- *Apolitical functioning*
- *Good governance for betterment of the people to be the primary goal of civil service*
- *Duty to act objectively and impartially*
- *Accountability and transparency in decision-making*
- *Maintenance of highest ethical standards*
- *Merit to be the criteria in selection of civil servants consistent, however, with the cultural, ethnic and other diversities of the nation*
- *Ensuring economy and avoidance of wastage in expenditure*
- *Provision of healthy and congenial work environment*
- *Communication, consultation and cooperation in performance of functions i.e. participation of all levels of personnel in management.*

2.7.6 The draft Bill also envisages a Public Service Code and a Public Service Management Code laying down more specific duties and responsibilities. Violation of the Code would invite punishments akin to the current major and minor penalties by the heads of institutions/ organizations. A 'Public Service Authority' is also envisaged to oversee implementation of the Code and values indicated above and to render advice in the matter of the values and the Code. The Commission has decided that a detailed examination of the proposed draft Bill will be appropriately made in its forthcoming report on Civil Services Reforms.

2.7.7 The various issues discussed above are not significant only for the civil services. They are important for all segments of the bureaucracy and, equally so, for all local bodies and their employees. After the 73<sup>rd</sup> and the 74<sup>th</sup> Amendments of the Constitution, the local bodies now have an important role to play in the nation's development and have major executive powers. It is essential that the need for relevant codes for these bodies and their employees, and for any public authority, is recognized.

2.7.8 In 1999, the Government of Australia enacted the Australian Public Service Act, which prescribes a set of Public Service Values. These are not merely aspirational statements of intent, but all employees are expected to uphold these values and comply with the Code, even as senior executives are expected to promote these values. Interestingly, the Public Service Commissioner is authorized to evaluate the extent to which agencies incorporate and uphold the values, and the adequacy of the systems and procedures required to ensure compliance with the Code. He has both statutory powers and policy responsibilities. These include an annual report to Parliament on the state of the service, including an evaluation of the extent to which various agencies of Government have incorporated the values.

**Box 2.7: Evolution of Morality**

“...we know that as knowledge comes, person grows, morality is evolved, and idea of non-separateness begins. Whether men understand it or not, they are impelled by that power behind to become unselfish. That is the foundation of morality. It is the quintessence of all ethics, preached in any language, or any religion, or by any prophet in the world...”

-Swami Vivekananda

2.7.9 The Commission is of the view that there should be a set of Public Service Values which should be stipulated by law. As in the case of Australia, there should be a mechanism to ensure that civil servants constantly aspire towards these values. The values prescribed in the draft Public Services Bill, 2006 is a step in the right direction. The Commission will examine this Bill in detail in its report on Civil Services Reforms.

**Box 2.8: The Seven Social Sins**

The Seven Social Sins, as quoted by Mahatma Gandhi in “Young India,” 1925

1. Politics without principles
2. Wealth without work
3. Leisure without conscience.
4. Knowledge without character
5. Commerce without morality
6. Science without humanity
7. Worship without sacrifice

2.7.10 It has been noticed that normally codes of conduct are prescribed for a ‘service’. Along with this, it would be desirable that organizations also prescribe codes of conduct. This is particularly true of organizations having public interface.

2.7.11 The Commission feels that the prevailing practice of nominating serving officers on the boards of public sector bodies may compromise with the desired objectivity and independence necessary for decision making in these bodies. Also, the government is both the owner and the sovereign authority controlling the public undertaking. It would be unrealistic and imprudent for an official to sit in judgement of a decision taken by a Board of which he is a Member. There is a case for not nominating nor permitting serving officers to be nominated on boards of public sector bodies since there could be a conflict of interest.

**2.7.12 Recommendations<sup>†</sup>:**

- a) ‘Public Service Values’ towards which all public servants should aspire, should be defined and made applicable to all tiers of Government and

parastatal organizations. Any transgression of these values should be treated as misconduct, inviting punishment.

- b) Conflict of interest should be comprehensively covered in the Code of Ethics and in the Code of Conduct for officers. Also, serving officials should not be nominated on the Boards of Public undertakings. This will, however, not apply to non-profit public institutions and advisory bodies.

**2.8 Code of Ethics for Regulators**

2.8.1 There are codes of conduct for professionals and other trades. In fact, such codes have existed in society since time immemorial. For example, Hammurabi’s code prescribed:<sup>27</sup>

- *If a builder builds a house, and constructs it well, the owner will pay two shekels for each surface of the house.*
- *If a builder builds a house for someone, and does not construct it properly, and the house which he built, falls down and kill its owner, then that builder shall be put to death.*

2.8.2 The prescription and enforcement of Codes of Conduct for different sections of society is generally through internal regulatory mechanisms. Guilds are the oldest example of such a mechanism. A guild was an association of persons of the same trade or pursuits, formed to protect mutual interests and maintain standards<sup>28</sup>. With the emergence of competition and industrialization, guilds have, more or less, ceased to exist. However, the last century has seen the emergence of a large number of professions, especially in what is today termed as the services sector. These professions initially organized themselves into different types of associations in order to pursue common objectives and also to evolve acceptable norms of behaviour and mechanisms to enforce them. In some cases, such mechanisms have been provided statutory backing. The Indian Medical Council Act, 1956 (102 of 1956), prescribes that the Council may prescribe standards of professional conduct and etiquette and a Code of Ethics for medical practitioners. The Medical Council has accordingly made regulations relating to the Professional Conduct – ‘Etiquette and Ethics for Registered Medical Practitioners’.<sup>29</sup> The Advocates Act, 1961 incorporates the functions of the Bar Council of India, which include laying down standards of professional conduct and etiquette for advocates. The Chartered

**Box 2.9: The Credibility of a Profession**

The credibility of a (professional) council including its ‘disciplinary body’ in respect of any profession - whether it is law, medicine, accountancy or any other vocation - depends upon how they deal with cases of delinquency involving serious misconduct which has a tendency to erode the credibility and reputation of the said profession” and “the punishment, of course, has to be commensurate with the gravity of the misconduct”,

Supreme Court in : Shambhu Ram Yadav vs Hanum Das Khatri, dated 26.07.2001 (retrieved from <http://judis.nic.in>)

<sup>†</sup> More detailed set of recommendations will be made in the Commission’s forthcoming Report on Civil Services Reforms

<sup>27</sup> Source: <http://www.wsu.edu/~dee/MESO/CODE.HTM>, retrieved on 15-12-06

<sup>28</sup> Source: <http://www.answers.com/topic/guild>; retrieved on 10-12-06

<sup>29</sup> Issued on 11<sup>th</sup> March 2002.

Accountants Act, 1949 stipulates the creation of the Institute of Chartered Accountants of India for regulation of the profession of chartered accountancy in India. The Chartered Accountants Act, 1949 and the Schedules to the Act also set out the acceptable forms of behaviour of members of the profession. The Press Council of India functions under the Press Council Act, 1978. It is a statutory, quasi-judicial body, which acts as a watchdog of the press. It adjudicates the complaints against and by the press for violation of ethics and for violation of the freedom of the press respectively. The objects and functions of the Council include laying down a code of conduct for newspapers, news agencies and journalists in accordance with high professional standards. The Press Council of India has issued the Norms of Journalistic Conduct, to which the media is supposed to adhere. The Institution of Engineers (Incorporated under the Royal Charter, 1935) has prescribed a 'Code of Ethics for Corporate Members.'

2.8.3 Apart from internal regulators, there is another category of regulators, which may be termed as 'External Regulators'. An example of an external regulator is the All India Council of Technical Education (AICTE), which is a statutory body, established for proper planning & co-ordinated development of the technical education system throughout the country. The introduction of competition in erstwhile governmental functions has seen the emergence of a number of 'External Regulators'. The Telecom Regulatory Authority of India and the State Power Regulatory Authorities are some other examples.

2.8.4 In spite of the existence of a plethora of Codes of Conduct for almost all important professions, it is often pointed out that adherence to ethical norms has been generally unsatisfactory. Decline in ethical values in the professions has adversely impacted on the governance of the country and is an important reason for increasing corruption in public life. The role of external regulators would also increase as government's functions are thrown open. In such cases, prescribing ethical norms for the regulators themselves as well as for the service providers would become essential. Even more important would be evolution of objective, transparent and fair decision making processes and enforcement mechanisms. The Commission would in a separate report, examine all issues related to professions, regulatory bodies and their ethics, However, the Commission feels that there should be a Code of Ethics and a comprehensive and enforceable Code of Conduct for all major professions.

#### 2.8.5 Recommendation:

- a. A comprehensive and enforceable Code of Conduct should be prescribed for all professions, with statutory backing.

## 2.9 Ethical Framework for the Judiciary

2.9.1 In the Terms of Reference of the Commission, it has been stated:

*"The Commission may exclude from its purview the detailed examination of administration of Defence, Railways, External Affairs, Security and Intelligence, as also subjects such as Centre-State relations, judicial reforms etc, which are already being examined by other bodies. The Commission will, however, be free to take the problems of these sectors into account in recommending re-organisation of the machinery of the Government or of any of its service agencies".*

Thus even though detailed examination of judicial reforms is not strictly within the purview of the Administrative Reforms Commission, it is necessary to refer to a few important elements of reforms relating to the judiciary because of the critical role that the judiciary has in ensuring ethical governance.

2.9.2 Independence of the judiciary is inextricably linked with judicial ethics. An independent judiciary enjoying public confidence is a basic necessity of the rule of law. Any conduct on the part of a judge, which demonstrates a lack of integrity and dignity, will undermine the trust reposed in the judiciary by the citizens. The conduct of a judge should, therefore, always be above reproach.

2.9.3 In the United States, Federal Judges abide by the Code of Conduct for United States Judges, a set of ethical principles and guidelines adopted by the Judicial Conference of the United States. The Code of Conduct provides guidance for judges on issues of judicial integrity and independence, judicial diligence and impartiality, permissible extra-judicial activities, and the avoidance of impropriety or even its appearance.<sup>30</sup> In Canada, there is no written Code of Conduct for federally appointed judges but, various documents published by the Canadian Judicial Council over the years describe the ethical standards to which judges aspire. The Canadian Judicial Council was created in 1971, with a broad legislative mandate in the area of judicial governance. The main objective of the Council is to promote efficiency and uniformity and to improve the quality of judicial service in all superior courts in Canada.

2.9.4 The Supreme Court of India in its Full Court Meeting held on May 7, 1997 unanimously adopted a charter called the '**Restatement of Values of Judicial Life**', generally known as the Code of Conduct for judges. It reads as under:<sup>31</sup>

- a. *Justice must not merely be done but it must also be seen to be done. The behaviour and conduct of members of the higher judiciary must reaffirm the people's faith in the impartiality of the judiciary. Accordingly, any act of a Judge of the Supreme Court or a High Court, whether in official or personal capacity, which erodes the credibility of this perception has to be avoided.*

<sup>30</sup> Source : [http://www.uscourts.gov/understand03/content\\_5\\_0.html](http://www.uscourts.gov/understand03/content_5_0.html), retrieved on 10-12-06

<sup>31</sup> Source: Judicial Independence Fiscal Autonomy and Accountability; Justice S.B. Sinha; Judge, Supreme Court of India; [http://jrn21.supremecourt.gov.ph/files/documents/paper%20-%20Justice%20S.B.%20Sinha%20\\_India\\_.pdf](http://jrn21.supremecourt.gov.ph/files/documents/paper%20-%20Justice%20S.B.%20Sinha%20_India_.pdf)

- b. *A Judge should not contest the election to any office of a club, society or other association; further he shall not hold such elective office except in a society or association connected with the law.*
- c. *Close association with individual members of the Bar, particularly those who practise in the same court, shall be eschewed.*
- d. *A Judge should not permit any member of his immediate family, such as a spouse, son, daughter, son-in-law or daughter-in-law or any other close relative, if a member of the Bar, to appear before him or even be associated in any manner with a cause to be dealt with by him.*
- e. *No member of his family, who is a member of the Bar, shall be permitted to use the residence in which the Judge actually resides or other facilities for professional work.*
- f. *A Judge should practise a degree of aloofness consistent with the dignity of his office.*
- g. *A Judge shall not hear and decide a matter in which a member of his family, a close relation or a friend is concerned.*
- h. *A Judge shall not enter into public debate or express his views in public on political matters or on matters that are pending or are likely to arise for judicial determination.*
- i. *A Judge is expected to let his judgments speak for themselves. He shall not give interviews to the media.*
- j. *A Judge shall not accept gifts or hospitality except from his family, close relations and friends.*
- k. *A Judge shall not hear and decide a matter in which a company in which he holds shares is concerned unless he has disclosed his interest and no objection to his hearing and deciding the matter is raised.*
- l. *A Judge shall not speculate in shares, stocks or the like.*
- m. *A Judge should not engage directly or indirectly in trade or business, either by himself or in association with any other person. (Publication of a legal treatise or any activity in the nature of a hobby shall not be constructed as trade or business).*
- n. *A Judge should not ask for, accept contributions or otherwise actively associate himself with the raising of any fund for any purpose.*
- o. *A Judge should not seek any financial benefit in the form of a perquisite or privilege attached to his office unless it is clearly available. Any doubt in this behalf must be got resolved and clarified through the Chief Justice.*

- p. *Every Judge must, at all times, be conscious that he is under the public gaze and there should be no act or omission by him which is unbecoming of the high office he occupies and the public esteem in which that office is held.*

**Box 2.10: Independence of Judiciary**

“A judiciary independent of a king or executive alone is a good thing; but independence of the will of the nation is a solecism, at least in a republican government”.

- Thomas Jefferson

*These are only the “Restatement of the Values of Judicial Life” and are not meant to be exhaustive but illustrative of what is expected of a Judge.*

2.9.5 The following two Resolutions were also adopted in the said Full Court Meeting of the Supreme Court of India:

*“RESOLVED that an in-house procedure should be devised by the Hon’ble Chief Justice of India to take suitable remedial action against Judges who by their acts of omission or commission do not follow the universally accepted values of judicial life including those indicated in the “Restatement of Values of Judicial Life”.*

*RESOLVED FURTHER THAT every Judge should make a declaration of all his/her assets in the form of real estate or investments (held by him/her in his/her own name or in the name of his/her spouse or any person dependent on him/her) within a reasonable time of assuming office and in the case of sitting Judges within a reasonable time of adoption of this Resolution and thereafter whenever any acquisition of a substantial nature is made, it shall be disclosed within a reasonable time. The declaration so made should be to the Chief Justice of the Court. The Chief Justice should make a similar declaration for the purpose of the record. The declaration made by the Judges or the Chief Justice, as the case may be, shall be confidential”.*

2.9.6 The Restatement of Values of Judicial Life is a comprehensive but not exhaustive code of ethics. As stated earlier, mere prescription of a Code of Conduct is not an end in itself. Along with the Code of Conduct, a mechanism for enforcing the code needs to be evolved. It would be desirable to designate a senior Judge of the Supreme Court as the ‘Judicial Values Commissioner’. The Judicial Values Commissioner should be empowered to enquire into cases of violation of the Code of Conduct and report the matter to the Chief Justice of India for taking action. The Judicial Values Commissioner should have jurisdiction over the judges of the Supreme Court, and members of other judicial and quasi-judicial bodies. A similar institution should also be constituted at the state level. Closely linked with this is the issue of judicial accountability. The need for an effective mechanism for the enforcement of judicial accountability cannot be overemphasized.

2.9.7 Judicial independence and accountability should go together. Article 235 of the Constitution of India provides for the ‘control’ of the High Court over the subordinate judiciary, clearly indicating that the provision of an effective mechanism to enforce judicial accountability is a part of our constitutional philosophy. But this does not in any way compromise the independence of the judiciary at that level. In fact, it respects and strengthens the directive principle of separation of the judiciary from the executive as enshrined in Article 50 of the Constitution. It cannot be doubted that the independence of a subordinate judge is as important as that of a Judge in a High Court or in the Supreme Court. If this is accepted, then there should be no reason not to consider an accountability mechanism for the higher judiciary. What then should be that mechanism?

2.9.8 Article 124 vests the power of appointment of the Chief Justice of India (CJI) and the Judges to the Supreme Court in the President. It is stipulated that the President shall appoint a Judge of the Supreme Court, after consultation with such of the Judges of the Supreme Court and of the High Courts as the President may deem necessary. The appointment of Judges of the High Courts is also made by the President of India. The President has to consult the CJI, the Governor of the State and the Chief Justice of the High Court. A Presidential reference was made on 23<sup>rd</sup> July, 1998 to the Supreme Court in which nine questions were referred for consideration by the Supreme Court. One of the principles laid down by the Supreme Court was that the Chief Justice of India has to form a collegium of four senior-most puisne Judges of the Supreme Court. This is necessary for appointments of judges to the Supreme Court or to transfer a High Court Chief Justice or a High Court judge, and the opinion of the collegium will have primacy in the matter of appointments. It further clarified that it is open to the executive to inform the collegium of its objections. However, if the Chief Justice and his companion judges are still of the view that there is no reason to withdraw their recommendation, then that appointment should be made as a matter of healthy convention. However, even if two judges have serious reservations about a particular appointment, then it should not be made.

2.9.9 The system of appointments to the higher courts, as stipulated by the Constitution and as interpreted by the Supreme Court, has always placed the highest premium on judicial independence. In India, it is only a collegium of judges that recommends to the President names for elevation to the bench and there is no outside advice available for this purpose. Judicial pronouncements have made the recommendation binding. Perhaps in no other country in the world does the judiciary have a final say in its own appointments. In India, neither the executive nor the legislature has much say in who is appointed to the Supreme Court or the High Courts. The current system of appointments is not open to public scrutiny and thus lacks accountability and transparency. A comparative analysis of the appointment mechanism for judges in different countries is given in Table 2.1. A glance at the table

would indicate that across these countries, there is a collegium to recommend persons to the higher judiciary and this collegium included persons, presumably of eminence, but not necessarily from the judiciary itself.

**Table 2.1: International Comparison of Appointments to the Supreme Court**

Country/ Name of the Apex Court	Appointing Authority	Appointment Process
UK/Supreme Court of the United Kingdom <sup>32</sup> {Section 23(1)}	The Supreme Court consists of 12 judges appointed by Her Majesty by letters patent. {Section 23 (2)}.  A recommendation in this regard is made by the Prime Minister. (Section 26).	The Lord Chancellor is required to convene a selection commission for the selection of a person to be recommended. The selection commission consists of 5 members including the President and Deputy President of the Supreme Court and one member each of the following bodies: (i) the Judicial Appointments Commission (ii) the Judicial Appointments Board of Scotland (iii) the Northern Ireland Judicial Appointments Commission (Schedule 8). The selection commission must consult senior judges, the Lord Chancellor, the First Minister in Scotland, the Assembly First Secretary in Wales and the Secretary of State for Northern Ireland and make a report to the Lord Chancellor about the selection. (Section 27). On receipt of the report, the Lord Chancellor consults the same dignitaries as in the case of the selection commission. After consultation, he may either notify the selection to the Prime Minister, or reject it or require the commission to reconsider it. This process may involve three stages. Even then, the Lord Chancellor may notify a person who was not selected on basis of reasons recorded in writing. (Sections 28, 29 and 30). Notification by Lord Chancellor is binding on the Prime Minister. {Section 26(3)}.

*Contd. on page 52*

<sup>32</sup> Based on the Constitutional Reform Act 2005. References in parentheses are to this Act.

Contd. from page 51

Table 2.1 Contd.

Country/ Name of the Apex Court	Appointing Authority	Appointment Process
USA/Supreme Court of the United States <sup>33</sup>	President of the United States with the advice and consent of the Senate.	President of the United States makes the nomination. The Senate Judiciary Committee conducts hearings and makes a report to the Senate. Simple majority vote of the Senate is required to confirm the nomination.
France/Cour de Cassation <sup>34</sup>	President of the Republic on receipt of proposals for appointments from Conseil Supérieur de la Magistrature (CSM). (Article 65 of the Constitution).	President of the Republic presides over CSM and the Minister of Justice is its ex officio Vice-President. In addition, there are 16 other members. Four of the members are not magistrates. They are prominent public figures. The remaining twelve members are split in two formations: one dealing with sitting judges and one dealing with public prosecutors. The formation dealing with sitting judges is composed of five sitting judges and one public prosecutor. The four members who are not magistrates sit in both formations.
Germany/Federal Constitutional Court <sup>35</sup> (Bundesverfassungsgericht)	Court consists of two panels of 8 judges. Half of each panel are elected by the Bundestag (Lower House of Parliament) and the Bundesrat (Federal Council).	The judges to be elected by the Bundesrat are elected with two thirds of the vote of the Bundesrat. In case of the Bundestag, the judges are elected indirectly. The Bundestag, by proportional representation, elects a twelve-member electoral committee. To be elected, a judge requires at least eight votes.

2.9.10 A closely related aspect of the accountability of judges is the mechanism for removal of judges for deviant behaviour. Other than impeachment under Articles 124(4) and 217(1), there is no mechanism to proceed against any inappropriate behaviour or misdemeanour of judges. At the time of framing the Constitution, it was felt that judicial conventions and norms would constitute strong checks. However, the impeachment provisions have turned out to be impracticable as it is virtually impossible to initiate any impeachment proceedings, let alone successfully conclude them. There are five stages, all of them difficult to accomplish. First is a mandatory presentation of not less than hundred Lok Sabha members or fifty Rajya Sabha members for giving notice. At the second stage, the Speaker or the Chairman has to admit the motion; if he does not admit it, the matter ends there. In the third stage, if there is one, a committee is appointed to conduct an enquiry. The fourth stage is that the committee makes a report and forwards it to the Speaker or the Chairman. The fifth and final stage is reached when the two Houses of Parliament proceed to act in the manner prescribed by Section 6(3) of the Judges (Inquiry) Act. Inadequacy of the existing mechanism was affirmed in the K Veeraswami case, 1991(3) SCC 655<sup>36</sup> and the infructuous impeachment proceedings in the case of V Ramaswami<sup>37</sup> even after adverse findings of the Judges' Committee under the Judges Inquiry Act, 1968.

2.9.11 The issue of appointment and removal of judges was examined by the National Commission to Review the Working of the Constitution. The Commission recommended the constitution of a National Judicial Commission which would have the effective participation of both the executive and the judicial wings of the State "as an integrated scheme for the machinery for appointment of judges".

2.9.12 The Government introduced the Constitution (Ninety-eighth Amendment) Bill in the Lok Sabha in 2003. This Bill sought to create a National Judicial Commission (NJC) headed by the Chief Justice of India with two Judges of the Supreme Court next to the CJI in seniority; the Union Minister for Law and Justice; and one eminent citizen to be nominated by the President in consultation with the Prime Minister, as members. The Bill also proposed to empower the National Judicial Commission to draw up a code of ethics for judges, and to inquire into cases of misconduct of a judge (other than those punishable with his/her removal). This Bill could not be passed.

2.9.13 The Law Commission in its 195<sup>th</sup> Report, examined the draft Judges (Inquiry) Bill, 2005. It stated:

*Judicial independence is not absolute. Judicial independence and accountability are two sides of the same coin. The present proposals in the Bill of 2005 together with our recommendations for*

<sup>33</sup> Source: [http://encarta.msn.com/encyclopedia\\_761574302/Supreme\\_Court\\_of\\_the\\_United\\_States.html](http://encarta.msn.com/encyclopedia_761574302/Supreme_Court_of_the_United_States.html)

<sup>34</sup> Source: <http://www.conseil-superieur-magistrature.fr/presentationenglish/membership.htm>

<sup>35</sup> Based on Federal Constitutional Court Act (Gesetz über das Bundesverfassungsgericht), source: <http://www.inscomp.org/gla/statutes/BVerfGG.htm#6>

<sup>36</sup> In 1991, in a case arising from the discovery of large sums of money from the residence of Justice K Veeraswami, the then Chief Justice of Madras High Court; when the CBI initiated prosecution proceedings, the Supreme Court ruled that no FIR can be registered against a judge nor a criminal investigation be initiated without prior consent of the Chief Justice of India.

<sup>37</sup> The charges against the judge dealt with irregularities in purchases. These purchases were audited by the CAG and it was in that process the evidence of wrong deals came to light. The three judge-statutory committee found Justice Ramaswamy guilty on charges of corruption. However, the impeachment motion failed on the floor of the house.

*enabling the Judicial Council to impose 'minor measures' including stoppage of assignment of judicial work are constitutional. They ought not to be viewed as an encroachment on Judicial Independence by the Executive or by the Legislature. (p.341)*

2.9.14 The Law Commission observed that the Bill of 2005, which provides for the establishment of a National Judicial Council consisting only of judges is constitutionally valid and is consistent with the concept of independence of the judiciary, judicial accountability and doctrine of separation of powers. (p.363)

2.9.15 While supporting the idea of a Code of Conduct for the Judiciary, it recommended that the Code should be published in the Gazette of India, and till such time the Judicial Council publishes a Code of Conduct, the Bill must provide that the 'Restatement of Values of Judicial Life' adopted by the Supreme Court in its Resolution dated May 7th, 1997 shall be treated as the Code of Conduct for the purposes of the proposed law. It also favoured the suggestion that a breach of the Code of Conduct could be treated as misbehaviour.

2.9.16 Government is contemplating introduction of The Judges' (Inquiry) Bill, 2006. The Bill seeks to establish a National Judicial Council to undertake preliminary investigations and enquiring into allegations of misbehaviour and incapacity of a Judge of the Supreme Court or High Court and to regulate the procedure for such investigation, inquiry and proof, and for imposing minor measures. It further provides that the Council in the interest of administration of justice, issue a code of conduct containing guidelines for the conduct and behaviour for judges. The Bill also provides that every judge at the time of appointment and annually thereafter, shall give intimation of his assets and liabilities to the Chief Justice of India or the Chief Justice of the High Court as the case may be. It has been provided that any person may make a complaint in writing involving any allegation of misbehaviour or incapacity in respect of a judge to the Council. The Council thereafter may inquire into the case and if it is of the opinion that the charges proved do not warrant removal of the judge, it may impose the prescribed minor measures. In case the Council is satisfied that the charges which have been proved are of serious nature warranting the removal of the judge then it shall advise the President accordingly.

2.9.17 While the constitution of the National Judicial Council is a positive development in the direction of ensuring greater judicial accountability, the composition of the Council needs to be broadbased, and its powers enhanced so that it can exercise the necessary oversight of the judiciary. It is necessary to ensure that only candidates of the highest integrity and ability are appointed to these courts and that, once appointed, they perform their duties with highest standards of integrity, honesty, dedication and competence. This requires most meticulous scrutiny at the time of appointment. Such scrutiny would be ensured if the

National Judicial Council has representation from the executive, the legislature and the judiciary.

2.9.18 As pointed out in para 2.9.10, the impeachment process for removing errant judges has failed. Given the vital position of higher Courts in our constitutional scheme, and the critical role higher courts are playing to correct the distortions in the functioning of other institutions and organs of state, it is of paramount importance to ensure both competence and integrity in the higher judiciary. As Table 2.1 shows, in all major democracies, appointments are made by either the executive directly, or with the advice and consent of the legislature or through an elective process by the legislature.

2.9.19 The Commission is of the considered view that appointment of judges in higher courts should be with the participation of the executive, legislature and the Chief Justice and it should be a bipartisan process above day-to-day politics. Therefore, the proposed National Judicial Council should comprise representatives of all three organs of State - the legislature, the judiciary and the executive. Such a body can devise its own procedures in identifying and screening the candidates for the higher judiciary.

2.9.20 The Commission is also of the considered view that the NJC should be entrusted with the responsibility of recommending removal of judges of higher courts. Such recommendations should be binding on the President, and Articles 124 and 217 of the Constitution should be amended accordingly. This revised procedure for removal of judges is necessitated by the failure of the impeachment process in India. According to Article II, Section 4 of the US Constitution, the President, Vice President and all civil officers of the United States shall be removed from office or impeachment for, and conviction of treason, bribery or other high crimes and misdemeanors. So far, 17 federal officials including two Presidents, one Cabinet officer, one senator and 13 federal judges faced impeachment proceedings. While the two Presidents, Andrew Johnson and Bill Clinton were acquitted, one other President, Richard Nixon chose to resign in the face of certain impeachment and removal. The preponderance of judges among those who faced impeachment is evident in the US. Out of the 13 judges who were impeached, 9 were removed from office and 4 were acquitted. Thus, the impeachment process worked satisfactorily in the US. But the failure of the impeachment process in India, as well as the inability of the system to address serious questions of probity in the judiciary necessitate a revised, transparent, accountable and a bipartisan process for enquiry into judicial misconduct and removal of judges.

2.9.21 A bipartisan body comprising high dignitaries of great standing would be the ideal institution which can be entrusted with the grave responsibility of enquiring into complaints

and charges against judges and recommending removal. Accordingly, the Commission is of the view that the National Judicial Council, constituted as above, should have the power to enquire into judicial misconduct and recommend to the President, removal of judges. Such recommendations should be binding on the President. Articles 124 and 217 should be amended suitably. The NJC should have the power to devise its own procedures in discharge of its onerous functions.

2.9.22 The Constitution of a NJC would have to be done by providing for it under Article 124 of the Constitution (and also Articles 217 and 218). Simultaneously, changes would also have to be made in the Judges (Inquiry) Act, 1968. The creation of such a Council will require changes in three places in the existing laws. Any change in the process of appointment to the Supreme Court will require that Article 124 of the Constitution be amended to provide for a National Judicial Council. A similar amendment will have to be made to Article 217. Also, since the Council is to have the authority to oversee and discipline judges, further changes will need to be made to Article 217 (Clause 4).

#### 2.9.23 Recommendations:

- a. A National Judicial Council should be constituted, in line with universally accepted principles where the appointment of members of the judiciary should be by a collegium having representation of the executive, legislature and judiciary. The Council should have the following composition:

- The Vice-President as Chairperson of the Council
- The Prime Minister
- The Speaker of the Lok Sabha
- The Chief Justice of India
- The Law Minister
- The Leader of the Opposition in the Lok Sabha
- The Leader of the Opposition in the Rajya Sabha

In matters relating to the appointment and oversight of High Court Judges, the Council will also include the following members:

- The Chief Minister of the concerned State

- The Chief Justice of the concerned High Court
- b. The National Judicial Council should be authorized to lay down the Code of Conduct for judges, including the subordinate judiciary.
- c. The National Judicial Council should be entrusted with the task of recommending appointments of Supreme Court and High Court Judges. It should also be entrusted the task of oversight of the judges, and should be empowered to enquire into alleged misconduct and impose minor penalties. It can also recommend removal of a judge if so warranted.
- d. Based on the recommendations of the NJC, the President should have the powers to remove a Supreme Court or High Court Judge.
- e. Article 124 of the Constitution may be amended to provide for the National Judicial Council. A similar change will have to be made in Article 217. Also, since the Council is to have the authority to oversee and discipline judges, further changes will need to be made to Article 217 (Clause 4).
- f. A Judge of the Supreme Court should be designated as the Judicial Values Commissioner. He/she should be assigned the task of enforcing the code of conduct. Similar arrangement should also be made in the High Court.

## 3 LEGAL FRAMEWORK FOR FIGHTING CORRUPTION

### 3.1 Evolution of the Anti-Corruption Laws in India

3.1.1 In the pre-independence period, the Indian Penal Code (IPC) was the main tool to combat corruption in public life. The Code had a chapter on 'Offences by Public Servants'. Sections 161 to 165 provided the legal framework to prosecute corrupt public servants. At that time the need for a special law to deal with corruption was not felt.

3.1.2 The Second World War created shortages which gave opportunity to unscrupulous elements to exploit the situation leading to large scale corruption in public life. This situation continued even after the war. The lawmakers concerned about this menace, felt that drastic legislative measures need to be taken. Hence the Prevention of Corruption Act, 1947 was enacted to fight the evils of bribery and corruption.

3.1.3 *The Prevention of Corruption Act 1947*: This Act did not redefine nor expand the definition of offences related to corruption, already existing in the IPC. Similarly, it also adopted the same definition of 'Public Servant' as in the IPC<sup>38</sup>. However the law defined a new offence - 'Criminal misconduct in discharge of official duty' - for which enhanced punishment (minimum 1 year to maximum 7 years) was stipulated. In order to shift the burden of proof in certain cases to the accused, it was provided that whenever it was proved that a public servant had accepted any gratification, it shall be presumed that the public servant accepted such a gratification as a motive or reward under Section 161 of IPC. In order to prevent harassment to honest officers, it was mandated that no court shall take cognizance of offences punishable under Sections 161, 164 and 165 without the permission of the authority competent to remove the charged public servant. The Act also provided that the statement by bribe-giver would not subject him to prosecution.<sup>39</sup> It was considered necessary to grant such immunity to the bribe-giver, who might have been forced by circumstances into giving a bribe. If this immunity was not provided, all complainants would become liable for punishment, which would deter them from giving complaints against any public official who accepted a bribe.

3.1.4 The Criminal Law (Amendment) Act, 1952 brought some changes in laws relating to corruption. The punishment specified under Section 165 of IPC was enhanced to three years

instead of the existing two years. Also a new Section 165A was inserted in the IPC, which made abetting of offences, defined in Sections 161 and 165 of IPC, an offence. It was also stipulated that all corruption related offences should be tried only by special judges.

3.1.5 *Amendments in 1964*: The anti-corruption laws underwent comprehensive amendments in 1964. The definition of 'Public Servant' under the IPC was expanded (The Santhanam Committee had also recommended an expanded definition of the term 'Public Servant'). The CrPC was amended to provide in camera trial if either party or the court so desires. The presumption which was available under Section 4 of The Prevention of Corruption Act, was extended to include offences defined under Sections 5(1) and 5(2). The definition of 'criminal misconduct' was expanded and possession of assets disproportionate to the known sources of income of a public servant, was made an offence. Section 5(A) was amended so as to empower the State Governments to authorize officers of the rank of Inspectors of Police to investigate cases under the Act (earlier, this could be done only with the approval of the Magistrate (The Santhanam Committee recommended this). Police officers, competent to investigate cases under the Act, were empowered to inspect bankers' records, if they had reasons to suspect commission of an offence under the Act (This power is available under Section 94 CrPC, but only after a case has been registered. This was also one of the recommendations of the Santhanam Committee).

3.1.6 *The Prevention of Corruption Act, 1988*: This Act received Presidential assent on 9<sup>th</sup> September, 1988. It consolidates the provisions of the Prevention of Corruption Act 1947, the Criminal Law Amendment Act, 1952 and some provisions of IPC. Besides, it has certain provisions intended to effectively combat corruption among public servants. The salient features of the Act are as follows:

- a. The term 'Public Servant' is defined in the Act. The definition is broader than what existed in the IPC.
- b. A new concept – 'Public Duty' is introduced in the Act.
- c. Offences relating to corruption in the IPC have been brought in Chapter 3 of the Act, and they have been deleted from the Indian Penal Code.
- d. All cases under the Act are to be tried only by Special Judges.
- e. Proceedings of the court have to be held on a day-to-day basis.
- f. Penalties prescribed for various offences are enhanced.

<sup>38</sup> Section 2; The Prevention of Corruption Act, 1947

<sup>39</sup> Section 8; The Prevention of Corruption Act, 1947

- g. CrPC is amended (for the purposes of this Act only) to provide for expeditious trial {Section 22 of the Act provides for amended Sections 243, 309, 317 and 397 of CrPC}.
- h. It has been stipulated that no court shall stay the proceedings under the Act on the grounds of any error or irregularity in the sanction granted, unless in the opinion of the court it has led to failure of justice.<sup>40</sup>
- i. Other existing provisions regarding presumptions, immunity to bribe-giver, investigation by an officer of the rank of DySP, access to bank records etc have been retained.

## 3.2 The Prevention of Corruption Act, 1988

### 3.2.1 Defining Corruption

3.2.1.1 The Prevention of Corruption Act does not provide a definition of 'Corruption'. Interestingly, Finland, which is the least corrupt nation according to the Transparency International's Corruption Perception Index also does not have any formal definition of corruption in its laws. Even the United Nations Convention against Corruption does not provide a definition of corruption. It lays down in Article 5, some preventive anti-corruption policies and practices. They are:

1. *Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.*
2. *Each State Party shall endeavour to establish and promote effective practices aimed at the prevention of corruption.*
3. *Each State Party shall endeavour to periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption.*

*States Parties shall, as appropriate and in accordance with the fundamental principles of their legal system, collaborate with each other and with relevant international and regional organizations in promoting and developing the measures referred to in this Article. That collaboration may include participation in international programmes and projects aimed at the prevention of corruption.*

3.2.1.2 The Prevention of Corruption Act, 1988, lists offences of bribery and other related offences and the penalties from Sections 7 to 15. These offences broadly cover acceptance of illegal gratification as a motive or reward for doing or forbearing to do any official act, or favouring or disfavoured any person; obtaining a valuable thing without consideration or inadequate consideration; and criminal misconduct involving receiving gratification, misappropriation, obtaining any pecuniary advantage to any person without any public interest, or being in possession of pecuniary resources or property disproportionate to his known sources of income. Attempts to commit such offences and abetment are also listed as offences, in keeping with the principles usually applied in criminal law. The accent is thus on consideration, gratification of all kinds and pecuniary advantage.

3.2.1.3 However, experience of the past decades shows that such an indirect definition of corrupt practices is paradoxically restrictive and a whole range of official conduct, detrimental to public interest, is not covered by strong penal provisions. In particular, there are four types of official conduct which cause immense damage to public interest, which do not explicitly constitute violation of criminal law.

3.2.1.4 The first and possibly the most important of these is gross perversion of the Constitution and democratic institutions, including, wilful violation of the oath of office. Constitutional functionaries have sometimes been found to indulge in such constitutional perversion out of partisan considerations or personal pique. In most such cases, there may be neither illegal consideration nor pecuniary advantage, nor any form of gratification involved. In some of those cases, the Supreme Court held individuals holding high office guilty of gross misconduct amounting to perversion of the Constitution. In such cases, except public opinion, political pressure and dictates of the conscience of the individual, there are no legal provisions to punish the perpetrators.

3.2.1.5 The second such class of offences is abuse of authority unduly favouring or harming someone, without any pecuniary consideration or gratification. In such cases, often partisan interests, nepotism and personal prejudices play a role, though no corruption is involved in the restrictive, 'legal' sense of the term. Nevertheless, the damage done by such wilful acts or denial of one's due by criminal neglect have profound consequences to society and undermine the very framework of ethical governance and rule of law.

3.2.1.6 Third, obstruction or perversion of justice by unduly influencing law enforcement agencies and prosecution is a common occurrence in our country. Again in most such cases, partisan considerations, nepotism and prejudice, and not pecuniary gain or gratification, may be the motive. The resultant failure of justice undermines public confidence in the system and breeds anarchy and violence.

3.2.1.7 Finally, squandering public money, including ostentatious official life-styles, has become more common. In all such cases, there is neither private pecuniary gain nor specific gain or loss to any citizen. There is also no misappropriation involved. The public exchequer at large suffers and both public interest and citizens' trust in government are undermined.

3.2.1.8 It is generally believed that all these four types of wilful abuse of office are on the increase in our country at all levels and need to be firmly curbed if we are to protect public interest and our democratic system. Otherwise, public servants – elected or appointed – will be seen not as custodians of public interest and sentinels of democracy but as opportunists working for personal aggrandizement and pursuing private agendas while occupying public office.

3.2.1.9 There is therefore need for classifying the following as offences under the Prevention of Corruption Act:

- Gross perversion of the Constitution and democratic institutions amounting to wilful violation of oath of office
- Abuse of authority unduly favouring or harming someone
- Obstruction of justice
- Squandering public money

#### 3.2.1.10 Recommendation:

a. The following should be classified as offences under the Prevention of Corruption Act:

- Gross perversion of the Constitution and democratic institutions amounting to wilful violation of oath of office.
- Abuse of authority unduly favouring or harming someone.
- Obstruction of justice.
- Squandering public money.

### 3.2.2 Collusive Bribery

3.2.2.1 In any corrupt transaction, there are two parties - the bribe-giver and the bribe-taker. The offence of bribery can be classified into two categories. In one category the bribe giver is a victim of extortion, he is compelled to pay for a simple service, because if he does

not submit to the extortionary demands of the public servant, he ends up losing much more than the bribe. The delays, harassment, uncertainty, lost opportunity, loss of work and wages - all resulting from non-compliance with demands for a bribe - are so great that the citizen is sucked into a vicious cycle of corruption for day-to-day survival. Besides, there is another category of cases where the bribe-giver and bribe-taker together fleece society, and the bribe-giver is as guilty or even more guilty than the bribe-taker. These are cases of execution of substandard works, distortion of competition, robbing the public exchequer, commissions in public procurement, tax evasion by collusion, and causing direct harm to people by spurious drugs and violation of safety norms. These two categories of corruption are also termed as 'coercive' and 'collusive' corruption respectively. With the rapidly growing economy, cases of coercive corruption are on the increase, and, at times, these often assume the magnitude of 'serious economic offences'.

3.2.2.2 Chapter III of the Prevention of Corruption Act lays down various offences and penalties. Section 7 makes acceptance of illegal gratification by a public servant for doing any official act an offence. Though giving bribe is not separately defined as an offence, the bribe-giver is guilty of the offence of 'abetment' and is liable for the same punishment as the bribe-taker.<sup>41</sup> Section 24 of the Act, however, provides immunity from prosecution to a bribe-giver if he/she gives a statement in a court of law that he/she offered bribe. However, the Prevention of Corruption Act does not differentiate between 'coercive' and 'collusive' corruption.

3.2.2.3 Systemic reforms are very effective in combating coercive corruption. Besides, even though the general conviction rate in cases of corruption is low, it is observed that the rate of conviction in cases of coercive corruption is more than in collusive corruption. The reason for this is, the bribe-giver is also the victim and because of the immunity provided to him under Section 24 of the Prevention of Corruption Act, he often comes forward to depose against the bribe-taker. Besides, the 'trap cases' by the vigilance machinery are quite effective in such cases. The same is not true for 'collusive' corruption. Getting conviction in these cases is extremely difficult as both, the bribe-giver and the bribe-taker collude and are beneficiaries of the transaction. The negative impact of collusive corruption is much more adverse and the government and often the society, at large, are the sufferers.

3.2.2.4 The Commission is of the view that 'collusive' corruption needs to be dealt with by effective legal measures so that both the bribe-giver and the bribe-taker do not escape punishment. Also, the punishment for collusive corruption should be made more stringent. In cases of collusive corruption, the 'burden of proof' should be shifted to the accused.

<sup>41</sup> Section 12 of The Prevention of Corruption Act

3.2.2.5 The basic principle of our criminal justice system is that every person is presumed to be innocent till he/she is proved guilty. In other words, the burden of proving the charges lies totally on the prosecution. However, the Indian Evidence Act itself provides certain exceptions to this principle. For Example, Section 113A of the Indian Evidence Act provides that *“When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband”*. Similarly, Section 13(1)(e) of the Prevention of Corruption Act stipulates that a public servant is said to commit the offence of criminal misconduct if he/she cannot satisfactorily account for the property in his/her possession, which is disproportionate to his/her known sources of income. It is therefore implied that the burden is on the accused public servant to justify his possessions in relation to the sources of income. Also Section 20 of the Prevention of Corruption Act stipulates that if it is proved that the accused public servant has accepted any gratification, the court is under an obligation to presume that the gratification was for a reward as mentioned in Section 7 and the burden of proof shifts to the accused.

3.2.2.6 Section 7 of the Prevention of Corruption Act, therefore, needs to be amended to provide for a special offence of ‘collusive bribery’. An offence could be classified as ‘collusive bribery’ if the outcome or intended outcome of the transaction leads to a loss to the state, public or public interest. In all such cases if it is established that the interest of the state or public has suffered because of an act of a public servant, then the court shall presume that the public servant and the beneficiary of the decision committed an offence of ‘collusive bribery’. The punishment for all such cases should be increased to 10 years.

#### 3.2.2.7 Recommendations:

- a. Section 7 of the Prevention of Corruption Act needs to be amended to provide for a special offence of ‘collusive bribery’. An offence could be classified as ‘collusive bribery’ if the outcome or intended outcome of the transaction leads to a loss to the state, public or public interest.
- b. In all such cases if it is established that the interest of the state or public has suffered because of an act of a public servant, then the court shall presume that the public servant and the beneficiary of the decision committed an offence of ‘collusive bribery’.

- c. **The punishment for all such cases of collusive bribery should be double that of other cases of bribery. The law may be suitably amended in this regard.**

#### 3.2.3 Sanction for Prosecution

3.2.3.1 Section 19 of the Prevention of Corruption Act provides that previous sanction of the competent authority is necessary before a court takes cognizance of the offences defined under Sections 7, 10, 11, 13 and 15 of the Act. The objective of this provision is to prevent harassment to honest public servants through malicious or vexatious complaints. The sanctioning authority is expected to apply his/her mind to the evidence placed before him/her and be satisfied that a prima facie case exists against the accused public servant. Although the intention of this provision is clear, it has been argued that this clause has sometimes been used by a sanctioning authority to shield dishonest officials. There have also been cases where there have been inordinate delays in grant of such sanction. There have also been instances where unintentional defects in the grant of sanction has been used by the accused to challenge the sanction and have it set aside, thus nullifying the entire proceedings. The Commission has examined various aspects related to sanctions and is of the view that there are some areas requiring improvements, and this would need some amendments to the Law. These are dealt with in the following paras:

3.2.3.1.1 *Dispensing with sanction in cases where public servants have been trapped red-handed or in cases of possessing assets disproportionate to their known sources of income:* There are a number of cases of public servants being caught red handed while demanding/accepting bribes. The omnibus protection given under Section 19 of the Prevention of Corruption Act sometimes comes in the way of bringing corrupt public servants to justice as often the sanction is delayed or denied. The intention of the legislation appears to be to provide adequate protection to public servants in the discharge of their legitimate official duties. This objective can well be served if this provision is limited to such cases where the alleged misconduct is directly connected with the discharge of official duties. Such a protection is not required for offences which are basically based on the direct evidence of:

- i. Demand or/and acceptance of bribes,
- ii. Obtaining valuable things without or with inadequate consideration, and
- iii. Cases of possession of assets disproportionate to the known source of income.

Therefore, there is a case for excluding the protection given in the above mentioned circumstances.

3.2.3.1.2 *Validity of sanction for prosecution:* It has been found that sanctioning authorities are often summoned to adduce evidence on the sanction they had given, and this takes place several years later. A number of cases are discharged/acquitted on the grounds that the sanctioning authority had not applied its mind while giving the sanction. Moreover, this often happens after all the other evidences have been adduced in the trial!

The objective of Section 19 of the Prevention of Corruption Act was to prevent prosecution without sanction of the competent authority. In many such cases, the issue of the validity of sanctions gets raised after the prosecution has adduced all evidence. This is not fair to the sanctioning authority who may have given this sanction several years earlier. It is also not fair to the accused who has undergone a major part of the prosecution process, particularly if the sanction is found to be untenable. Moreover, it has also been noted that sanctioning authorities are often not able to attend the court because of other official preoccupation and this also contributes to delay in concluding trial.

The Commission feels that there is need for amending the Prevention of Corruption Act to ensure that sanctioning authorities are not summoned as witnesses and if a trial court desires to summon the sanctioning authority, it should record the reasons for doing so. This should be at the first stage, even before framing of charges by the court.

3.2.3.1.3 *Sanctioning authority for MPs and MLAs:* Section 2 (definition) of the Prevention of Corruption Act does not explicitly include MPs or MLAs. This issue, whether elected representatives are public servants or not, came up for determination before various courts. The Supreme Court in *P.V. Narasimha Rao v .State (CBI/SPE)* held as follows:

*“ We think that the view of the Orissa High Court that a member of a Legislative Assembly is a public servant is correct. Judged by the test enunciated by Lord Atkin in Mc. Millan v Gust and adopted by Sikri, J. in Kanta Khaturia case, the position of a Member of Parliament, or of Legislative Assembly, is subsisting, permanent and substantive; it has an existence independent of the person who fills it and it is filled in succession by successive holders. The seat of each constituency is permanent and substantive. It is filled, ordinarily for the duration of the legislative term, by the successful candidate in the election for the constituency. When the legislative term is over, the seat is filled by the successful candidate at the next election. There is, therefore, no doubt in our minds that a Member of Parliament, or of a Legislative Assembly, holds an office and he is required and authorized thereby to carry out a public duty. In a word, a Member of Parliament or of a Legislative Assembly is a public servant for the purposes of the said Act”.*

The National Commission for Review of the Constitution (NCRWC) recommended as follows:

*“A second issue that was raised in this case concerned the authority competent to sanction prosecution against a member in respect of an offence involving acceptance of a consideration for speaking or voting in a particular manner or for not voting in either House of Parliament. A Member of Parliament is not appointed by any authority. He is elected by his or her constituency or by the State Assembly and takes his or her seat on taking the oath prescribed by the Constitution. While functioning as a Member, he or she is subject to the disciplinary control of the presiding officer in respect of functions within the Parliament or in its Committees. It would, therefore, stand to reason that sanction for prosecution should be given by the Speaker or the Chairman, as the case may be.*

The Commission is of the view that the Authority for according sanction for prosecution under Section 19 of the Prevention of Corruption Act, should be stipulated in case of elected representatives. This Authority, in case of Members of Parliament should be the Speaker or Chairman, as the case may be. A similar procedure may be adopted by State Legislatures.

3.2.3.1.4 *Protection to those persons who have ceased to be public servants at the time of taking cognizance of the offence by the court:* Section 19(1) of the Prevention of Corruption Act reads as follows:

*“ No court shall take cognizance of an offence punishable under Sections 7,10,11,13 and 15 alleged to have been committed by a public servant, except with the previous sanction,*

- (a) *in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;*
- (b) *in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;*
- (c) *in the case of any other person, of the authority competent to remove him from his office.”*

An issue has arisen whether such sanction would be necessary in case the accused is no longer a public servant on the day of taking of cognizance by the court. The Supreme Court has held that where the accused had ceased to be a public servant on the day the court took cognizance of the offence, the provisions of Section 6 (Prevention of Corruption Act, 1947) would not apply and the prosecution against him will not be vitiated by the lack of a previous sanction by the competent authority.

The objective of this provision was to provide protection to the public servant from malicious prosecution, and his/her status at the time of the commission of the alleged offence is relevant rather than his/her status at the time of taking cognizance of the offence by the court. The interpretation given by the courts may lead to a situation where a person who superannuates, or resigns from service would not get the protection of this provision, even if the alleged offence was committed while he/she was in service. Therefore, the law should be amended so that retired public servants can also get the same level of protection, as a serving public servant.

3.2.3.1.5 *Expediting sanctions*: It has been represented to the Commission that many a time there is substantial delay in obtaining sanction for prosecution from government, with the result that corrupt officials are often not brought to book. The Commission is of the view that the procedure for granting sanction, where government is the competent authority, needs to be streamlined so that there is no delay in processing such cases. The Commission would like to recommend that at the level of the Union Government, the sanction for prosecution should be processed by an Empowered Committee consisting of the Central Vigilance Commissioner and the Departmental Secretary to Government<sup>42</sup>. In case of a difference of opinion between the two, it could be resolved by placing the subject before the full Central Vigilance Commission. In case, sanction is sought against a Secretary to Government, the Empowered Committee would comprise the Cabinet Secretary and the Central Vigilance Commissioner.

#### 3.2.3.2 Recommendations:

- a. **Prior sanction should not be necessary for prosecuting a public servant who has been trapped red-handed or in cases of possessing assets disproportionate to the known sources of income.**
- b. **The Prevention of Corruption Act should be amended to ensure that sanctioning authorities are not summoned and instead the documents can be obtained and produced before the courts by the appropriate authority.**
- c. **The Presiding Officer of a House of Legislature should be designated as the sanctioning authority for MPs and MLAs respectively.**
- d. **The requirement of prior sanction for prosecution now applicable to serving public servants should also apply to retired public servants for acts performed while in service.**

- e. **In all cases where the Government of India is empowered to grant sanction for prosecution, this power should be delegated to an Empowered Committee comprising the Central Vigilance Commissioner and the Departmental Secretary to Government. In case of a difference of opinion between the two, the matter could be resolved by placing it before the full Central Vigilance Commission. In case, sanction is required against a Secretary to Government, then the Empowered Committee would comprise the Cabinet Secretary and the Central Vigilance Commissioner. Similar arrangements may also be made at the State level. In all cases the order granting sanction for prosecution or otherwise shall be issued within two months. In case of refusal, the reasons for refusal should be placed before the respective legislature annually.**

#### 3.2.4 Liability of Corrupt Public Servants to Pay Damages

3.2.4.1 While corrupt acts of a public servant are liable for punishment under the Prevention of Corruption Act, there is no civil liability for the wrong doer nor is there a provision for compensation to the person/organization which has been wronged or has suffered damage because of the misconduct of the public servant. The Constitutional Review Committee had recommended the enactment of a comprehensive law to provide for the creation of liability in cases where public servants cause loss to the State by malafide actions or omissions (para 6.17).

3.2.4.2 The Supreme Court did impose exemplary damages in cases of improper allotment of petrol pumps<sup>43</sup>. However, this order was later reversed in a Review Petition<sup>44</sup> in which the Court held that though exemplary damages could be awarded against public servants it was not justified in these cases. The Commission is of the view that in cases where public servants cause loss to the State or citizens by their corrupt acts, they should be made liable to make good the loss so caused, and in addition, should be made liable for damages. This may be provided by insertion of a chapter in the Prevention of Corruption Act. The circumstances of cases where such damages would be payable, the principles of assessing the damages and the criteria for awarding the damages to the persons who have been wronged should be clearly spelt out. It should also be ensured that adequate safeguards are provided so that bona fide mistakes should not end in award of such damages, otherwise public servants would be discouraged from taking decisions in a fair and expeditious manner.

<sup>42</sup> Section 19(1) stipulates that sanction should be provided by the authority competent to remove the accused public servant. This would necessitate an amendment to Section 19.

<sup>43</sup> (1996) 6 Supreme Court Cases 593

<sup>44</sup> (1999) 6 Supreme Court Cases 667

**3.2.4.3 Recommendation:**

- a. In addition to the penalty in criminal cases, the law should provide that public servants who cause loss to the state or citizens by their corrupt acts should be made liable to make good the loss caused and, in addition, be liable for damages. This could be done by inserting a chapter in the Prevention of Corruption Act.

**3.2.5 Speeding up Trials under the Prevention of Corruption Act:**

3.2.5.1 The average time taken by trial courts in the disposal of cases has increased over the years. At the end of 1996, the number of cases pending trial were 8225 whereas at the end of the year, the number of cases pending trial rose to 12703. In the year 2005 the number of cases registered were 3008, 2162 cases were chargesheeted and in 2048 cases, trials were completed. (These figures pertain to cases taken up by the State Anti-Corruption Wings, extracted from 'Crime in India' published by the National Crime Records Bureau).

3.2.5.2 A major cause of delay in the trial of cases is the tendency of the accused to obtain frequent adjournments on one plea or the other. There is also a tendency on the part of the accused to challenge almost every interim order passed even on miscellaneous applications by the trial court, in the High Court and later, in the Supreme Court and obtaining stay of the trial. Such types of opportunities to the accused need to be restricted by incorporating suitable provisions in the CrPC. It may also be made mandatory for the judges to examine all the witnesses summoned and present on a given date. Adjournments should be given only for compelling reasons.

3.2.5.3 In order to ensure speedy trial of corruption cases, the Prevention of Corruption Act made the following provisions:

- a. All cases under the Act are to be tried only by a Special Judge.
- b. The proceedings of the court should be held on a day-to-day basis.
- c. No court shall stay the proceedings under the Act on the grounds of any error or irregularity in the sanction granted, unless in the opinion of the court it has led to failure of justice.

3.2.5.4 The experience with the trial of cases under the Act, has been disappointing in spite of the provisions which were considered as path-breaking at the time. Although the judges trying corruption cases under the Prevention of Corruption Act have been declared as Special

Judges, they have been saddled with numerous other non-corruption cases with the result that trials in corruption cases get delayed.

3.2.5.5 The Commission feels that there is need to fix a time limit for various stages of trial in corruption cases. This could be done through an amendment to the CrPC. More importantly, the existing provisions for conducting trials on a day-to-day basis should be meticulously adhered to.

**3.2.5.6 Recommendations:**

- a. A legal provision needs to be introduced fixing a time limit for various stages of trial. This could be done by amendments to the CrPC.
- b. Steps have to be taken to ensure that judges declared as Special Judges under the provisions of the Prevention of Corruption Act give primary attention to disposal of cases under the Act. Only if there is inadequate work under the Act, should the Special Judges be entrusted with other responsibilities.
- c. It has to be ensured that the proceedings of courts trying cases under the Prevention of Corruption Act are held on a day-to-day basis, and no deviation is permitted.
- d. The Supreme Court and the High Courts may lay down guidelines to preclude unwarranted adjournments and avoidable delays.

**3.3 Corruption Involving the Private Sector**

3.3.1 According to the Bribe Payers Index 2006 of Transparency International, businesses from India, China and Russia, who are at the bottom of the index, had the greatest propensity to pay bribes. This raises the issue of how corruption in private bodies should be dealt with.

3.3.2 Corruption in the private sector does not come under the purview of the Prevention of Corruption Act. However, if the private sector (or any person engaged by them) is involved in bribing any public authority then he/she is liable to be punished for the offence of abetment of bribery under the Prevention of Corruption Act. A large number of public services, which were traditionally done by government agencies, are being entrusted to non-government agencies. In such cases, persons engaged by the private agency replace the role of erstwhile public servants. It is therefore necessary to bring such agencies within the fold of the Prevention of Corruption Act. Also, a large number of Non-Governmental Organizations receive

substantial aid from government. As these agencies spend public money it would be desirable that persons engaged by such organizations be deemed to be public servants for the purpose of the Prevention of Corruption Act.

3.3.3 Article 12 of UN Convention against Corruption, to which India is a signatory, however, deals with corruption in the private sector:

1. *Each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures.*
2. *Measures to achieve these ends may include, inter alia:*
  - (a) *Promoting cooperation between law enforcement agencies and relevant private entities;*
  - (b) *Promoting the development of standards and procedures designed to safeguard the integrity of relevant private entities, including codes of conduct for the correct, honourable and proper performance of the activities of business and all relevant professions and the prevention of conflicts of interest, and for the promotion of the use of good commercial practices among businesses and in the contractual relations of businesses with the State;*
  - (c) *Promoting transparency among private entities, including, where appropriate, measures regarding the identity of legal and natural persons involved in the establishment and management of corporate entities;*
  - (d) *Preventing the misuse of procedures regulating private entities, including procedures regarding subsidies and licenses granted by public authorities for commercial activities;*
  - (e) *Preventing conflicts of interest by imposing restrictions, as appropriate and for a reasonable period of time, on the professional activities of former public officials or on the employment of public officials by the private sector after their resignation or retirement, where such activities or employment relate directly to the functions held or supervised by those public officials during their tenure; and*
  - (f) *Ensuring that private enterprises, taking into account their structure and size,*

*have sufficient internal auditing controls to assist in preventing and detecting acts of corruption and that the accounts and required financial statements of such private enterprises are subject to appropriate auditing and certification procedures.*

3. *In order to prevent corruption, each State Party shall take such measures as may be necessary, in accordance with its domestic laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, to prohibit the following acts carried out for the purpose of committing any of the offences established in accordance with this Convention:*
  - (a) *The establishment of off-the-books accounts;*
  - (b) *The making of off-the-books or inadequately identified transactions;*
  - (c) *The recording of non-existent expenditure;*
  - (d) *The entry of liabilities with incorrect identification of their objects;*
  - (e) *The use of false documents; and*
  - (f) *The intentional destruction of bookkeeping documents earlier than foreseen by the law.*
4. *Each State Party shall disallow the tax deductibility of expenses that constitute bribes, the latter being one of the constituent elements of the offences established in accordance with articles 15 and 16 of this Convention and, where appropriate, other expenses incurred in furtherance of corrupt conduct.*

3.3.4 The Prevention of Bribery Ordinance (PBO) of Hong Kong deals specifically with corruption in the private sector. For example, Section 9 of PBO safeguards the interests of private companies by protecting employers from employees who are corrupt. Section 9 also prohibits an agent from soliciting or accepting an advantage without his principal's permission when conducting his principal's affairs or business.

3.3.5 In India, the Companies Act, 1956 provides the statutory framework which governs the internal processes of a Company. The Company is a juridical person whose internal processes are determined by the Companies Act and its Articles of Association. In case of non-compliance, the penal provisions are invoked against the Company and its officers in default. The Companies Act, 1956 contains penal provisions against criminal offences by companies and their directors and officers. Though the offence of corruption or bribery is not specified under the Companies Act, 1956, instances of wrong doing by

Companies and their officers are addressed through the mechanisms of Accounts and Audit (Section 211), Inspection under Section 209A, Technical Scrutiny of Balance Sheet (Section 234), Investigation under Section 235/237 or Section 247, special audit under Section 233A, reference to Company Law Board (CLB) under Section 388B etc. Besides, Companies are required to have audit committees of the Board of Management to look into various aspects related to financial propriety. The Commission feels that corruption in the private sector should be addressed by effective enforcement of 'Regulations on Corporate Governance'.

3.3.6 The Commission is further of the view that corruption within the private sector should be tackled through the effective enforcement of existing laws and regulations. Bringing the activities of the entire private sector within the fold of the Prevention of Corruption Act is neither desirable nor practical. ('Serious Economic Offences' is dealt with later in this Chapter in para 3.7)

#### 3.3.7 Recommendations:

- a. The Prevention of Corruption Act should be suitably amended to include in its purview private sector providers of public utility services.
- b. Non-Governmental agencies, which receive substantial funding, should be covered under the Prevention of Corruption Act. Norms should be laid down that any institution or body that has received more than 50% of its annual operating costs, or a sum equal to or greater than Rs 1 crore during any of the preceding 3 years should be deemed to have obtained 'substantial funding' for that period and purpose of such funding.

### 3.4 Confiscation of Properties Illegally Acquired by Corrupt Means

3.4.1 Prosecution and subsequent conviction of corrupt public servants has not been commensurate with the extent of corruption. As mentioned earlier, the level of proof required and the procedural hurdles have ensured that a large number of corrupt public servants are not convicted. Even worse, they often flaunt their ill-gotten wealth with impunity. It is necessary that apart from criminal prosecution, the corrupt public servant should also be denied the ownership of his/her ill gotten wealth.

3.4.2 The Prevention of Corruption Act provides for confiscation of assets of public servants in excess of their known sources of income. However, the provision has proved inadequate because such forfeiture is possible only on conviction for the relevant offences.

At present, for attachment and forfeiture of illegally acquired property of public servants the provisions of the Criminal Law Amendment Ordinance, 1944 are invoked. Under this Ordinance, there is a provision for interim attachment of the property illegally acquired. The Special Judge is empowered to do so based on an application by an authorized person. Depending upon the outcome of the criminal case, the attached property is either forfeited or released.

3.4.3 Another shortcoming in the existing provisions is that the procedure for attachment can start only after the court has taken cognizance of the offence. In actual situations, this may be too late as the accused may get enough time to hide or adjust his/her ill gotten wealth. Moreover, under the existing provisions, the State or the Union Government has to authorize the filing of a request seeking attachment. This could also be time consuming.

3.4.4 In the case of DDA v Skipper Construction Company (private limited), the Supreme Court observed:

*"A law providing for forfeiture of properties acquired by holders of public offices by indulging in corrupt and illegal acts and deals is a crying necessity in the present state of our society".*

3.4.5 The Law Commission in its 166<sup>th</sup> Report (1999) observed as follows:

*"The Prevention of Corruption Act has totally failed in checking corruption. In spite of the fact that India is rated as one of the most corrupt countries in the world, the number of prosecutions and more so the number of convictions are ridiculously low. A corrupt Minister or a corrupt top civil servant is hardly ever prosecuted under the Act, and in the rare event of his/her being prosecuted, the prosecution hardly reaches conclusion. At every stage there will be revisions and writs to stall the process."*

3.4.6 In the same Report, the Law Commission had suggested enactment of a law for forfeiture of property of corrupt public servants and a Bill titled 'The Corrupt Public Servants (Forfeiture of Property)' was annexed. The Report is pending consideration of the Government since February 1999. The relevant provision of the Bill reads as follows:

*"where any person holds any illegally acquired property in contravention of the provisions of sub-section (1), such property shall be liable to be forfeited to the Central Government in accordance with provisions of the Act".*

3.4.7 Under the draft Bill, a public servant is prohibited from holding any 'illegally acquired property', and it is provided that such property shall be liable to be forfeited to the

government. Powers of forfeiture are proposed to be given to the Competent Authority (CVC). The provisions of the proposed Bill regarding forfeiture are in addition to the provision relating to conviction for a minimum period of seven years, which may extend up to fourteen years. The provisions of the proposed Bill apply not only to the public servant but also to every person who is a “relative” of the public servant or an “associate” of such person or the holder of any property which was at any time previously held by the public servant, unless such holder proves that he was a transferee in good faith for adequate consideration. It is also stipulated in the draft Bill that the burden of proving that the property sought to be forfeited has not been acquired illegally, is on the accused public servant. As the proceedings would be of a civil nature, the level of proof would not be as stringent as in a criminal trial.

3.4.8 The Commission notes that the Jammu and Kashmir Legislature has passed ‘The Prevention of Corruption (Amendment) Act, 2006’. This Act provides for seizure and forfeiture of properties of a public servant that have been acquired by acts of omission and commission which constitute an offence of criminal misconduct under Section 5 of the Prevention of Corruption Act. The initial powers of seizure have been given to the Investigating Officer. However, the seizure order made by the Investigating Officer has to be placed before a ‘Designated Authority’ within 48 hours for confirmation or otherwise. The Designated Authority is notified by the State Government and is an officer not below the rank of Secretary to Government. An appeal against the order of the Designated Authority lies with the Special Court. The Special Court if satisfied about such seizure, may order forfeiture of such property. Thus, the scope of the Jammu and Kashmir Prevention of Corruption (Amendment) Act 2006, is somewhat limited as compared to the draft Bill suggested by the Law Commission. Moreover, the Act of Jammu and Kashmir provides for confiscation only on conviction.

3.4.9 The Commission is of the view that for confiscation of the property of a public servant convicted for possession of disproportionate assets, the law should shift the burden of proof to the public servant who is convicted. The presumption, in such cases, should be that the disproportionate assets found in the possession of the public servant were acquired by him though corrupt means and a proof of preponderance of probability should be sufficient for confiscation of property. These requirements are adequately met in the draft Bill proposed by the Law Commission.

#### 3.4.10 Recommendation:

- a. **The Corrupt Public Servants (Forfeiture of Property) Bill as suggested by the Law Commission should be enacted without further delay.**

### 3.5 Prohibition of ‘Benami’<sup>45</sup> Transactions

3.5.1 The Law Commission, in its 57<sup>th</sup> and 130<sup>th</sup> Reports, had recommended enactment of a legislation prohibiting Benami transactions and acquiring properties held Benami. A law entitled The Benami Transactions (Prohibition) Act, 1988 was passed in 1988. The Act precludes the person who acquired the property in the name of another person from claiming it as his own. Section 3 of the Act prohibits Benami transactions while Section 4 prohibits the acquirer from recovering the property from the Benamidar.

#### 3.5.2 Section 5 of the Act permits acquisition of property held benami. It states

- (1) *All properties held benami shall be subject to acquisition by such authority, in such manner and after following such procedure as may be prescribed.*
- (2) *For the removal of doubts, it is hereby declared that no amount shall be payable for the acquisition of any property under sub-section (1).*

3.5.3 Unfortunately, in the last 18 years, Rules have not been prescribed by the government for the purposes of sub-section (1) of Section 5, with the result that the government is not in a position to confiscate properties acquired by the real owner in the name of his benamidars. The wealth amassed by corrupt public servants is often kept in ‘Benami’ accounts or invested in properties in others’ names. Strict enforcement of the the Benami Transactions (Prohibition) Act, 1988, could unearth such properties and make property accumulation difficult for corrupt officers and also work as a deterrent for others.

#### 3.5.4 Recommendation:

- a. **Steps should be taken for immediate implementation of the Benami Transactions (Prohibition) Act, 1988.**

### 3.6 Protection to Whistleblowers

3.6.1 Whistleblowers play a crucial role in providing information about corruption. Public servants who work in a department/agency know the antecedents and activities of others in their organization. They are, however, often unwilling to share the information for fear of reprisal. There is a very close connection between the public servant’s willingness to disclose corruption in his organization and the protection given to him and his/her identity. If adequate statutory protection is granted, there is every likelihood that the government would be able to get substantial information about corruption. The term “whistleblowing” itself is a relatively recent addition to our lexicon. In the United States, in the post-Watergate era, after the trials and tribulations of Daniel Ellsberg, the man who “blew the whistle” on the so called

<sup>45</sup> ‘Benami’ is a Hindi word meaning ‘without name’. It is commonly used to denote immoral transfers of property in names of others or even fictitious names, with an intention to escape from certain laws.

“Pentagon papers”, whistleblowing has not only been protected by statute but is also encouraged as an ethical duty on the part of the citizens. Furthermore, after the spectacular collapse of Enron and WorldCom, the US Congress passed the Sarbanes-Oxley Act of 2002, granting sweeping protection to whistleblowers in publicly traded companies. Anyone retaliating against a corporate whistleblower can now be imprisoned for up to 10 years<sup>46</sup>.

#### Box 3.1: The Whistleblowers

Manjunath Shanmugam working with Indian Oil Corporation (IOC) was a graduate of the Indian Institute of Management, Lucknow. He refused bribes and ignored threats to his life in his fight against adulteration by the petrol pump owners. He paid the price. He was shot dead on 19<sup>th</sup> November, 2005 allegedly at the behest of corrupt petrol pump owners.

Satyendra Dubey, working with the National Highways Authority of India (NHAI), exposed the rampant corruption in construction of roads. He was also found dead on 27<sup>th</sup> November, 2003.

3.6.2 Laws providing such protection exist in the UK, the USA, Australia and New Zealand. The UK Public Interest Disclosure Act, 1998, the Public Interest Disclosure Act, 1994 of Australia, the Protected Disclosure Act, 2000 of New Zealand, and the Whistle blowers Protection Act, 1984 of USA are legislations providing protection to whistleblowers. All these laws generally provide for preserving the anonymity of the whistleblower and safeguarding him/her against victimization within the organization.

3.6.3 The Law Commission in its 179<sup>th</sup> Report has proposed a Public Interest Disclosure (Protection of Informers) Bill, which provides protection to whistleblowers. The Bill has provisions for providing safeguards to the whistleblowers against victimization in the organization. It also has a provision that the whistleblower may himself seek transfer in case he apprehends any victimization in the current position. In order to ensure protection to whistleblowers, it is necessary that immediate legislation may be brought on the lines proposed by the Law Commission.

#### 3.6.4 Recommendation:

- a. Legislation should be enacted immediately to provide protection to whistleblowers on the following lines proposed by the Law Commission:
  - Whistleblowers exposing false claims, fraud or corruption should be protected by ensuring confidentiality and anonymity, protection from victimization in career, and other administrative measures to prevent bodily harm and harassment.
  - The legislation should cover corporate whistleblowers unearthing fraud or serious damage to public interest by willful acts of omission or commission.

- Acts of harassment or victimization of or retaliation against, a whistleblower should be criminal offences with substantial penalty and sentence.

### 3.7 Serious Economic Offences

3.7.1 Economic Offences, called frauds in common parlance (the term itself has been defined in the Indian Contract Act<sup>47</sup>) have become a matter of concern because of an increasing trend both in terms of size and complexity. This worrying trend has its roots in the rapid pace at which the Indian economy is growing and the financial sector is diversifying. The impact of some of these crimes is widespread and can cause much damage to the economy seriously affecting the public at large and sometimes even becoming a threat to national security. These economic offences include tax evasion, counterfeiting, distorting share markets, falsification of accounts, frauds in the banking system, smuggling, money laundering, insider trading and even bribery. In a world of increasing financial activity, with new instruments for such activity and new technology to facilitate it, the present laws are not adequate to combat new economic crimes.

#### Box 3.2: The Need for a Serious Frauds Office

Investigations into the recent stock market ‘scam’ have underscored the limitations of a fragmented approach in our enforcement machinery. Though a number of agencies investigated the highly publicised fraud, none really got the holistic picture of what really happened. The chances of effectively punishing the fraudsters, in such a situation, are very slim.

Financial frauds in the corporate world are very complex in nature, and can be properly investigated only by a multi-disciplinary team of experts; there are limits to what even gifted amateurs can achieve, especially when they do not have a common platform and different enforcement agencies concerned play a lone hand from their respective turfs. There is a need to provide for a more concerted approach, perhaps by creating an office along the lines of the Serious Fraud Office (SFO) in the United Kingdom.

Source: Report of the Committee on Corporate Audit and Governance (Naresh Chandra Committee, 2002)

3.7.2 There are a large number of laws governing economic offences. These include the Indian Penal Code (IPC); the Banking Regulation Act, 1949; the Companies Act, 1956; the Customs Act, 1962; the Income Tax Act, 1961; the Essential Commodities Act, the Conservation of Foreign Exchange and the Prevention of Smuggling Activities Act, the Foreign Exchange Management Act, the Prevention of Food Adulteration Act, the Indian Patents Act etc. In a large number of these Acts, investigations are carried out by the police. Some states have also established Economic Offences Wings to guide such investigations. In respect of some Central Laws, investigations are taken up by designated agencies under the law. The Central Bureau of Investigation also takes up cases by way of referral by other authorities or on directions by the government or the courts. It is generally felt that the punishment provided under the existing laws is not enough of a deterrent; as a result these offences have become a high gain low risk activity.

<sup>46</sup> Source: Raghu Dayal-“Whistleblowers need to be protected”-ET: 26-12-06

<sup>47</sup> Section 17 of the Contract Act defines fraud as follows: “Fraud means and includes any of the following acts committed by a party to a contract, with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract: (a) suggestion as a fact, of that which is not true, by one who does not believe it to be true; (b) active concealment of a fact by one having knowledge of belief of that fact; (c) a promise made without any intention of performing it; (d) any other fact fitted to deceive; (e) any such act or omission as the law specifically describes to be fraudulent”.

3.7.3 Of late, economic offences, have been drawing more attention because these are being used to fund criminal and even terrorist activities. In 1993, the N.N. Vohra Committee had revealed the powerful nexus between those who violated the economic laws, politicians and government functionaries, which resulted in protection of large-scale economic crimes. That Committee had also pointed out that in those cases, which became public, only nominal action was taken against the offenders.

3.7.4 Developed countries have responded to the challenge of such offences by constituting a specialized machinery to deal with serious economic crimes. In England and Wales, the Serious Frauds Office (SFO) was formed in April 1988, in response to the need for a unified organisation for the investigation and prosecution of serious fraud cases. The Office is headed by the Director who is appointed by and accountable to the Attorney General. This office has multi-disciplinary teams with expertise in law, accountancy, investigation etc. Investigations are led by Case Controllers who are generally experienced lawyers. The SFO derives powers under the Criminal Justice Act, 1987, and also prosecutes its own cases, without having to refer to the Crown Prosecution Service (CPS). It needs to be mentioned that the Criminal Justice Act, 1987 does not define 'serious fraud'. The Director of the SFO is empowered under Section 1(3) of the Act to "investigate any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud".

3.7.5 In New Zealand, the Serious Fraud Office (SFO) constituted under the SFO Act, detects, investigates and prosecutes cases of serious fraud. The SFO Act, 1990 gives the SFO powers to obtain evidence during the course of its investigations. The SFO is headed by a Director who is empowered to investigate serious frauds. In determining what constitutes a serious fraud, the Director has to consider- (a) The suspected nature and consequences of the fraud; (b) The suspected scale of the fraud; (c) The legal, factual, and evidential complexity of the matter; (d) Any relevant public interest considerations.

3.7.6 The Mitra Committee Report (The Report of the Expert Committee on Legal Aspects of Bank Frauds 2001) submitted to the Reserve Bank of India pointed out that criminal jurisprudence in India based on proof beyond doubt was too weak an instrument to control bank frauds. The Committee recommended a two-pronged strategy for systemic reforms through strict implementation of Regulator's Guidelines and obtaining compliance certificates. Second, a punitive approach by defining scams as a serious offence with the burden of proof shifting to the accused and with a separate investigative authority for serious frauds, and special courts and prosecutors for trying such cases was recommended. The Committee suggested the creation of a Statutory Fraud Committee under the Reserve Bank of India. It also recommended a legislation called "The Financial Fraud (Investigation, Prosecution, Recovery and Restoration of Property) Bill, 2001." In its proposed draft,

provisions have been made for constitution of a Financial Fraud Enquiry Committee and a Bureau of Investigation of Financial Fraud. An amendment has been suggested in the I.P.C. by insertion of a new chapter XXIV containing Sec.512 and 513(a). The proposed Section 512 defines 'Financial Fraud' to mean and include "any of the following acts committed by a person or with his connivance, or by his agent, in his dealings with any bank or financial institution or any other entity holding public funds:

- the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
- active concealment of a fact by one having knowledge or belief of the fact;
- a promise made without any intention of performing it;
- any other act fitted to deceive;
- any such act or omission as the law specially declares to be fraudulent provided that whoever acquires, possesses or transfers any proceeds of financial fraud or enters into any transaction which is related to proceeds of fraud either directly or indirectly or conceals or aids in the concealment of the proceeds of financial fraud, commits financial fraud."

3.7.7 The proposed Section 513(a) provides for punishment for financial fraud. Following the Davie Committee Report of England, Explanation (2) to the proposed Section 513(a) provides guidelines for classifying serious financial frauds. Thus, "if and only if, the case:

- involves a sum exceeding Rs. Ten crores; or
- is likely to give rise to widespread public concern; or
- its investigation and prosecution are likely to require high specialized knowledge of financial market or of the behaviour of banks or other financial institutions; or
- involves significant international dimensions; or
- in the investigation of which there is requirement of legal, financial, investment and investigative skills to be brought together; or
- which appear to be complex to the regulators, banks, Union Government or any financial institution;

can it be classified as ‘financial fraud’ for the express purposes of the proposed Act. This draft Act also provides for establishment of special courts and amendment to the Indian Evidence Act, 1872 relating to trial of cases pertaining to financial frauds.

3.7.8 The Committee also recommended the inquisitorial system of proof in the evidential process. For this, they have suggested amendment of the Indian Evidence Act so that mens rea could be presumed by the court.

3.7.9 The Naresh Chandra Committee on Corporate Audit and Finance recommended in 2002:

1. *A Corporate Serious Fraud Office (CSFO) should be set up in the Department of Company Affairs with specialists inducted on the basis of transfer/deputation and on special term contracts.*
2. *This should be in the form of a multi-disciplinary team that not only uncovers the fraud, but is able to direct and supervise prosecutions under various economic legislations through appropriate agencies.*
3. *There should be a Task Force constituted for each case under a designated team leader.*
4. *In the interest of adequate control and efficiency, a Committee headed by the Cabinet Secretary should directly oversee the appointments to, and functioning of this office, and coordinate the work of concerned departments and agencies.*
5. *Later, a legislative framework, along the lines of the SFO in the UK, should be set up to enable the CSFO to investigate all aspects of the fraud, and direct the prosecution in appropriate cases.*

3.7.10 A Serious Frauds Investigation Office (SFIO) was set up in 2003 as a specialised multi-disciplinary organisation to deal with cases of serious corporate frauds. It has experts from the financial sector, capital market, banks, accountancy, forensic audit, taxation, law, information technology, company law, customs and investigation. SFIO presently carries out investigations under the provisions of Sections 235 to 247 of the Companies Act. Its Charter includes forwarding of its investigation reports on violations of the provisions of other Acts to the concerned agencies for prosecution/appropriate action.

3.7.11 The Expert Committee on Company Law, headed by Dr. Jamshed J. Irani (2004) had observed:

*“In addition to investigation, there is also a need to take up prosecution of the concerned corporate and officers in default in the appropriate forum. For this purpose, procedures would need to be simplified to enable SFIO to move swiftly and purposefully for successful prosecution of the guilty. To enable this, there are certain ambiguities in the law which would have to be removed to enable SFIO to take up prosecution under the IPC in addition to violation of the Companies Act. The Committee recommends that a separate statute may be framed to regulate and guide the functioning of the (SFIO) and to address such issues to enable successful investigation and prosecution of cases of corporate fraud. Therefore, presence of SFIO may be recognized in the Companies Act. Officers of the SFIO may also be authorised by Central Government to file complaints for offences under Criminal Procedure Code in addition to for offences under the Companies Act.*

*The Committee took note of the fact that corporate frauds were generally the result of very complex and intricate series of actions. It may not be easy for the law enforcement agencies at the State Government level to respond effectively to such situations in the absence of proper training and development of skills of the concerned law enforcing personnel for such investigations. The Committee recommends that the SFIO, set up by the Central Government, should serve as a Nodal Agency for development of such expertise and its dissemination to the State Governments, who may also be encouraged to set up similar organisations and provide requisite specialization as a part of their action against economic offences. This would also enable better coordination in respect of prosecution of offences under IPC”*

3.7.12 The West Bengal National University of Juridical Sciences, Kolkata had also undertaken a project on drafting of an Economic Offences Code for India. The draft code, entitled ‘Serious Economic Offences (Prevention, Control, Investigation and Trial) Act’ defines ‘Serious Economic Offence’ to mean “any dishonest, fraudulent or illegal transaction involving money or property of the value exceeding Rupees Five Crores or such other amount as may be prescribed, which –

- a) has serious impact on the national economy or the national security of India, or
- b) affects, or is likely to prejudicially affect, the social, economic or political relation of India with other nations, or
- c) has adversely affected large number of citizens of India as victims of the offence, or
- d) involves person holding high positions of public trust or public duty in government, public or private undertakings, including banks and other financial institutions or other body corporates, and shall also include such offence committed by persons within India or in any place beyond India.”

3.7.13 The draft Bill envisages the constitution of a high-powered and autonomous body called the 'Commission for the Control of Serious Economic Offences' to ensure effective implementation of this law. Establishment of special courts and special rules of procedure and evidence relating to investigation and trial of serious economic offence have also been provided.

3.7.14 During the hearing of a PIL filed in the Supreme Court by an NGO, Common Cause, the Reserve Bank of India suggested the creation of an independent and insulated Serious Frauds Office. This PIL was in relation to the mammoth size of non-performing assets plaguing the banking sector and the frequency of economic offences. While appreciating the suggestion, the Hon'ble Supreme Court has asked the Union Government to respond to the idea on priority basis.<sup>48</sup>

3.7.15 The Commission had discussions on this issue with the Reserve Bank of India, the Security and Exchange Board of India and the ICICI Bank. SEBI is of the view that given the absence of an adequate number of persons of appropriate level with skill sets in the area of financial investigation, it might be worthwhile to strengthen existing institutions rather than create new institutions. ICICI Bank is of the view that strong investigation, law enforcement and judicial systems would go a long way in the development of an effective fraud control mechanism in the financial system; and the Economic Offences Wing and the Cyber Crime wing in the bank are lending specialization and expertise in dealing with frauds/crimes related to Banking. They also stated that a similar specialization and dispensation in the Judiciary will be of immense help in trying cases of frauds in the financial system. RBI was of the view that the recommendations of the Mitra Committee should be implemented.

3.7.16 The Commission is of the view that the current provisions in the Banking Regulation Act, 1949; SEBI Act, 1992 and the Companies Act, 1956 are not strong enough to prevent large scale fraudulent practices nor are they deterrent enough. The present regulatory bodies like RBI, SEBI and Department of Company Affairs are not adequately empowered to address criminality involved in such scams and frauds. There is, therefore, need for a separate institution for investigation and prosecution of serious financial fraud cases and recovery of assets involved therein.

3.7.17 There is need to define 'Serious Economic Offence' under a statute and prescribe deterrent punishment for it. The existing SFIO, though a positive step, can investigate offences only under the Companies Act. The complex and multi-disciplinary nature of 'Serious Economic Offences' would require the constitution of an empowered body to investigate and prosecute the cases under all such offences. This would require the

establishment of a new and adequately empowered Serious Frauds Office (SFO) which would, necessarily, subsume the existing SFIO. The Serious Frauds Office thus constituted should be under the control and supervision of a Serious Frauds Monitoring Committee chaired by the Cabinet Secretary with representatives from the financial sector, capital and futures markets, commodity markets, accountancy, direct and indirect taxation, forensic audit, criminal and company law, investigation and information technology. The SFO should be empowered to take up cases suo motu or upon reference by the Union or the State Governments.

3.7.18 As getting conviction for economic offences under the existing laws is difficult and moreover, because these offences many times generate funds for other organized crimes and terrorist activities, the Commission agrees with the suggestion made by the Mitra Committee that for 'Serious Frauds' the Court may presume the existence of mens rea.

#### 3.7.19 Recommendations:

- a. A new law on 'Serious Economic Offences' should be enacted.
- b. A Serious Economic Offence may be defined as :
  - i. One which involves a sum exceeding Rs 10 crores; or
  - ii. is likely to give rise to widespread public concern; or
  - iii. its investigation and prosecution are likely to require highly specialized knowledge of the financial market or of the behaviour of banks or other financial institutions; or
  - iv. involves significant international dimensions; or
  - v. in the investigation of which there is requirement of legal, financial, investment and investigative skills to be brought together; or
  - vi. which appear to be complex to the Union Government, regulators, banks, or any financial institution.
- c. A Serious Frauds Office (SFO) should be set up (under the new law), to investigate and prosecute such offences. It should be attached to the Cabinet Secretariat. This office shall have powers to investigate and prosecute all such cases in Special Courts constituted for this purpose. The SFO should be staffed by experts from diverse disciplines

such as the financial sector, capital and futures market, commodity markets, accountancy, direct and indirect taxation, forensic audit, investigation, criminal and company law and information technology. The SFO should have all powers of investigation as stated in the recommendation of the Mitra Committee. The existing SFIO should be subsumed in this.

- d. A Serious Frauds Monitoring Committee should be constituted to oversee the investigation and prosecution of such offences. This Committee, to be headed by the Cabinet Secretary, should have the Chief Vigilance Commissioner, Home Secretary, Finance Secretary, Secretary Banking/ Financial Sector, a Deputy Governor RBI, Secretary, Department of Company Affairs, Law Secretary, Chairman SEBI etc as members.
- e. In case of involvement of any public functionary in a serious fraud, the SFO shall send a report to the Rashtriya Lokayukta and shall follow the directions given by the Rashtriya Lokayukta (see para 4.3.15).
- f. In all cases of serious frauds the Court shall presume the existence of *mens rea* of the accused, and the burden of proof regarding its non-existence, shall lie on the accused.

### 3.8. Prior Concurrence for Registration of Cases: Section 6A of the Delhi Special Police Establishment Act, 1946

#### 3.8.1 As per Section 6-A of the Delhi Special Police Establishment Act, 1946

*“The Delhi Special Police Establishment shall not conduct any inquiry or investigation into any offence alleged to have been committed under the Prevention of Corruption Act, 1988 except with the previous approval of the Central Government where such allegation relates to-*

- b. the employees of the Central Government of the level of Joint Secretary and above; and*
- c. such officers as are appointed by the Central Government in corporations established by or under any Central Act, Government companies, societies and local authorities owned or controlled by that Government.*

3.8.2 It has been argued that given the prevailing corruption ridden environment, there is danger of such a provision being misused to protect corrupt senior public servants, and if at all such a protection is to be given, the power should vest with an independent body like the CVC, which can take an objective stand.

3.8.3 The counter argument is that officers at the level of Joint Secretaries and above have an important role in decision making in the government. Also while taking these decisions or rendering advice they should be able to do so without any fear or favour. Exposing these officers to frequent enquiries could have a demoralizing effect on them and encourage them most of the time to ‘save their skin’ and not act in a manner that would best serve the public interest.

3.8.4 The Commission on balance is of the view that it would be necessary to protect honest civil servants from undue harassment, but at the same time in order to ensure that this protection is not used as a shield by the corrupt, it would be appropriate if this permission is given by the Central Vigilance Commissioner in consultation with the Secretary to Government concerned and if the Secretary is involved, a committee comprising the Central Vigilance Commissioner and the Cabinet Secretary may consider the case for granting of permission. In case of Cabinet Secretary such permission may be given by the Prime Minister.

#### 3.8.5 Recommendation:

- a. Permission to take up investigations under the present statutory arrangement should be given by the Central Vigilance Commissioner in consultation with the concerned Secretary. In case of investigation against a Secretary to Government, the permission should be given by a Committee comprising the Cabinet Secretary and the Central Vigilance Commissioner. This would require an amendment to the Delhi Special Police Establishment Act. In the interim the powers of the Union Government may be delegated to the Central Vigilance Commissioner, to be exercised in the manner stated above. A time limit of 30 days may be prescribed for processing this permission.

### 3.9 Immunity Enjoyed by Legislators

3.9.1 The National Commission to Review the Working of the Constitution recommended (Para 5.15.6) that Article 105(2) may be amended to clarify that the immunity enjoyed by Members of Parliament under parliamentary privileges should not cover corrupt acts committed by them in connection with their duties in the House or otherwise. Such a recommendation was made because corrupt acts include accepting money or other valuable considerations to speak and/or vote in a particular manner and, for such acts, they should be liable for action under the ordinary law of the land.

### 3.9.2 The NCRWC stated as follows

*“The law of immunity of members under the parliamentary privilege law was tested in PV Narsimha Rao Vs. State (CBI/SPE), (AIR 1998 SC 2120). The substance of the charge was that certain members of Parliament had conspired to bribe certain other members to vote against a no-confidence motion in Parliament. By a majority decision the Court arrived at the conclusion that while bribe-givers, who were Members of Parliament, could not claim immunity under Article 105, the bribe-takers, also Members of Parliament, could claim such immunity if they had actually spoken or voted in the House in the manner indicated by the bribe-givers. It is obvious that this interpretation of the immunity of Members of Parliament runs counter to all notions of justice, fair play and good conduct expected from Members of Parliament. Freedom of speech inside the House cannot be used by them to solicit or to accept bribes, which is an offence under the criminal law of the country. The decision of the court in the aforesaid case makes it necessary to clarify the true intent of the Constitution. To maintain the dignity, honour and respect of Parliament and its members, it is essential to put it beyond doubt that the protection against legal action under Article 105 does not extend to corrupt acts”.*

3.9.3 Right to equality and equal protection of law is a fundamental right and the Constitution enshrines this principle of equality. The Ruling in the above case creates an anomalous situation wherein the Members of Parliament are immune from prosecution for their corrupt acts if they are related to voting or speaking in the Parliament. This runs contrary to norms of justice and fair-play. Members of Parliament, being the lawmakers have to maintain the highest standards of integrity and probity. It is, therefore, necessary to amend the Constitution to remove this anomaly.

### 3.9.4 Recommendations:

- a. The Commission, while endorsing the suggestion of the National Commission to Review the Working of the Constitution, recommends that suitable amendments be effected to Article 105(2) of the Constitution to provide that the immunity enjoyed by Members of Parliament does not cover corrupt acts committed by them in connection with their duties in the House or otherwise.
- b. The Commission also recommends that similar amendments may be made in Article 194(2) of the Constitution in respect of members of the state legislatures.

### 3.10 Constitutional Protection to Civil Servants – Article 311

3.10.1 Civil servants in India enjoy unique protection in terms of specific provisions in Part XIV of the Constitution, which authorize the regulation of their conditions of service. Article 309 stipulates that subject to the provisions of the Constitution, acts of appropriate legislature may regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of a State. Under Article 310, - persons serving the Union or a State hold office during the pleasure of the President or the Governor of the State as the case may be. The exercise of this pleasure is, however, circumscribed by the provisions of Article 311. The Article reads as follows :

*“Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State—*

- (1) *No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.*
- (2) *No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges:*

*Provided that where, it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:*

*Provided further that this clause shall not apply —*

- (a) *where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or*
  - (b) *where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or*
  - (c) *where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.*
- (3) *If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the*

*authority empowered to dismiss or remove such person or to reduce him in rank shall be final.”*

3.10.2 The procedure laid down in Article 311, subject to the provisos, or exceptions, therein, is intended to, first, assure a measure of security of tenure to government servants, who are covered by the Article and, second, provide certain safeguards against arbitrary dismissal or removal of a government servant or reduction to a lower rank. These provisions are enforceable in a court of law and where there is an infringement of Article 311 orders passed by the disciplinary authority are ab-initio void. The provisions of Articles 310 and 311, apply to all government servants.

#### Arguments in favour of retaining Article 311

3.10.3 Article 311 of the Constitution has been a matter of much debate over the past fifty years. Arguments range from its retention in its present form, or even strengthening it, to its total deletion. Those in favour of retaining Article 311 argue that the Article subjects the doctrine of pleasure contained in the preceding Article 310 to certain safeguards. Indeed, this Article earlier also envisaged giving an opportunity to the accused official to protest the quantum of punishment proposed if the charges were proved - this requirement was, however, dispensed with through the 42<sup>nd</sup> amendment to the Constitution.

3.10.4 It is further argued that the safeguards under Article 311 are focused and that the framers of the Constitution were mindful of the rare eventualities in which even such minimal safeguards would not be necessary. Indeed, the safeguard of an opportunity of being heard has been held to be a fundamental principle of natural justice. Even if Article 311 were to be repealed, it is argued, the need for giving an opportunity to be heard cannot be dispensed with. The requirement that only an authority which is the appointing authority or any other authority superior to it can impose a punishment of dismissal or removal also appears reasonable as the government follows a hierarchical structure where the appointing authority for different categories of employees are assigned to different levels- the obvious principle being that for positions having higher responsibility, the appointing authority is higher up in the hierarchy.

3.10.5 Moreover, if Article 310 stands without the procedural safeguards of Article 311, it is highly unlikely that the rules governing disciplinary proceedings and departmental inquiries can be dispensed with on the ground that the President or the Governor have a right to dismiss an official from service without proving charges after due inquiry. In such a situation the only outcome would be an increase in litigation concerning service matters.

3.10.6 Besides, judicial review is an integral part of our Constitution and a substantial portion of the appellate work of the Supreme Court concerns Article 311. A random check of the decided cases from the Index notes of the Supreme Court cases yields various rulings, which indicate that the Article is not an obstacle in dealing with delinquent public servants:

- (i) The disciplinary authority is free to take a view contrary to the finding of ‘not guilty’ by the inquiry officer. (*High Court v Shrikant Patil* 2000 1SCC 416).
- (ii) Where the charges are proved in a departmental inquiry while the person is acquitted of the same charges in criminal prosecution, acquittal will have no effect on disciplinary action as the degree of proof required in the two proceedings is quite different. (*Senior Superintendent v A. Gopalan* AIR 1999 SC 1514).
- (iii) Where the appointing authority is the President or the Governor, it is not necessary for these office-holders to be personally satisfied about the justification for disciplinary penalty. (*Union v Sripati Ranjan* 1975 4 SC 699).
- (iv) Where the three eventualities envisaged in second proviso to Article 311 (2) are attracted, recourse to Article 14 cannot be had to get an opportunity of being heard. (*Union v Tulsiram Patel* 1985 3 SCC 398).
- (v) Where witnesses are intimidated, it is open to the disciplinary authority to take a view that an inquiry is not “reasonably practicable” (*Satyavir v Union* 1985 4 SCC 252).
- (vi) Article- 311 is also not attracted if age of retirement is reduced. (*Andhra Pradesh v Moinuddin* AIR 1994 SC 1474).
- (vii) Compulsory retirement also does not attract the aforesaid Article (*Biswanath v Bihar* 2001 SCC 2 305).
- (viii) Courts do not sit in appeal over findings of Departmental inquiries. The role of the higher courts is restricted to ascertain whether the inquiry was fairly or properly conducted; once that is proved, the court will not interfere with the ultimate finding. The court will interfere only in cases where there is no evidence whatsoever to support the finding of guilt. (*Kuldeep v Commissioner of Police* 1999 2 SCC 10).

3.10.7 It is argued that it is the rules governing disciplinary enquiries, and not Article 311 itself, that are responsible for the delays in enquiry and even in the removal of delinquent government servants. Most of the relevant procedures antedate the Constitution and little information exists about their origin, or, in some cases, even about their *raison d'être*. It will be clear from the rulings cited above that the Supreme Court has adopted a judicious approach to Article 311 and it would be unreasonable to take the view that the said Article has proved a panacea for delinquent Government employees.

#### Arguments in favour of repealing Article 311

3.10.8 But the argument above is itself the starting point of the argument in favour of repealing Article 311. It can be argued that if the decisions of the judiciary did not obviate the need to act against delinquent officials, then why retain the Article with its potential to protect the corrupt through any unintended interpretation? Indeed, it is not as if in all cases involving Article 311 the Supreme Court has taken a 'pro Government' stance. There are cases where the apex court has struck down the actions of the disciplinary authority or the Government. Some instances can be cited illustratively;

- (i) Where a temporary servant was accused of accepting bribe, it was held that the matter should have been dealt with in accordance with Article 311 and if proved guilty the penalty of dismissal, instead of termination of service should have been imposed. (*Madan Gopal v Punjab* AIR 1963 SC 531).
- (ii) Where a temporary constable was discharged from service, it was held that "the order of discharge, though couched in innocuous terms and stated to be made in accordance with (the rules) was really a camouflage for an order of dismissal from service on the ground of misconduct as found on an enquiry into the allegations behind her back. It was penal in nature as it cast a stigma on the service career of the appellant. The order was made without serving the appellant any charge sheet, without asking for any explanation from her, without giving any opportunity to show cause against the purported order of dismissal from service and without giving any opportunity to cross-examine the witnesses. It, therefore, contravenes Article 311(2) of the Constitution and is liable to be quashed and set aside." (*Smt. Rajinder Kaur v State of Punjab and Another*, AIR 1986 SC 1790).
- (iii) Where an inquiry was held at a place away from the place of posting and the accused employee could not attend the proceedings due to lack of funds as he was not paid any subsistence allowance (during the period of suspension), it was held that the inquiry was vitiated. (*Fakirbhai v Presiding Officer* 1986 3 SCC 111).
- (iv) It is necessary for the Disciplinary Authority to furnish copy of report of Inquiry Officer to Charged Officer and give him an opportunity to make a representation

against it before taking a decision on the charges. (*Union of India v. Mohd. Ramzan Khan*, 1991 (1)SLR SC 159 : AIR 1991 SC 471)

- (v)
  - (a) Adverse entries awarded to an employee lose their significance on his promotion to a higher post and cannot be taken into consideration for forming opinion for prematurely retiring him.
  - (b) Uncommunicated remarks or remarks pending disposal of representation cannot be the basis for premature retirement. (*Brij Mohan Singh Chopra v. State of Punjab*, 1987 (2) SLR SC 54).
- (vi) It has been observed, "But even if the Government has, by contract or under the rules, the right to terminate the employment without going through the procedure prescribed for inflicting the punishment of dismissal or removal or reduction in rank, the Government may, nevertheless, choose to punish the servant and if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and the requirements of Article 311 must be complied with." (*P.L. Dhingra v Union of India*, 1958 SCR p.828 at 862).

3.10.9 There are a number of decisions of the lower courts which have tied down the disciplinary authorities with technical detail where the procedure has become more important than the substance.

3.10.10 In present times, the position prevailing in India has to be viewed against the practice followed in other countries, where such punitive action is possible with a hearing permitted at the discretion of the appropriate authority, not as a matter of right. Even in the UK, whose administrative systems were adopted in India, such freedom does not exist. India is perhaps one of very few countries where a public servant, who, though an agent of the government, has the power to invoke Constitutional rights against the government which is his/her employer.

3.10.11 The Constitution has been amended to recognize the needs of governance as felt from time to time. The Indian Constitution, and Part XIV thereof, was drafted at a time when, in the aftermath of partition, and post-colonial administrative upheavals, it was felt necessary to prescribe certain guarantees to the bureaucracy. In the present scenario, that protection does not appear quite necessary. For one, the recent growth of the economy has ensured that Government is no longer the only significant source of employment. Indeed, in the present debate of even providing outcome oriented contractual appointments for senior positions, there is a new focus on the question of permanency in the civil services. Inflexibility and compartmentalization, created over decades within the bureaucratic structure, has been encouraged by the difficulty in even transferring staff who have rushed to courts against their transfer; this was presumably not the intention of the framers of the Constitution. The increase in corruption and inefficiency in Government has been

acknowledged as requiring major “surgery”. The role of Government as a model employer cannot take away from the fact that public good must override individual right, certainly of the corrupt and inefficient public servant.

3.10.12 It is no doubt essential that reasonable opportunity is provided to a government official against what might be arbitrary or vindictive action. But this should be only reasonable, not excessive, and that must be the criteria for assessing the nature of legal protection that the employee must receive. The protection required to be provided in terms of security of tenure or permanency in the civil service must not lead to a situation where delayed action becomes common reason for emboldening errant officials into committing acts against public interest.

3.10.13 It has been held that, for proper compliance with the requirement of ‘reasonable opportunity’ as envisaged in Article 311(2), a government servant against whom action is contemplated should, in the first instance, be given an opportunity to deny the charges. If, as a result of an inquiry, the charges are proved and it is proposed to impose any of the penalties of dismissal, removal, or reduction in rank, such penalty may be imposed on the basis of the findings of the inquiry. It is not necessary to give him any opportunity of making a representation on the penalty proposed after the amendment of clause (2) of Article 311 of the Constitution with effect from 3<sup>rd</sup> January, 1977. The Santhanam Committee had listed as many as 15 criteria laid down by the Supreme Court and the High Courts in order to enable conduct of an inquiry in accordance with the spirit of the Constitution. The interpretations and requirements laid down by the highest courts have made disciplinary proceedings for major penalties very convoluted, tedious and time consuming involving a large number of sequential steps before a person can be found guilty of the charges and punished. The process unfortunately does not end there. Provisions exist for appeal, revision and review only after completion of which, the delinquent officer would begin to suffer the penalty. The accused officer also has the right to challenge the legality of the action of disciplinary authority before the Administrative Tribunal, get an interim stay of the proceedings and relief thereafter, and to substantively appeal against the decision of the disciplinary authority or the government as the case may be in the Tribunal. This apart, he reserves his fundamental right to invoke the writ jurisdiction of the High Court and the Supreme Court protesting the violation of such rights in the conduct of the inquiry.

3.10.14 Understandably, this has given rise to the demand for curtailing rights of the public servant in relation to his employment. The only amendment of any substantial nature that has been affected is to dispense with the requirement of a second opportunity to show cause. The Santhanam committee had observed:

*“...In view of the constitutional requirements and the judicial pronouncements, we consider that it would not be possible to radically simplify the procedure unless the Constitution is suitably amended. However, we examined the possibility of simplifying the procedure in relation to disciplinary proceedings to the extent possible within the existing legal framework”.*

3.10.15 The Hota Committee, while recommending measures to make civil services responsive, citizen, friendly and ethical, has stated as follows:

*“We recommend that Article 311 of the Constitution be amended to provide that if there are allegations against a civil servant / person holding a civil post of accepting illegal gratification or of having assets disproportionate to his known sources of income and the President or the Governor is satisfied that the civil servant / person holding a civil post be removed from service forthwith in the public interest, the President or the Governor may pass an order removing the civil servant / person holding the civil post from service and give him an opportunity in a post-decisional hearing to defend himself.*

*If the person removed from service is prosecuted in a court of law, the President or the Governor may also specify by order that a post-decisional hearing may be given to the person removed from service only after a judgement of the court of law acquitting him becomes final and conclusive. The person so removed shall be given a post-decisional hearing in a regular departmental inquiry to defend himself against the charge. If he is exonerated of the charge, he shall be reinstated in service with full restoration of his service conditions, including his seniority, and shall be paid the arrears of pay and allowances due to him in full.*

*In our view, such a Constitutional amendment would :*

- *Facilitate summary removal from service of a corrupt officer;*
- *Inspire confidence in the minds of the common people that corrupt practice by members of the civil service / persons holding civil posts will not be tolerated;*
- *Ensure justice to the official so removed in a post-decisional hearing.*

3.10.16 The National Commission to Review the Working of the Constitution had recommended :

*“Yet the services have remained largely immune from imposition of penalties due to the complicated procedures that have grown out of the constitutional guarantee against arbitrary and vindictive action (Article 311). The constitutional safeguards have in practice acted to shield the guilty against swift and certain punishment for abuse of public office for private gain. A major corollary*

*has been erosion of accountability. It has accordingly become necessary to revisit the issue of constitutional safeguards under Article 311 to ensure that the honest and efficient officials are given the requisite protection but the dishonest are not allowed to prosper in office. A comprehensive examination of the entire corpus of jurisprudence has to be undertaken to rationalize and simplify the procedure of administrative and legal action and to bring the theory and practice of security and tenure in line with the experience of the last more than 50 years”.*

3.10.17 The view favouring the deletion of Article 311 argues ultimately that, over time, the provisions of Article 311 have given rise to a mass of judicial pronouncements which have led to much confusion and uncertainty in interpretation. These pronouncements should not continue to have significance and effect on the strength of the continued existence of Article 311. If this Article is deleted, judicial pronouncements based on the Article would no longer be in force and binding. This could be made clear in the statement of objects and reasons of any proposed amendment to the Constitution so that these rulings are not relied upon to claim a protection which was not intended.

#### Summing up – Removing Article 311

3.10.18 The Commission has given deep consideration to the case for and against Article 311 remaining in the Constitution of India. No other Constitution appears to contain the kind of guarantees that this Article does. The Government of India Act-1919 was the first enactment to apply the ‘doctrine of pleasure’ in India, through Section 96B thereof. Its application was “subject to rules”, and the courts while examining challenges to penalties under that Act applied the extant rules to determine whether these were rightly imposed. In other words, when this doctrine was first applied in India, it was deemed sufficient to provide protection against any unjust exercise of ‘pleasure’. With the provisions of Judicial review now available in our Constitution, the protection available to Government employees is indeed formidable even outside Article 311. This is borne out by the fact that ample relief is available to employees invoking judicial intervention in cases involving compulsory retirements even though Article 311 does not extend to such cases.

3.10.19 When Sardar Patel argued for protection of civil servants, the intention was clearly to embolden senior civil servants to render impartial and frank advice to the political executive without fear of retribution. But the compulsions of equal treatment of all public servants and judicial pronouncements have made such a protection applicable to employees of PSUs, para-statal organizations and even body corporates like cooperatives and this has created a climate of excessive security without fear of penalty for incompetence or wrongdoing. The challenge before the nation now is to confront this exaggerated notion of life-time security irrespective of performance and to create a climate conducive to effective delivery of services and accountability with reasonable security of tenure.

3.10.20 The Commission believes that the rights of a civil servant under the Constitution should be subordinate to the overall requirement of public interest and the contractual right of the State. It cannot be an argument that a corrupt civil servant’s rights are more important than the need to ensure an honest, efficient and corruption-free administration. Ultimately, the public servant, an agent of the State, cannot be superior to the State and it is his fundamental duty to serve the State with integrity, devotion, honesty, impartiality, objectivity, transparency and accountability.

3.10.21 It is true that the government as an employer is expected to act in a fair manner and it has to be a model employer worthy of emulation by others. It has also to be ensured that honest and efficient public servants are not subjected to the whims and fancies of their superiors. No government can be expected to dispense with the services of a government servant in an arbitrary manner or without a proper enquiry. Such arbitrary removal is not possible even in the private sector. Strictly, there should be no need for retaining Article 310, and legal safeguards may be provided through legislation under Article 309.

3.10.22 Articles 309, 310 and 311 form a continuum. If the whole gamut of “conditions of service” is codified as required by the substantive part of Article 309, this can include matters such as disciplinary proceedings and imposition of penalties. Moreover, as noted above, with rule of law accepted as an integral part of the basic structure of the constitution, reasonable protection now attributed to Article 311 will continue to be available to satisfy the requirements of ‘rule of law’.

3.10.23 Taking into account these considerations and a fairly common perception that explicit articulation of “protection” in the Constitution itself gives an impression of inordinate ‘protection’, the Commission is of the view that on balance Article 311 need not continue to be a part of the Constitution. Instead appropriate and comprehensive legislation under Article 309 could be framed to cover all aspects of recruitment and service, even with regard to dismissal, removal or reduction in rank. Appropriate legislation by the respective legislatures may also be ensured through a revised Constitutional provision. The Commission will examine in detail issues related to such enactment in its Report on Civil Services Reforms.

#### 3.10.24 Recommendations:

- a. Article 311 of the Constitution should be repealed.
- b. Simultaneously, Article 310 of the Constitution should also be repealed.

- c. Suitable legislation to provide for all necessary terms and conditions of services should be provided under Article 309, to protect the bona fide actions of public servants taken in public interest; this should be made applicable to the States.
- d. Necessary protection to public servants against arbitrary action should be provided through such legislation under Article 309.

### 3.11 Disciplinary Proceedings

3.11.1 The term, “Disciplinary Proceedings” has not been defined under any legislation or rules. A working definition would, however, run something like; *Action initiated to find whether an employee has violated a prescribed or implicit code of ethical and professional conduct to enable the employer to impose penalties like forfeiture of employment or denial of employment related benefits on the guilty.* In the entire repertoire of measures to deal with misconduct by civil servants, disciplinary proceedings occupy a special place as the entire process is carried out within the civil service system. It is axiomatic that an efficient disciplinary system promotes efficiency and professionalism and drastically inhibits recourse to external judicial processes.

3.11.2 Prior to the enactment of the Government of India Act, 1919, there was no formal system of departmental inquiries as a prelude to disciplinary action. Police manuals and regulations governing Forest Departments provided penalties like dismissal, monetary fines and stoppage of increments etc. Such penalties were imposed after calling for, and considering explanations. A system of oral inquiry appears to have first started in the Railways in the early 1920s although at that time the Indian Railway system was an amalgam of private and public initiatives. Insofar as the system of disciplinary proceedings is concerned, enactment of the Government of India Act, 1919 is rightly regarded as a watershed. Section 96B of that Act, while prescribing that “every person in the civil service of the crown holds office during His majesty’s pleasure”, had made this “subject to provisions of this Act and Rules made thereunder”. The importance of this provisions was that specific rules were envisaged for the first time to regulate conditions of service, including imposition of penalties.

3.11.3 Pursuant to the above provision, the Civil Services Classification Rules, 1920 were framed. Rule XIV of these Rules, for the first time, prescribed a procedure for conducting disciplinary proceedings. The provisions of these rules were amplified in the form of the amended Civil Services Regulations of 1930. The basic provisions currently in vogue essentially remain unchanged. [The early history of these measures can be gleaned from a number of judicial pronouncements such as; the judgement of the Privy Council in *R. Venkata Rao v Secretary of State for India AIR (1937) PC 31*, and of the Calcutta and Rangoon High Courts respectively in *Satish Chandra Das v Secretary of State ILR (54) Cal 44* and *J.R Baroni v Secretary of State AIR (1929) Rang 207*].

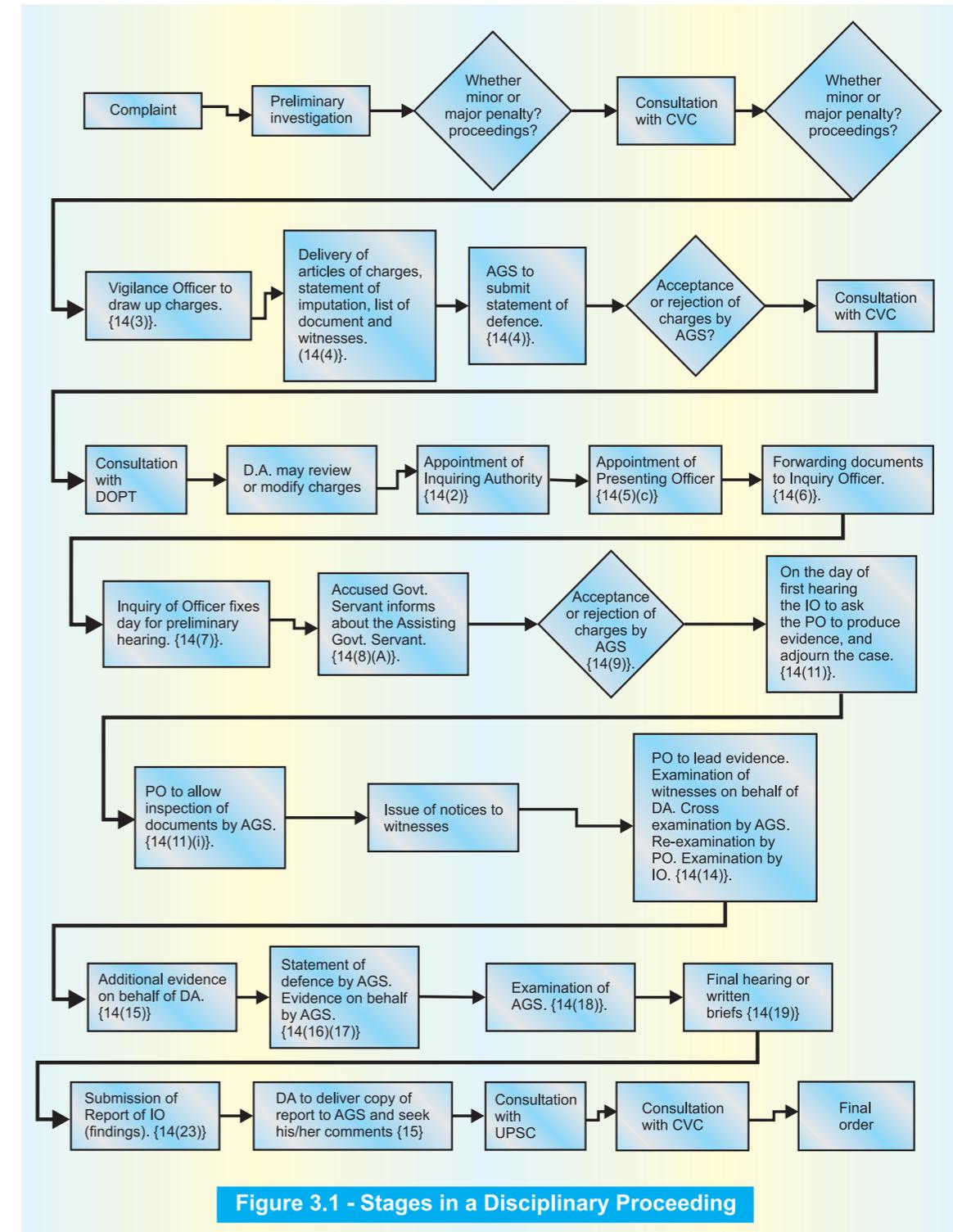
3.11.4 It is also pertinent to note that the provisions relating to “Services under the Union and the States” in Part XIV of the Constitution, and in particular Articles 309 to 313 thereof, reproduces verbatim, provisions of the Government of India Act, 1935. As such, the present framework for prescribing penalties, including the method of imposition thereof, contained in the Central Civil Services (Classification, Control and Appeal) Rules, 1965 essentially continues the pattern firmed up in pre independence days with certain modifications brought in pursuance of the recommendations of the Santhanam Committee. Rules on the subject framed by State Governments are also remarkably similar to the Central Rules (to be referred hereinafter as the ‘CCA Rules’) for the obvious reason that they share a ‘common lineage’ as the ‘parent rules’ of 1920 had all India application including to the local governments.

3.11.5 A major change that has been brought about, post independence, is that the Code of Conduct has been separated from CCA and analogous Rules in the form of Central Civil Services (Conduct) Rules and the All India Services (Conduct) Rules etc on the lines suggested by the Santhanam Committee have been notified. That Committee, after examination of the separate rules then prevailing in regard to discipline and appeal for the All India Services, the Central Civil Services, the Railways and the civilians in Defence Services recommended unified set of rules. The Committee stated: *“Our intention was that the conduct rules, particularly those relating to integrity should be uniform. If, for any reason, it is necessary to promulgate the rules separately for a service or a department there could be no objection to the rules being promulgated separately provided the rules, particularly those relating to integrity are uniform”.* Accordingly, in the present pattern, the norms of professional and, to a limited extent personal behaviour, are laid down in the conduct rules while the consequences of violation of these norms are dealt with in the CCA and similar rules.

3.11.6 CCA Rules envisage two kinds of penalties. **Minor penalties** consist of “Censure”, “Withholding of promotion for a specified period”, and “Withholding of increment and recovery from the salary of whole or part of pecuniary loss caused by the employee”. Minor penalty can be imposed after calling for and considering the explanation of the accused employee. **Major Penalties** comprise reduction in rank through reversion to a lower scale of pay or to the parent cadre etc, compulsory retirement, removal or dismissal from service. Such penalties can be imposed only after a detailed inquiry except in cases covered by the second proviso to Article 311 (2) i.e. in the eventuality of conviction for a criminal offence, on grounds related to security of the state and where an inquiry is considered not practicable.

3.11.7 Detailed procedures governing the initiation of disciplinary proceedings, and the progress and culmination, thereof, is diagrammatically depicted in **Figure 3.1**. While there are minor variations in this pattern in the states or even in the Union Government in respect of the non Gazetted establishment, broadly the 'flows' indicated therein embrace the entire community of central and state government employees including those of the public sector and nationalized banks. Without going into the details of such procedures, but to be able to appreciate the issues involved, it will be sufficient to note the following procedural outlines along with the time limit within which the Central Vigilance Commission (CVC) expects these to be attended to:

- Complaints received or lapses noticed are examined to ascertain whether they involve a 'vigilance angle' (essentially violation of conduct rules) - 1 month .
- Decision about whom to refer complaints to ascertain whether these have any substance to the CBI or departmental agencies-3 months.
- Submission of findings of investigations- 3 months.
- Department/CBI report to be sent for 'First Stage Advice' to the CVC- 1 month from the date of reference.
- Formulation of CVC's advice-1 month.
- Issue of charge-sheet, statement of imputation of misconduct, and list of witnesses and documents etc, if it is decided to proceed in departmental inquiry - 1 month from the receipt of CVC advice.
- Consideration of Defence Statement of the accused employee- 15 days.
- Issue of final orders in minor penalty cases-2 months from receipt of Defence Statement.
- Appointment of the Inquiry Authority (IA) and Presenting Officer (PO) where the 'first stage advice' recommends major penalty which requires detailed inquiry- Immediately after receipt of Statement of Defence.
- Completion of inquiry- 6 months from the date of appointment of the Inquiry Officer and the Presenting Officer.
- Sending a copy of the inquiry report, (where the accused is held guilty or the disciplinary authority records reasons for disagreement with an inquiry report holding that charges are not proved), to the charged officer for representation, if any- 15 days from the receipt of representation.



- Considering the representation of the accused employee and forwarding the inquiry report for **Second Stage Advice to the CVC**- 1 month from the date of receipt of the representation.
- Issue of orders on the inquiry report- 1 month from the receipt of CVC's 'second stage advice' ( or 2 months from the date of inquiry report where such advice is not required).

*(It may be noticed that the above schedule does not include the time taken between commission of a 'wrong' and its detection or receipt of a complaint about it. A very rough calculation would also indicate that even if the above time schedule is adhered to, the estimated time taken in bringing to culmination cases involving minor and major penalties can be respectively estimated at 10 months 15 days and 16 months. It needs to be added that this schedule excludes the time required for consultation with the UPSC wherever required)*

3.11.8 In order to appreciate the problems involved in the conduct of actual proceedings, it will be necessary to also invite attention to the following factors impinging on departmental inquiries particularly in the Union Government.

- The CVC has emerged as the nodal, statutory authority to over-see vigilance administration and, also to a certain extent of the working of the Central Bureau of Investigation. Initiation and completion of inquiries require clearance of this authority.
- Each Ministry/Department or other organization in the Union Government now has an internal vigilance set-up under a whole-time or part-time Chief Vigilance Officer (CVO) with the responsibility of conducting or supervising preliminary investigations in complaints, preparing the article of charge etc. keeping a watch on progress of proceedings and examining inquiry reports apart from undertaking preventive vigilance and surveillance etc.
- The total civil establishment of the Government of India consists primarily of Groups "C" and "D" staff. The monitoring and supervisory role of the CVC is, however, confined to only Groups "A" and Gazetted "B". In other words, the bulk of disciplinary cases do not benefit from the attention of the CVC.
- Disciplinary proceedings are often resorted to in cases originally investigated by the CBI for criminal prosecution if warranted by the investigation, but where the investigating agency eventually reaches the conclusion that the incriminating evidence collected is not sufficient to secure conviction but is of a degree to

suffice for the finding of guilt in departmental proceedings. (The degree of proof required in a criminal case must prove guilt 'beyond reasonable doubt; in departmental proceedings, as also in civil cases, 'preponderance of probabilities is sufficient).

- Historically, departmental proceedings were entrusted for inquiry to officials from within the organization, chosen at random subject only to the consideration that the inquiry officer be senior to the accused in rank. The present trend is to have full time inquiry officers working as Commissioner Departmental Inquiries in the CVC. This, however, only supplements the system of part-time inquiry officers as the number of departmental inquiries is significantly high.
- The Department of Personnel and Training now has a very limited role in conduct of departmental inquiries except in case of members of All India services and, for the most part, the various Ministries/Departments exercise the functions of disciplinary authorities in respect of officials borne on their establishment.

With the formation of Central Administrative Tribunals (CATs) in the 1980s most of the judicial proceedings arising out of departmental inquiries are handled in these fora which, not infrequently, entertain pleas to stay disciplinary proceedings on technical grounds and even entertain pleas against interlocutory orders. Public servants are able to challenge the orders of the tribunal in High Courts. There is, in addition, recourse to the Supreme Court under Article 136 of the Constitution of filing 'appeal by special leave'.

3.11.9 The Commission takes note of the fact that there is considerable dissatisfaction among all sections of stake-holders about the way the process of disciplinary proceedings is operating. The Hota Committee which had gone into some aspects of such proceedings had also drawn attention to the delays and procedural aspects therein which prevent disciplinary penalties from becoming a tool for ensuring efficiency and probity. That committee had also suggested measures like more frequent resort to proceedings for minor penalties, relieving the inquiry officer of all other duties while conducting the inquiry, and furnishing copies of the documents proposed to be utilized to prove the case against the accused employee along with the charge-sheet etc.

3.11.10 A recent study<sup>49</sup> brings out some revealing information. Some of the salient findings (cases studied) are;

- In 116 cases studied, the average time taken between reference to CVC for the 'first stage advice' and receipt of the advice in cases studied was 170 days (these cases apparently involved imposition of minor penalty).

<sup>49</sup> Source: "Disciplinary Proceedings as a Tool of Anti Corruption Strategy", W R Reddy (IIPA New Delhi, 2005)

- In 234 cases involving proceedings for a major penalty the average time taken between appointment of the Inquiry Officer and completion of inquiry was 584 days.
- In 56 cases the average time taken from receipt of the inquiry report to sending the case to the CVC for 'second stage advice' was 288 days.
- In 33 cases the average time taken between the 'date of occurrence of misconduct'\* and sending the cases to the CVC for 'first stage advice' was 1284 days.
- Analysis of certain completed cases revealed the following 'break-up' of time taken by various agencies;
 

Administrative Department	- 69%
Inquiry Officer	- 17%
CVC	- 9%
UPSC	- 5%
- There was considerable variation in the time taken often in the same stages depending on the source relied upon viz. Disciplinary Cases Monitoring and Management Information System (DCMMIS) of the Administrative Vigilance Division of the Department of Personnel and Training, CVC data of 'first stage advice' i.e. cases resulting in closure or minor penalties and 'second stage advice' of the same organization i.e. cases referred again after departmental inquiry.

(The concept of 'date of occurrence of misconduct', though an innovative bench-mark, needs to be used with caution in a situation where the 'discovery' of misconduct is necessarily possible only at some future date).

3.11.11 From the above data two facts clearly emerge: *first*, there is no congruence between the time taken in completion of various stages and the schedule prescribed for their completion by the CVC; and *second*, while it would be unrealistic in such cases to expect 'immediate report of the offence', the discovery of the commission of a 'misconduct' is shockingly delayed. In fact, it is not very clear, on the whole, as to how such 'misconducts' come to light-whether a significant number of cases could be detected within the organization or whether most such cases were disclosed through complaints of 'affected-outsiders'. These are aspects on which greater clarity and empirical evidence are clearly required.

3.11.12 The Commission is of the view that the existing regulations governing disciplinary proceedings need to be recast and the following broad principles should be followed in laying down the new regulations.

- a. The procedure needs to be made simple so that the proceedings could be completed within a short time frame.
- b. Emphasis should be on documentary evidence, and only in case documentary evidence is not sufficient, recourse should be made to oral evidence.
- c. An appellate mechanism should be provided within the department itself.
- d. Imposition of major penalties should be recommended by a committee in order to ensure objectivity.

The Commission would be elaborating these aspects in its Report on civil services reforms.

### 3.12 Statutory Reporting Obligations

3.12.1 Statutory provisions have cast reporting obligations on the citizen. Such provisions apply to both citizens and public servants backed with penal provisions in the event of failure to comply with such obligations. Section 39 of the Code of Criminal Procedure, 1973 makes it mandatory for any person to report to a magistrate or officer of the law any alleged corrupt offence by a public servant failing which he shall be liable for prosecution. However, this provision has remained a dead letter because no mechanisms are available for protection of the informants. Obviously, fear of potential whistleblowers being subjected to reprisals by the perpetrators of corrupt acts, and the inability of the government to protect their person and property in the event of such threats are powerful deterrents which far outweigh the moral pressure of duty as a citizen. In the case of a civil servant, the threat is not only from the actual agents who perpetrate the crime reported, but also from the government apparatus where there is collusive corruption. Thus, he suffers both from external physical threat and internal official harassment.

3.12.2 Failure to give information as required by law also constitutes an offence under Sections 176 or 202 of the Indian Penal Code which deal with omission to give notice to public servant by a person legally bound to give it and intentional omission to give information of offence by a person bound to inform. Section 125 of the Indian Evidence Act, 1872 also covers aspects of the interest and integrity of the information given in respect of offences. Official communication with regard to crime is privileged, and a police officer or a magistrate cannot be compelled to disclose the source of information received by him with regard to the commission of the offence. These provisions indicate how the law makers had, over a century ago, realized the importance of the need to encourage public and official reporting of crimes or of the intention to commit crimes of corruption. In this context, Malaysia has stipulated that a public official who is offered a bribe but fails to report it, may be convicted and imprisoned for up to ten years. The Commission feels that making a law on whistleblower's protection would provide the necessary protection against departmental victimization (para 4.7.4) thus creating an environment where public servants would come forward and reveal details of corrupt practices within their organizations.

## 4 INSTITUTIONAL FRAMEWORK

### 4.1 Existing Institutions/Agencies

#### Union Government

4.1.1 The Administrative Vigilance Division of the Department of Personnel & Training is the nodal agency for dealing with Vigilance and Anti-corruption. Its tasks, *inter alia*, are to oversee and provide necessary directions to the Government's programme of maintenance of discipline and eradication of corruption from the public services. The other institutions and agencies at the Union level are - (i) The Central Vigilance Commission (CVC); (ii) Vigilance units in the Ministries/Departments of Government of India, Central public enterprises and other autonomous organisations; and (iii) the Central Bureau of Investigation (CBI).

#### Central Vigilance Commission

4.1.2 In pursuance of the recommendations made by the Committee on Prevention of Corruption, popularly known as the Santhanam Committee, the Central Vigilance Commission was set up by the Government of India by a Resolution dated 11.2.1964. It was accorded statutory status, consequent upon the judgement of the Hon'ble Supreme Court in Vineet Narain v. Union of India, through the Central Vigilance Commission Act, 2003. 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 Central Bureau of Investigation, and also over the vigilance administration of various Ministries and other organizations of the Union Government.

#### Vigilance Units in the Government of India

4.1.3 All Ministries/Departments in the Union Government have a Chief Vigilance Officer (CVO) who heads the Vigilance Division of the organization concerned, assisting and advising the Secretary or Head of Office in all matters pertaining to vigilance. He also provides a link between his organisation and the Central Vigilance Commission on the one hand and his organisation and the Central Bureau of Investigation on the other. Vigilance functions performed by the CVO include collecting intelligence about corrupt practices of the employees of his organisation; investigating verifiable allegations reported to him; processing

investigation reports for further consideration of the disciplinary authority concerned; and referring matters to the Central Vigilance Commission for advice wherever necessary.

#### The Central Bureau of Investigation

4.1.4 The Central Bureau of Investigation (CBI) is the principal investigative agency of the Union Government in anti-corruption matters. It derives its powers from the Delhi Special Police Establishment Act, 1946 (DSPE Act) to investigate certain specified offences or classes of offences pertaining to corruption and other kinds of malpractices involving public servants. The Special Police Establishment, which forms a division of the Central Bureau of Investigation, has three units, viz. (i) Anti-corruption Division, (ii) Economic Offences Wing, and (iii) Special Crimes Division. The Anti-corruption Division investigates all cases registered under the Prevention of Corruption Act, 1988 as also cases of offences under any other sections of the IPC or other law if committed along with offences of bribery and corruption. The Anti-corruption Division investigates cases pertaining to serious irregularities allegedly committed by public servants. It also investigates cases against public servants of State Governments, if the case is entrusted to the CBI. The Special Crimes Division investigates all cases of economic offences and conventional crimes; such as offences relating to internal security, espionage, sabotage, narcotics and psychotropic substances, antiquities, murders, dacoities/robberies, cheating, criminal breach of trust, forgeries, dowry deaths, suspicious deaths and other offences under IPC and other laws notified under Section 3 of the DSPE Act.

#### Vigilance Systems in State Governments

4.1.5 At the level of state governments, similar vigilance and anti-corruption organisations exist, although the nature and staffing of these organisations vary between and across state governments. While some states have Vigilance Commissions and anti-corruption bureaus, others have Lokayuktas. Andhra Pradesh has an Anti Corruption Bureau, a Vigilance Commission and a Lokayukta. Tamil Nadu and West Bengal have State Vigilance Commissions to oversee the vigilance functions. The Vigilance Commissioner in Tamil Nadu is a serving Secretary to Government and functions as a Secretary though he brings out an Annual Report in his capacity as Vigilance Commissioner. Maharashtra has a combination of an Ombudsman and a Vigilance Commissioner, a multi-member body called the Lokayukta with a retired Judge of the higher judiciary as the Chairman and a retired civil servant as Vice Chairman. There are Vigilance Commissioners in the States of Assam, Bihar, Gujarat, Jammu & Kashmir, Meghalaya and Sikkim. In the Union Territories, the Chief Secretary himself acts as the Vigilance Commissioner. Some States have adopted the pattern of the Union Government and set up internal vigilance organizations with dual responsibility of reporting to the Vigilance Commissioner and the departmental head with subordinate units in offices of Heads of Departments and the districts reporting to the higher formations and the Vigilance Commissioner.

### 4.2 Evaluation of the Anti-Corruption Machinery in India

4.2.1 The working of many of these anti-corruption bodies leaves much to be desired. In order to analyse the functioning of the anti-corruption laws and the agencies involved in their enforcement, the Commission studied the details of cases investigated, tried and convicted in the past three decades, based on the annual statistics published by the National Crime Records Bureau. The analysis is summarized in Fig-4.1 to Fig-4.4.

Fig. 4.1: Analysis of Cases Prosecuted by CBI under the Prevention of Corruption Act

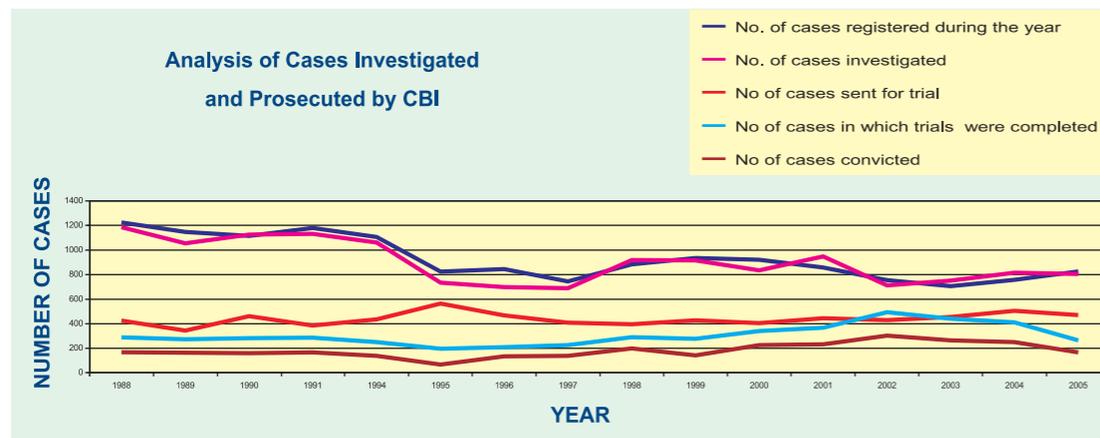


Fig.4.2: Analysis of Cases Investigated and Prosecuted by State Anti Corruption Wings

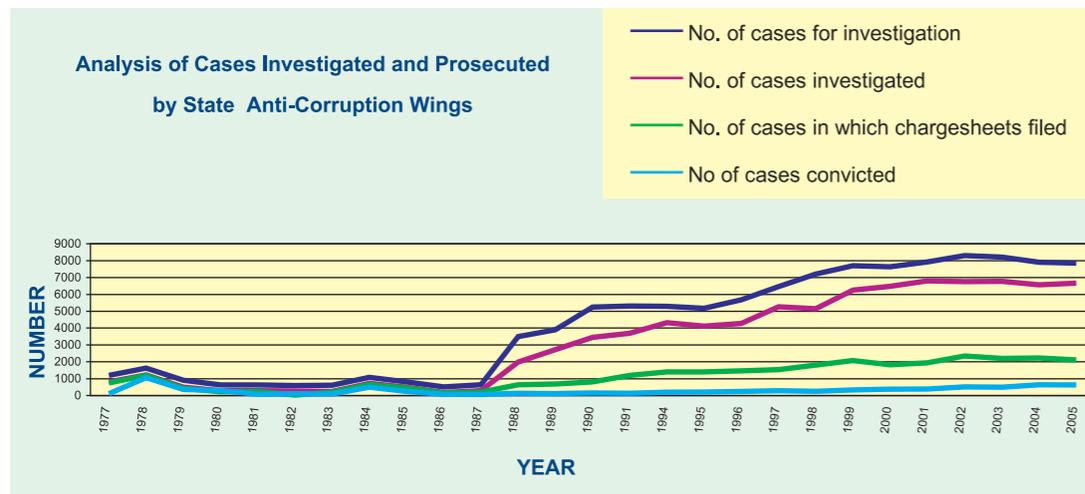


Fig 4.3: Comparison of Conviction Rates of CBI and State Anti Corruption Organisations

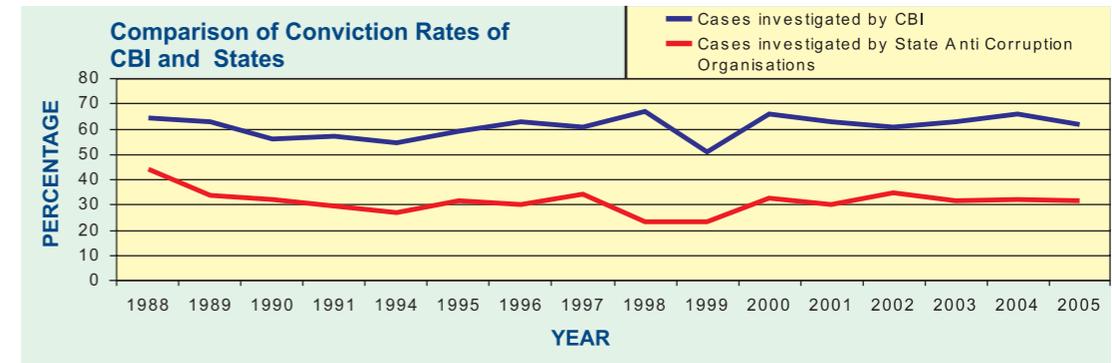
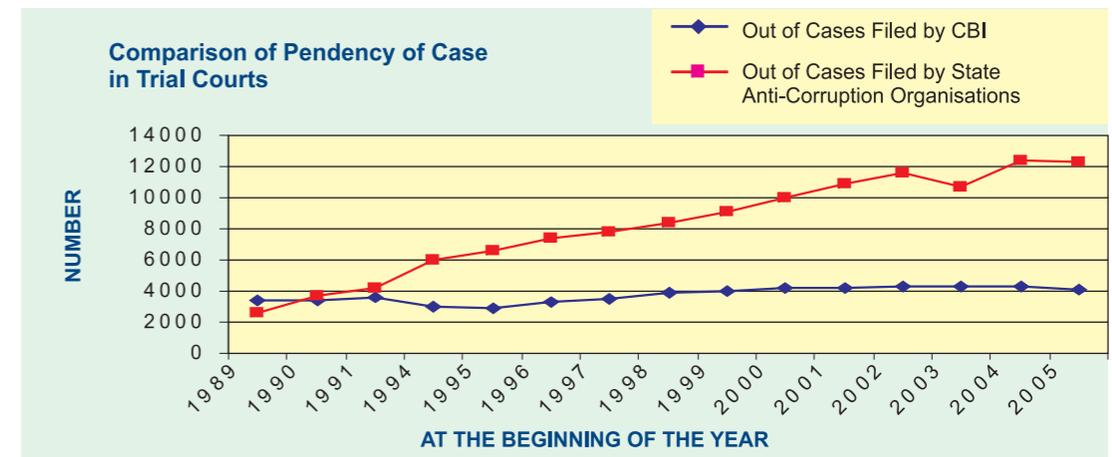


Fig. 4.4: Pendency of Cases in Courts



4.2.2 From an analysis of the available statistics, the following broad conclusions may be drawn:

- a. The conviction rate in cases by CBI is low compared to the cases registered, which nevertheless is double that of the State Anti Corruption organisations. The number of cases of the CBI pending for trial at the beginning of the year 2005 was 4130 and 471 more cases were added during the year. But only 265 cases could be disposed of during the year. Similarly, in the States there were 12285 cases pending at the beginning of 2005, and 2111 cases were added during the year. But only 2005 cases were disposed of during the year. If one were to assume that no cases are filed from now onwards, it would take about six years to clear the backlog in the states.

- b. There has been rapid increase in the number of cases registered and investigated by the State Anti-Corruption organisations after 1988.
- c. The number of cases pending for investigation before the State Anti Corruption organisations has been increasing.
- d. The number of cases disposed of in trials each year is much less than the number of cases filed, indicating that the backlog of cases in trial courts is increasing.

4.2.3 An international comparison of the conviction rate for the offence of bribery, as indicated in Figure 4.5, reveals that most countries have a much higher rate of conviction than India.<sup>50</sup>

**Table 4.1: International Comparison of Persons Convicted for Bribery**

Country	Year			Rate per 100,000 inhabitants		
	1998	1999	2000	1998	1999	2000
Albania			1			0.03
Armenia	13	12	28	0.34	0.32	0.74
Azerbaijan	45	45	45	0.57	0.56	0.56
Belarus	246	224	220	2.44	2.24	2.20
Bulgaria	32	26	38	0.39	0.32	0.47
Chile	5	8	7	0.03	0.05	0.05
China	8,770	8,568	9,729	0.71	0.69	0.77
Costa Rica	10	4	4	0.27	0.11	0.10
Croatia	31	55	44	0.71	1.26	1.00
Cyprus	1	1	-	0.13	0.13	-
Czech Republic	111	110	118	1.08	1.07	1.15
Egypt	-	528	1,225	-	0.84	1.92
Estonia	28	20	43	1.99	1.44	3.14
Finland	5	3	3	0.10	0.06	0.06
France	193	314	279	0.33	0.54	0.47
Georgia	11	2	18	0.20	0.04	0.36
Germany	427	395	-	0.52	0.48	-
Guatemala	380	369	600	3.52	3.32	5.26
HongKong, China (SAR)	130	74	107	1.96	1.10	1.57
Hungary	278	297	294	2.75	2.94	2.94
India	654	684	-	0.07	0.07	-
Indonesia	136	391	232	0.07	0.19	0.11
Italy	963	723	717	1.67	1.26	1.24
Japan	187	153	119	0.15	0.12	0.09
Korea, Republic of	803	1,466	960	1.73	3.13	2.03
Latvia	17	32	10	0.69	1.33	0.42
Lithuania	44	43	51	1.19	1.16	1.38
Macedonia, FYR	11	23	19	0.55	1.14	0.94
Malaysia	230	641	800	1.04	2.82	3.43
Mexico	49	239	247	0.05	0.25	0.25

Population source: World Bank

<sup>50</sup> Source: Eighth United Nations Survey of Crime Trends and Operations of Criminal Justice Systems, covering the period 2001 – 2002; <http://www.unodc.org/pdf/crime/eighthsurvey/8pv.pdf>

### 4.3 The Lok Pal

4.3.1 The first Administrative Reforms Commission had recommended the establishment of the institution of Lok Pal. The Lok Pal Bill has been introduced several times but due to various reasons it has not been enacted into law. The Lok Pal is supposed to be a watchdog over the integrity of Ministers and the Members of Parliament. The Indian Lok Pal was intended to be similar to the institution of Ombudsman existing in the Scandinavian countries. The institution of Ombudsman has emerged 'as a bulwark of democratic government against the tyranny of officialdom'. The Lok Pal Bill provides for constitution of the Lok Pal as an independent body to enquire into cases of corruption against public functionaries, with a mechanism for filing complaints and conducting inquiries etc.

4.3.2 The Commission is of the view that the Lok Pal Bill should become law with the least possible delay. As recommended in the Bill, the Lokpal should deal with allegations of corruption against Ministers and Members of Parliament.

4.3.3 Allegations of corruption against government officials are dealt with departmentally and also by the Central Bureau of Investigation under the Central Vigilance Commission. In some cases of corruption there may be collusion between the Ministers and the officers. Therefore there should be an organic link between the Lok Pal and the Central Vigilance Commissioner. The reason for this is that an overarching approach to fighting corruption in high places is necessary. Corruption at the political level is at times with the connivance of officials. Some cases of corruption involving officers may also point towards political patronage and involvement. Thus the linkage between the CVC and the Lok Pal would enable sharing of information and prompt action against all persons involved. It may also be provided that all cases of corruption involving Ministers or Members of Parliament which also have elements of connivance or collusion by officials, should be enquired into by the Lok Pal only. While the Central Vigilance Commission should enjoy full functional autonomy, it should nevertheless work under the overall guidance and superintendence of the Lok Pal.

4.3.4 The Commission is of the view that the Lok Pal should be a three-member body. This would bring in the expertise and insight of more than one person which would be essential for transparency and objectivity. Moreover, the multi-member characteristic would render it more immune to any extraneous influence. The Commission is also of the view that of the three members, the Chairman should be from the judiciary (a serving or retired Supreme Court Judge), the second member should be an eminent jurist and the third should be the Central Vigilance Commissioner (ex-officio).

4.3.5 One issue which has been debated for long is whether the office of Prime Minister should be brought under the jurisdiction of the Lok Pal. Those who believe that the Prime Minister's conduct should be scrutinized by the Lok Pal rightly argue that all public servants should be accountable. In a democracy, the citizen is the sovereign, and every public servant holds office to serve the citizens, spending tax money and exercising authority under the laws made on citizens' behalf or under the Constitution, which we, the people, gave unto ourselves. Therefore, no functionary, however high, should be exempt from scrutiny by the Lok Pal.

4.3.6 In constitutional theory, according to the Westminster model, the Prime Minister is the first among equals in a Council of Ministers exercising collective responsibility. Therefore, whatever rules apply to other Ministers, should apply to the Prime Minister as well.

4.3.7 However, there are deeper issues that need to be examined carefully. While the Prime Minister's office was merely the first among equals in conception, over time the Prime Minister became the leader of the executive branch of government. The Cabinet accepts collective responsibility once decisions are made. That is why all policy debates are customarily within the Council of Ministers away from public gaze, and Ministers are not free to express their reservations or differences of opinion in public. It is the function of the Prime Minister to lead and to coordinate among the Ministers in framing of policies, decision making and execution of those policies and decisions. The Prime Minister's unchallenged authority and leadership are critical to ensure cohesion and sense of purpose in government, and to make our Constitutional scheme function in letter and spirit. The Prime Minister is accountable to the Parliament, and on his survival, depends the survival of the government. If the Prime Minister's conduct is open to formal scrutiny by extra-Parliamentary authorities, then the government's viability is eroded and Parliament's supremacy is in jeopardy.

4.3.8 In our Constitutional scheme of things, the Prime Minister is appointed on the basis of the President's judgment of his commanding majority support in Parliament. All Ministers are then appointed only on the advice of the Prime Minister. The President cannot ordinarily dismiss the Prime Minister as long as he enjoys the majority support in the House of the People. But other Ministers are removed by the President at any time on the advice of the Prime Minister. No reasons are required to be given by the Prime Minister for removal of such Ministers. Integrity and competence of the Ministers are not sufficient conditions to continue in office. They must enjoy the confidence of the Prime Minister in order to hold office as Ministers. This scheme has been deliberately introduced in our Constitution to preserve the authority of the Prime Minister, and to ensure cohesion and coordination in the functioning of government. Any enquiry into a Prime Minister's official conduct by any authority other than the Parliament would severely

undermine the Prime Minister's capacity to lead the government. Such weakening of Prime Minister's authority would surely lead to serious failure of governance and lack of harmony and coordination, and would severely undermine public interest.

4.3.9 Those who argue that the Prime Minister is like any other Member of Parliament or any other Minister are technically correct. In reality, in all countries following the Parliamentary executive model drawing the Cabinet from the legislature, the Prime Minister becomes the leader of the country and government. The authority of the Prime Minister, as long as he enjoys Parliamentary support, has become synonymous with the nation's dignity and prestige. A Prime Minister facing formal enquiry by a Lok Pal would cripple the government. One can argue that such an enquiry gives the opportunity to the incumbent to defend himself against baseless charges and clear his name. But the fact is, once there is a formal enquiry by a Lok Pal on charges, however baseless they might be, the Prime Minister's authority is severely eroded, and the government will be paralysed. Subsequent exoneration of the Prime Minister cannot undo the damage done to the country or to the office of the Prime Minister. If the Prime Minister is indeed guilty of serious indiscretions, Parliament should be the judge of the matter, and the Lok Sabha should remove the Prime Minister from office. No lengthy enquiry or impeachment is therefore contemplated in our scheme of things, and a mere passing of no-confidence motion without assigning reasons is sufficient to change government. In the directly elected executive model of government, the Parliament cannot remove the President who is the chief executive, and therefore a complex process of impeachment, and an enquiry by Special Prosecutors to precede such an impeachment have become necessary.

4.3.10 It could be argued that since any Minister could be removed on Prime Minister's advice, or Parliament as well, the Lok Pal need not have jurisdiction on a Minister's conduct also. But Parliament does not really sit in judgment over a Minister's conduct. It is the Prime Minister and the Council of Ministers as a whole whose fate is determined by Parliament's will. And the Prime Minister does not have the time or energy to personally investigate the conduct of a Minister. The government's investigative agencies are controlled or influenced by the Ministers, and therefore it is difficult for the Prime Minister to get objective assessment of the Ministers' official conduct. Therefore, an independent, impartial body of high standing would be of great value in enforcing high standards of ethical conduct among Ministers. A similar reasoning applies to Members of Parliament, since Parliament's time and energy cannot be consumed by detailed enquiry into the conduct of a Member. But, the final decision of removing the Member must vest in Parliament, and that of removal of a Minister must be on the advice of the Prime Minister. Parliament is responsible to the

nation for its decisions, and the Prime Minister is responsible to the Parliament for his decisions. These responsibilities of Parliament and Prime Minister cannot be transferred to any unelected body.

4.3.11 Finally, while the Prime Minister is yet another Member of Parliament in constitutional theory, political evolution transformed him into the leader of the nation. Theoretically, each member of the legislature is elected by his/her constituents in our model of government. But over the past century, elections even in parliamentary system have become plebiscitary in nature. Most often, the Prime Minister's personality, vision, and leadership are the issues, which determine the electoral outcomes. Similarly, the opposition focuses its energies and hopes on its leader. The electoral contest is transformed into a test of acceptability of the leaders. The constituency contests have thus become increasingly dependent on the larger question of whose governmental leadership people trust or seek at that point of time. Given this overwhelming political reality, it would be unwise to subject the Prime Minister's office to a prolonged public enquiry by any unelected functionary. Ultimately, the Parliament is the best forum we can trust to enforce integrity in the office of the Prime Minister.

4.3.12 The same principles and arguments also hold good in respect of the Chief Minister of a state. Therefore, it would be unwise to include the Chief Minister in the Lokayukta's jurisdiction. Several states have excluded the Chief Minister from the Lokayukta's ambit though in a few states, the Chief Minister is included. But, if the Chief Minister is brought under the jurisdiction of a federal institution of high standing, then the risks are mitigated. The Commission is of the view that once the Lok Pal or equivalent institution is in place, all Chief Ministers should be brought under Lok Pal's purview. Such a provision would necessitate making Lok Pal a Constitutional authority and defining his jurisdiction in the Constitution while leaving the details of appointment and composition to be fixed by parliament through legislation.

4.3.13 In order to enable the Lok Pal to enhance its effectiveness and to increase the trust the public has in the institution, it is essential for the Lok Pal to establish mechanisms for effective interaction with the public in general and the private sector and the civil society in particular. Such association would also help better understanding of the environment, build checks and balances in its functioning, and prevent abuse of authority by investigating agencies by bringing them to the Lok Pal's notice. The experience of ICAC in Hong Kong which has been elaborated upon in para 5.1.2 has shown that the education and awareness raising function is crucial to any anti-corruption strategy if it is to be effective. Botswana's DCEC, Singapore's CPIB and the ICAC of New South Wales, Australia, have similar mandates. In fact, the ICAC of New South Wales is noted for holding public hearings to

expose corruption. In the light of the successful experience of these countries with anti-corruption efforts by associating the public in general and the private sector and the civil society in particular, the Commission would like to recommend that such activities should be taken up by the Lok Pal.

4.3.14 The role of the Lok Pal in ethical conduct in high places cannot be over-emphasised. The Commission would like to recommend, that the Lok Pal be given a Constitutional status. This would provide the eminence and status and Constitutional safeguards appropriate for such an important institution, which is expected to be a watchdog against wrong doings by high public authorities.

Another minor issue is the name itself. To provide an element of a continuum in the fight against corruption from the Union to the States, from the top to the grass roots, it may be useful to provide a connect with the State Lokayuktas and name the proposed Lok Pal as the 'Rashtriya Lokayukta'. The Commission would, therefore, like to make the following recommendations to make changes in the Lok Pal Bill.

#### 4.3.15 Recommendations:

- a. **The Constitution should be amended to provide for a national Ombudsman to be called the Rashtriya Lokayukta. The role and jurisdiction of the Rashtriya Lokayukta should be defined in the Constitution while the composition, mode of appointment and other details can be decided by Parliament through legislation.**
- b. **The jurisdiction of Rashtriya Lokayukta should extend to all Ministers of the Union (except the Prime Minister), all state Chief Ministers, all persons holding public office equivalent in rank to a Union Minister, and Members of Parliament. In case the enquiry against a public functionary establishes the involvement of any other public official along with the public functionary, the Rashtriya Lokayukta would have the power to enquire against such public servant(s) also.**
- c. **The Prime Minister should be kept out of the jurisdiction of the Rashtriya Lokayukta for the reasons stated in paras 4.3.7 to 4.3.11.**
- d. **The Rashtriya Lokayukta should consist of a serving or retired Judge of the Supreme Court as the Chairperson, an eminent jurist as Member and the Central Vigilance Commissioner as the ex-officio Member.**

- (e) The Chairperson of the Rashtriya Lokayukta should be selected from a panel of sitting Judges of the Supreme Court who have more than three years of service, by a Committee consisting of the Vice President of India, the Prime Minister, the Leader of the Opposition, the Speaker of the Lok Sabha and the Chief Justice of India. In case it is not possible to appoint a sitting Judge, the Committee may appoint a retired Supreme Court Judge. The same Committee may select the Member (i.e. an eminent jurist) of the Rashtriya Lokayukta. The Chairperson and Member of the Rashtriya Lokayukta should be appointed for only one term of three years and they should not hold any public office under the government thereafter, the only exception being that they can become the Chief Justice of India, if their services are so required.
- (f) The Rashtriya Lokayukta should also be entrusted with the task of undertaking a national campaign for raising the standards of ethics in public life.

#### 4.4 The Lokayukta

4.4.1 In the wake of the recommendations of the first Administrative Reforms Commission, many State Governments enacted legislation to constitute the Lokayukta to investigate allegations or grievances arising out of the conduct of public servants including political executives, legislators, officers of the State Government, local bodies, public enterprises and other instrumentalities of Government including cooperative societies and universities. By virtue of such legislation, a member of the public can file specific allegations with the Lokayukta against any public servant for enquiry. It is also open to the Lokayukta to initiate suo-motu inquiry into the conduct of public servants. The Lokayukta is generally a retired Judge of the High Court or the Supreme Court and normally appointed for a five-year term on the basis of a joint decision involving the Chief Minister, the Chief Justice, the Speaker of the House and leader of the Opposition. However, in many states the Lokayukta does not have an independent investigating authority at its disposal and is therefore dependent on Government agencies to carry forward its investigations. The Maharashtra and Orissa Lokayuktas assume more the character of a grievance redressal organization rather than an Ombudsman for cases of corruption.

4.4.2 Over seventeen states presently have Lokayuktas but there is no uniformity in the provisions of the enactments, with fundamental differences regarding their functions. While in all states the Lokayuktas deal with issues of corruption, in some, they also deal with other grievances. In a few states, a wide range of functionaries including Chief Ministers,

Vice Chancellors and office bearers of cooperatives have been brought within the Lokayukta's purview; in others, the coverage is quite restrictive. In some States, investigative powers are vested in them with an investigation machinery attached. Some also provide for powers of search and seizure in the course of investigation. The expenditure on the Lokayukta is, in some States, charged on the consolidated fund of the State providing requisite financial independence for the institution. Some Lokayuktas have powers to punish for contempt.

4.4.3 Be that as it may, the experience in regard to the working of the Lokayuktas has been rather unfortunate as the following examples will show. Though Maharashtra was the first State to establish this institution as early as in 1972, its public credibility was lost when the incumbent continued to function for several months after he was asked to step down. Orissa instituted and then abolished the institution. In Haryana, the institution of Lok Pal was abolished overnight through an Ordinance as the serving High Court Judge functioning as the Lok Pal had protection against summary dismissal. The Punjab Government also repealed the Act through an Ordinance as a fallout of a matter in which the Lok Pal had received eight complaints against former Ministers in the previous ministry in the State. The Rajasthan Lokayukta was forthright in recommending to the Government in its annual report in 1996 that there was no use of continuing the institution as the institution had not proved to be effective. Even though the Madhya Pradesh Lokayukta had indicted two Ministers in a land deal and certain other Ministers were also held responsible for wrong doing, no action whatsoever was taken against any of them. Here too, in its annual report for 1997-98, the Lokayukta had advised the Government that unless adequate powers were given to it there was no need for continuance of the institution. In Andhra Pradesh and Bihar, the annual reports of the Vigilance Commission have not been laid on the table of the legislature as required by the order constituting the Commission.

4.4.4 The Karnataka Lokayukta which has been a very active institution, is headed by a retired Judge of the Supreme Court and has jurisdiction over all public servants including the Chief Minister and Ministers. With the Anti Corruption Bureau of the State forming part of the institution, it has unfettered power to enquire or investigate into cases of misconduct and deals both with allegations and grievances. However, though the Karnataka Act provides for the submission of property returns to the Lokayukta by the Chief Minister, Ministers and all legislators, few have submitted these returns so far and no action has been taken against those who have not done so.

4.4.5 In this context, the Lokayuktas' Conference<sup>51</sup> had proposed a comprehensive Bill for a uniform institution of Lokayukta in every state, based on a Central legislation with Constitutional back up. In the Draft Bill, maladministration has been defined to make it more broad based to facilitate investigation and the definition of public functionary coming

<sup>51</sup> Held on 17th and 18th January, 2003 in Bangalore.

within the ambit of the institution has been widened. Various powers have been proposed to strengthen the Lokayukta. Most importantly, it has been proposed that the proceedings before the Lokayukta should be treated as judicial proceedings investing it with jurisdiction, powers and authority to punish for contempt of itself as a High Court. The proposals include the conferment of constitutional status on par with High Court Judges.

4.4.6 The entire structure of the anti-corruption machinery in the States needs reconsideration. An all-out effort to combat corruption would require that this problem be dealt with appropriately at all levels. On the one hand, curbing corruption at the cutting edge level would require a machinery having wide reach which could investigate a large number of cases of corruption effectively. On the other, curbing corruption at the highest level would require a mechanism with adequate powers, expertise and status which could investigate cases against high public functionaries like Ministers. If the Lokayukta is to be effective, it would neither be appropriate nor feasible to make this institution investigate petty cases against junior functionaries as its primary effort. Therefore, it is necessary to have the equivalent of the Central Vigilance Commission at the state level to deal with cases of corruption among public servants. The Lokayukta could then deal with corruption at the highest level covering senior-most public functionaries. However, often the thread of corruption runs through several levels, indicating connivance of Ministers and public officials. It is therefore necessary to have a link between the Lokayukta and the State Vigilance Commissioner. The Commission in para 4.3.15 has recommended that the Central Vigilance Commissioner be made a Member of the Lok Pal. The Commission has also recommended a multi-member Lok Pal, so that it is better insulated against outside influence and also because a decision of a multi-member Commission would be more objective as it would have inputs from the different members. A similar approach at the state level would be appropriate. The multi-member Lokayukta should have a retired Supreme Court Judge or a retired Chief Justice of the High Court in the Chair, the State Vigilance Commissioner as a member and an eminent jurist or an eminent administrator of impeccable credentials as a member. A collegium comprising the Chief Minister, the Leader of the Opposition and the Chief Justice of the High Court should appoint the Chairman and Members of the Lokayukta.

4.4.7 The State Vigilance Commissions should exercise superintendence over the functioning of the Anti-Corruption Bureaus. It should tender independent and impartial advice to the disciplinary and other authorities in disciplinary cases, involving the vigilance angle at different stages i.e. investigation, inquiry, appeal, review etc; and exercise a general check and supervision over vigilance and anti-corruption work in Departments of the State Government and other organizations within the control of the State Government.

4.4.8 The Commission is of the view that to insulate the institution of Lokayukta from the vagaries of political expediency, of the kind witnessed in the past, it would be necessary to give the Lokayukta, as in the case of the Lok Pal, a Constitutional status. It would be necessary to amend the Constitution to provide for the institution of Lokayukta in all states. This would also provide the opportunity to vest this authority with certain uniform powers, responsibilities and functions across all states. To this effect the Commission believes that the Lokayukta can be a state level equivalent of the Rashtriya Lokayukta with a similar constitution.

#### 4.4.9 Recommendations:

- a. The Constitution should be amended to incorporate a provision making it obligatory on the part of State Governments to establish the institution of Lokayukta and stipulate the general principles about its structure, power and functions.
- b. The Lokayukta should be a multi-member body consisting of a judicial Member in the Chair, an eminent jurist or eminent administrator with impeccable credentials as Member and the head of the State Vigilance Commission {as referred in para 4.4.9(e) below} as ex-officio Member. The Chairperson of the Lokayukta should be selected from a panel of retired Supreme Court Judges or retired Chief Justices of High Court, by a Committee consisting of the Chief Minister, Chief Justice of the High Court and the Leader of the Opposition in the Legislative Assembly. The same Committee should select the second Member from among eminent jurists/administrators. There is no need to have an Up-Lokayukta.
- c. The jurisdiction of the Lokayukta would extend to only cases involving corruption. They should not look into general public grievances.
- d. The Lokayukta should deal with cases of corruption against Ministers and MLAs.
- e. Each State should constitute a State Vigilance Commission to look into cases of corruption against State Government officials. The Commission should have three Members and have functions similar to that of the Central Vigilance Commission.

- f. The Anti Corruption Bureaus should be brought under the control of the State Vigilance Commission.
- g. The Chairperson and Members of the Lokayukta should be appointed strictly for one term only and they should not hold any public office under government thereafter.
- h. The Lokayukta should have its own machinery for investigation. Initially, it may take officers on deputation from the State Government, but over a period of five years, it should take steps to recruit its own cadre, and train them properly.
- i. All cases of corruption should be referred to Rashtriya Lokayukta or Lokayukta and these should not be referred to any Commission of Inquiry.

#### 4.5 Ombudsman at the Local Level

4.5.1 The 73<sup>rd</sup> and the 74<sup>th</sup> amendments to the Constitution have firmly established decentralization of powers and functions to the third tier of the government hierarchy on a statutory footing as a measure of democratisation calculated to bring government closer to the people and increase the accountability of the local administration. However, concern has been expressed that decentralisation without proper safeguards can increase corruption, if the process is not simultaneously accompanied by the creation of suitable accountability mechanisms otherwise available at the level of the Union Government and state governments. This gives greater scope for corruption. A disturbing trend visible is the growing corruption and capture of power by local political elites with questionable integrity.

4.5.2 The Commission is of the view that a system of Local Bodies Ombudsman may be established to hear complaints of corruption against local bodies (elected members as well as officials). Such Ombudsman may be constituted for a group of districts. The Local Bodies Ombudsman should have powers to enquire into allegations of corruption against public functionaries in local bodies. They should be empowered to take action against the elected members if they are found guilty of misconduct. For this, the State Panchayat Raj Acts, and the Municipalities Acts would have to be amended to prescribe the details. The overall superintendence over the Local Bodies Ombudsman's should vest in the Lokayukta of the state, who should be given revisionary powers over the Local Bodies Ombudsman.

4.5.3 The Government of Kerala has appointed Ombudsman under the Kerala Panchayati Raj (Amendment) Act, 1999. It conducts investigations in respect of any action involving

corruption, maladministration or irregularities in the discharge of administrative functions by local self government institutions, or by an elected representative, or an official working in any local self government institution and for the disposal of any complaint relating to such action in accordance with the provisions of the Kerala Panchayat Raj Act, 1994 (Act No.13 of 1994).

4.5.4 In the wake of the larger Constitutional role now envisaged for decentralised local governments, it would be a good initiative to have a separate vigilance oversight agency to investigate allegations of corruption and maladministration against elected executives and members of the three tiers of these local bodies and their paid personnel. The total number of such elected personnel is so large that it is virtually impossible for the state Lokayuktas to exercise effective vigilance over these bodies.

4.5.5 The Commission is of the view that the Ombudsman should be appointed under the respective Panchayat Raj/Urban Local Bodies Acts in all States/UTs., for a group of connected districts. The Ombudsman should be empowered to investigate cases of corruption or maladministration by functionaries of local self government institutions. It is often argued that constitution of Local Ombudsman would lead to duplication of efforts since the Lokayukta is already there. The Commission has already recommended that the Lokayukta should investigate cases only against Ministers or equivalent rank public functionaries and legislators. Therefore, there would be no clash of jurisdiction between the Local Ombudsman and the Lokayukta. However, in order to provide proper guidance to the Local Ombudsman, they should be placed under the overall guidance and superintendence of the Lokayukta.

#### 4.5.6 Recommendations:

- a. A local bodies Ombudsman should be constituted for a group of districts to investigate cases against the functionaries of the local bodies. The State Panchayat Raj Acts and the Urban Local Bodies Act should be amended to include this provision.
- b. The local bodies Ombudsman should be empowered to investigate cases of corruption or maladministration by the functionaries of the local self governments, and submit reports to the competent authorities for taking action. The competent authorities should normally take action as recommended. In case they do not agree with the recommendations, they should give their reasons in writing and the reasons should be made public.

#### 4.6 Strengthening Investigation and Prosecution

4.6.1 Prosecution is often a weak link in the chain of anti-corruption law enforcement and there are instances where prosecutors have facilitated the discharge of a delinquent officer. It is, therefore, crucial that cases of corruption are handled by efficient prosecutors whose integrity and professional competence is above board. The Supreme Court did mandate a key safeguard in corruption cases, by decreeing that a panel of lawyers, answerable to a body similar to that of the Director of Prosecutions in the United Kingdom should be created to review the prosecution of corruption cases. As the Supreme Court observed, this panel of “competent lawyers of experience and impeccable reputation shall be prepared on the advice of the Attorney General.” According to the Supreme Court, each case of prosecution by the CBI will have to be reviewed by a lawyer from the panel, and responsibility for unsuccessful prosecution should be fixed. It would be desirable that the Lokayuktas/State Vigilance Commissions are empowered to supervise the prosecution of corruption related cases. This would provide the much needed oversight of the prosecutors on the one hand, and guidance to the prosecutors on the other.

4.6.2 Corruption prevention and enforcement in an increasingly electronic environment both in government institutions and outside, requires specific measures to equip the investigating agencies with electronic investigating tools and capability to undertake such investigation. Systematic training of officers in this area more particularly at the state level is essential.

4.6.3 In view of the complexities involved in investigating modern-day corruption, the investigating agencies should be equipped with economic, accounting and audit, legal, technical, and scientific knowledge, skills and tools of investigation. More specifically they require specialised knowledge of forensic accounting, audit in different fields like engineering depending on the nature of the case. It would be advisable to have officials in the investigative agencies drawn from different wings of government.

4.6.4 Inter-agency information exchange and mutual assistance among various enforcement and investigative agencies such as the Directorate of Enforcement, Economic Intelligence Agencies including those relating to direct and indirect taxes as well as the State investigating agencies can play a key role in unearthing serious cases of frauds and economic offences. In recognition of this fact, Ministry of Finance has set up an elaborate nodal agency for this purpose. Under the present system, there is an Economic Intelligence Council chaired by the Union Finance Minister with representatives from key Ministries and investigative and intelligence agencies at the national level. Eighteen Regional Economic Intelligence

Committees (REICs) were also set up in 1996 and reactivated in 2003 to, *inter alia*, ensure operational coordination between various enforcement and economic intelligence agencies as well as similar State level agencies. The REICs are required to meet on a monthly basis. There is perhaps need for the Ministry of Finance to monitor the work of the REICs so that they become more effective nodal agencies for checking fraud and corruption arising from economic and related offences.

4.6.5 It has been also noticed that the cases filed relate mostly to those based on complaints or press reports, being reactive action on the part of the anti-corruption agencies. Few cases emanate out of the department’s own efforts. Streamlined vertical corruption runs through several levels of the official hierarchy in corruption prone departments, and does not receive the attention it deserves. This calls for strengthening sources of information to specifically target officers involved in the chain of hierarchical corruption. Anti-corruption agencies should conduct systematic surveys of departments with particular reference to highly corruption prone ones in order to gather intelligence and to observe officers at the higher levels with questionable reputations.

#### 4.6.6 Recommendations:

- a. **The State Vigilance Commissions/Lokayuktas may be empowered to supervise the prosecution of corruption related cases.**
- b. **The investigative agencies should acquire multi-disciplinary skills and should be thoroughly conversant with the working of various offices/ departments. They should draw officials from different wings of government.**
- c. **Modern techniques of investigation should also be deployed like electronic surveillance, video and audio recording of surprise inspections, traps, searches and seizures.**
- d. **A reasonable time limit for investigation of different types of cases should be fixed for the investigative agencies.**
- e. **There should be sustained step-up in the number of cases detected and investigated. The priorities need to be reoriented by focussing on ‘big’ cases of corruption.**

- f. The prosecution of corruption cases should be conducted by a panel of lawyers prepared by the Attorney General or the Advocate General in consultation with Rashtriya Lokayukta or Lokayukta as the case may be.
- g. The anti-corruption agencies should conduct systematic surveys of departments with particular reference to highly corruption prone ones in order to gather intelligence and to target officers of questionable integrity.
- h. The economic offences unit of states need to be strengthened to effectively investigate cases and there should be better coordination amongst existing agencies.

## SOCIAL INFRASTRUCTURE

### 5.1 Citizens' Initiatives

5.1.1 The citizens' voice can be effectively used to expose, denounce and restrain corruption. This calls for the engagement of civil society and the media in educating citizens about the evils of corruption, raising their awareness levels and securing their participation by giving them a 'voice'. This introduces a new dimension to the concept of accountability of government to the people otherwise than through the traditional horizontal mechanisms of legislative and legal accountability of the executive and internal vertical accountability. Civil society here refers to formal as well as informal entities and includes the private sector, the media, NGOs, professional associations and informal groups of people from different walks of life.

5.1.2 The Independent Commission Against Corruption (ICAC) of Hong Kong has produced exemplary results over the last quarter century by strengthening the ability of civil society to question corruption. The credit for raising the consciousness of the community in Hong Kong about fighting corruption, goes largely to the vigorous public education campaigns carried out by the ICAC. The ICAC has used innovative social strategies to combat corruption, but its main emphasis has been on bringing about changes in the public attitude to corruption. Corruption in Hong Kong was entrenched before the ICAC started functioning. At that time, people regarded corruption as

#### Box 5.1: The ICAC of Hong Kong

The ICAC has taken the anti-corruption message to every corner of the community in a complex operation which has called for the skilful use of every possible avenue open to it. Mass media has been the most effective channel of spreading the anti-corruption message. Every year, the ICAC produces a series of radio and television advertisements to keep the issue of corruption in the forefront of public consciousness. The ICAC also produces a television drama series called the 'ICAC Investigators', telecast on local television stations. Based on real cases, the series educates the community about corruption by depicting how investigators of the ICAC expose and punish corruption. Advertisements, feature articles, and reports in newspapers and magazines, tell people about corruption and the work done by the ICAC. The ICAC also uses face-to-face contact with the community to spread the anti-corruption message and educate members of the public from all walks of life. Every day, the staff of the ICAC take education services to the door steps of various levels of the community in order to spread the anti-corruption message and enlist public support. The ICAC produces specially designed education packages with video and games to appeal to the students in various age-groups. These packages inform students of anti-corruption work in Hong Kong. They also seek to promote positive values such as the correct attitude towards money and the importance of fair play. Corruption is portrayed, in such campaigns, concerts, sporting events and in material distributed to school children, as harmful to families, to the society and to the economy.

inevitable and any effort to fight it as futile. But the well-conducted public relation campaigns conducted by the ICAC shattered that conception. The ICAC has, in fact, transformed a passive social environment, which condoned corruption and helped sustain it in the process. It is noted for its unique outreach programme comprising press releases, public announcements, interviews, documentaries, posters, leaflets, meetings and work with schools and universities to convey anti-corruption message to the public. It also sponsors sporting, cultural and entertainment events that are aimed at youth which emphasize anti-corruption themes. A feature of its working includes collaborative efforts with major Chambers of Commerce to promote the Hong Kong Ethics Development Centre to further ethics in corporate governance. It also instructs, advises and assists any person, on request, on ways in which corrupt practices may be eliminated and advises heads of government departments or of public bodies of changes in practices or procedures compatible with the effective discharge of their duties.

5.1.3 In India, there have been many outstanding cases of civil society engagement. In fact, civil society initiatives to improve governance in India has grown in scale and content from the early 1990s. There have been efforts in different parts of country to challenge current paradigms, test alternative approaches and share the learning from these experiences. Some successful civil society engagements are:

- 1) Public Interest Litigation by Common Cause Delhi and Consumer Education and Research Centre, Ahmedabad, the Association for Democratic Reforms of Ahmedabad;
- 2) Report Card Survey of Public Affairs Centre, Bangalore;
- 3) *Jan Sunwai* by Mazdoor Kisan Shakti Sangathan, Rajasthan and Parivartan, Delhi;
- 4) Campaign for Electoral Reforms and Citizens' Charters by Lok Satta, Hyderabad;
- 5) Capacity Building for Advocacy by National Centre for Advocacy Studies, Pune;
- 6) Campaign for Effective Municipal Decentralization by CIVIC, Bangalore;
- 7) Public discussion on municipal and State budgets by Disha and PROOF of Bangalore and participatory municipal budgeting by Janaagraha, Bangalore;
- 8) Campaign for Citizen Charters by PRAJA of Mumbai;

- 9) Voter Awareness Campaign by Catalyst Trust, Chennai, Public Affairs Centre, Bangalore and Lok Satta, Hyderabad; and
- 10) National Campaign for People's Right to Information/Parivartan, New Delhi on Right to Information.

5.1.4 The example of just two of these organizations would indicate the excellent work being done by these and other civil society organisations. The Mazdoor Kisan Shakti Sangathan (MKSS) in Rajasthan, a well-known NGO, started uncovering corruption in local public works by gaining access to employment rolls, vouchers, beneficiary lists, and completion and utilisation certificates and then, handing them over to the concerned villagers for scrutiny in public hearings called *Jan Sunwai*. Instances of large-scale corruption were unearthed in these public hearings regarding false muster rolls, false bills and vouchers, and false completion and utilisation certificates. As a result of these public hearings facilitated by MKSS, the government in Rajasthan was finally persuaded to introduce serious reforms such as the creation of a ward sabha that was given the power to conduct social audit of government programmes, approve proposals for public works and certify proper execution of works. *Parivartan*, an NGO based in Delhi, used the Right to Information law to expose corruption in the Public Distribution System by insisting on access to stock registers maintained by fair price shops, and expose that large quantities of rice, wheat and oil intended for the public had been diverted to the open market.

5.1.5 What do these initiatives signify? Civil society groups have put pressure on erring governments to reform corrupt practices. They have also provided monitoring mechanisms to track corruption by educating members of the public and associating them in anti-corruption efforts. They have helped generate demand for reducing corruption and introducing systemic reforms. On the whole, these civil society engagements are path-breaking initiatives that have emerged out of an urge to serve the needs of the common man and have involved a great deal of educating people and mobilizing them.

5.1.6 The successful initiatives of civil society groups underscore the criticality of educating people and raising their awareness in fighting corruption. Though such initiatives come from the society, the government can create an environment whereby the citizens' groups can effectively participate in its efforts to root out corruption. Some measures to facilitate this could be:

- a. inviting civil societies to oversee government programmes;
- b. establishing and disseminating service standards;

- c. establishing credible complaints mechanisms;
- d. assessing public confidence in anti-corruption institutions, judiciary and law enforcement and in designing programmes to improve trust levels;
- e. enforcing access to information;
- f. educating society on the events of corruption and to instil moral commitment to integrity;
- g. using public hearings to audit government activities where audiences gather to hear details of public work schemes and residents provide their own perception;
- h. initiating government or private sector sponsored public education and awareness campaigns through radio, newspapers and the television;
- i. holding integrity workshops and public hearings at the national and local levels at regular intervals to discuss problems and suggest changes involving all participants;
- j. surveying and assessing public service delivery periodically;
- k. surveying corruption perceptions in general or specific sectors of government functioning;
- l. incorporating corruption as a subject in the education curriculum; and
- m. setting up websites on corruption - containing information, facilitating dialogue and feedback from citizens, associating former public servants in lobbying against corruption.

5.1.7 Citizens' Charters make administration both accountable and citizen-friendly. A few years back, almost every government department and organisation launched its Citizens' Charter. The Charter is an undertaking a public service organization gives to the citizens, to provide a high level of service while meeting the standards contained in the declaration. Over time in a large number of offices Citizens' Charters have fallen into disuse. The promises made in the charters have become pious declarations with no mechanism to enforce them. The Citizens' Charter should contain specific provisions and set out specific obligations for the public services, the time within which the department would be obliged to provide a service or to respond to a query or complaint. The Commission feels that in order to make these charters effective tools for holding public servants accountable, the charters should

clearly spell out the remedy/penalty/compensation in case there is a default in meeting the standards spelt out in the charter. It would be better to have a few promises which can be kept rather than a long list of lofty declarations which are impractical.

5.1.8 Citizens may be involved in the assessment and maintenance of ethics in major government offices and institutions with large public contacts. This assessment could be done at the state, district and sub-district levels. The assessment may be made from the perception of citizens who have been in touch with such offices, with the help of professional agencies. A mechanism needs to be put in place in government offices so that a data base of all visitors is maintained. The professional agency should contact these persons and get their feedback. Based on these feedbacks, the public office could be given a rating.

5.1.9 A policy of incentivising citizens' participation should be actively pursued. Enacting a False Claims Law (para 5.2) is one way of incentivising citizens' participation. A reward system for reporting cases of corruption could also help in bringing to light cases of corruption. Prompt action on citizens' complaints apart from redressing the grievance also motivates others to bring their grievances to the notice of authorities.

5.1.10 School awareness programmes can be very effective in bringing about attitudinal changes in the society. Such programmes are ideally taken up in high schools and should educate students about the role of citizens in a democracy, the role of civil society, harmful effects of corruption, principles of collective assertion in fight against corruption, some exposure to functioning of public institutions etc.

5.1.11 An allied aspect relates to the question of government using positive inducements or rewards to disclose information on corruption. There are reward schemes in taxation departments where complainants are rewarded a percentage of the income unearthed based on the information. Such cases of rewards should also be offered where information is furnished about corrupt practices. Innovative incentives need to be introduced so that people are motivated to expose the wrong doings of corrupt public officials. Change will come when the incentives to throw out a corrupt system become stronger than the incentives to retain such a system. The need of the hour is to have zero tolerance towards corruption.

#### 5.1.12 Recommendations:

- a. **Citizens' Charters should be made effective by stipulating the service levels and also the remedy if these service levels are not met.**
- b. **Citizens may be involved in the assessment and maintenance of ethics in important government institutions and offices.**

- c. Reward schemes should be introduced to incentivise citizens' initiatives.
- d. School awareness programmes should be introduced, highlighting the importance of ethics and how corruption can be combated.

## 5.2 False Claims Act

5.2.1 The existing provisions in the Indian Penal Code and other enactments are not adequate to enable interested citizens and civil society groups to approach courts for recovery of the proceeds of corruption and provide for a share in the proceeds. In the United States, the False Claims Act makes it possible for interested citizens to approach any court in any judicial district for recovery of the proceeds of corruption.

5.2.2 Under the Federal False Claims, any person who has knowledge about a fraud committed by another person or entity, may file a law suit on behalf of the Federal Government. And if the fraud is established in a court of law, the person committing the fraud is penalized and the plaintiff is rewarded with a percentage of recovery. The Law was enacted during the Civil War<sup>52</sup> to control fraud in Federal contracts. It was amended in 1986 and given more teeth. The amendments to the False Claims Act in US in 1986 were carried out as the Congress felt that government alone cannot win the war against frauds and sought to create incentives for private citizens to come forward and supplement government's efforts. A significant feature of the law is the protection it offers to whistle blowers. The Commission has recommended the enactment of a law to provide protection to whistleblowers (para 3.6.4). It would be appropriate to emphasise the fact here that "insider information" regarding false claims made to a government office, in a case of collusion would be more forthcoming with the passing of that law.

5.2.3 The central features of the US False Claims Law are as follows :

- The provider of goods or services in public

### Box 5.2: Recoveries under the US False Claims Act

Recoveries in suits and investigations of fraud against the United States for the fiscal year ending September 30, 2003, tallied a record \$2.1 billion. This is a 75 per cent increase over the prior year's recoveries (\$1.1 billion) and brings total recoveries to over \$12 billion since Congress substantially strengthened the civil False Claims Act in 1986.

Source: US Department of Justice: [http://www.usdoj.gov/opa/pr/2003/November/03\\_civ\\_613.htm](http://www.usdoj.gov/opa/pr/2003/November/03_civ_613.htm) (dated:10-11-2003)

### Box 5.3: Purpose of the False Claims Act

The government needs help - lots of help - to adequately protect the Treasury against growing and increasingly sophisticated fraud ... Part of the solution - something I consider essential to any meaningful improvements in cutting down fraud - is the establishment of a solid partnership between public law enforcers and public taxpayers. The Federal government has a big job on its hands as it attempts to ensure the integrity of the nearly \$1 trillion we spend each year on various programs and procurement. That job is simply too big if government officials are working alone.

Senator Charles Grassley explaining the purpose behind the Act while introducing amendments to the False Claims Act in 1985.

procurement should offer to Federal Government the best price. If any other customer is provided a more favourable price for the same quality, the contractor is liable to make good the difference in price.

- The citizens are empowered to file a civil suit in the Federal Courts on behalf of the United States. The US Government is notified of such an event and the Government may implead itself as a litigant in such cases.
- The Court will determine the loss sustained by the public. Such loss includes actual monetary loss and non-monetary loss to society in the form of poor quality of goods and services, pollution and other social costs. In respect of social cause, the court computes it in money terms. The court is empowered to impose a penalty of three times the loss sustained or computed.
- The citizen filing the civil suit will get 15 to 35% of the penalty levied as the compensation for his efforts, depending upon his involvement in the case. This provides strong incentive to citizens and civil society organizations to unearth false claims and corruption and to file civil suits.
- The whole procedure is governed by rules of civil litigation and the standard of proof needs to meet civil court norms, and does not require proof beyond reasonable doubt.

5.2.4 There is need for legislation on the lines of the US False Claims Act, which will make it possible for interested citizens and civil society groups to seek legal relief for the recovery of the proceeds of corruption and claim a share. Such a law would help in curbing corruption where the fraud has been committed in collusion with a public servant. But more important, such a law would help in building a culture of fair play in private and public organizations.

## 5.2.5 Recommendations:

- a. Legislation on the lines of the US False Claims Act should be enacted, providing for citizens and civil society groups to seek legal relief against fraudulent claims against the government. This law should have the following elements:
  - i. Any citizen should be able to bring a suit against any person or agency for a false claim against the government.
  - ii. If the false claim is established in a court of law, then the person/

agency responsible shall be liable for penalty equal to five times the loss sustained by the exchequer or society.

- iii. The loss sustained could be monetary or non-monetary as in the form of pollution or other social costs. In case of non-monetary loss, the court would have the authority to compute the loss in monetary terms.
- iv. The person who brought the suit shall be suitably compensated out of the damages recovered.

### 5.3 Role of Media

5.3.1 A free media has a crucial role in the prevention, monitoring and control of corruption. Such media can inform and educate the public on corruption, expose corruption in government, private sector and civil society organizations and help monitor codes of conduct while policing itself against corruption.

5.3.2 Investigative reporting by media or reporting of instances of corruption as they occur can be a significant source of information on corruption. Daily reporting of instances of corruption as they occur is another type of contribution. Timely action should be taken by the authorities to immediately respond to such reports, to appraise the correct facts, to take steps to bring the culprits to book and to keep the press and the public informed from time to time of the progress of such action. It has been the common experience that very often there is no systematic arrangement to take note of these allegations and to follow them up. The collation of reports appearing in different sections of the media and their follow up should be an integral part of complaints monitoring mechanism in all public offices.

5.3.3 It has been observed that sometimes under pressure of competition, the media does not verify allegations and information before putting them in the public domain. Occasionally, such allegations/complaints are motivated. It is necessary to evolve norms and practices that all allegations/complaints would be duly screened, and the person against whom such allegations are made is given a fair chance to put forth his version.

5.3.4 The Press Council was reconstituted to maintain and improve the standards of newspapers and news agencies in India. The Press Council of India has prescribed a Code of Conduct for the print media. However, no such code exists for the electronic media. The Ministry of Information and Broadcasting has prepared a draft Broadcasting Services Regulation Bill which proposes to set up a Broadcasting Regulatory Authority of India

(BRAI) with both licensing and oversight functions covering the electronic media. The Bill also proposes to lay down norms and provide for a self-regulatory mechanism to ensure observance of a liberal Content Code. There has also been a proposal for the formation of a Media Commission. The Commission is not going into the details of these proposals. The Commission is of the view that since the electronic media plays a role as important as the one played by the print media, there is need to have a code for the electronic media covering different aspects of its functioning.

#### 5.3.5 Recommendations:

- a. It is necessary to evolve norms and practices requiring proper screening of all allegations/complaints by the media, and taking action to put them in the public domain.
- b. The electronic media should evolve a Code of Conduct and a self regulating mechanism in order to adhere to a Code of Conduct as a safeguard against malafide action.
- c. Government agencies can help the media in the fight against corruption by disclosing details about corruption cases regularly.

### 5.4 Social Audit

5.4.1 Social audit through client or beneficiary groups or civil society groups is yet another way of eliciting information on and prevention of wrong doing in procurement of products and services for government, in the distribution of welfare payments, in the checking of attendance of teachers and students in schools and hostels, staff in the hospitals and a host of other similar citizen service-oriented activities of government. This will be a useful supplement to surprise inspections on the part of the departmental supervisors. The Commission, without entering into details of all these, would like to suggest that provisions for social audit should be made a part of the operational guidelines of all schemes.

#### 5.4.2 Recommendation:

- a. Operational guidelines of all developmental schemes and citizen centric programmes should provide for a social audit mechanism.

## 5.5 Building Societal Consensus

5.5.1 In fighting corruption, it is necessary to build a broad consensus on the importance of making society corruption-free. Towards that end, it is essential that the political parties which have crucial roles and responsibilities in governance, pursue anti-corruption agendas. It is heartening to know that for the Lok Sabha elections in 2004, most major political parties had included fight against corruption as a major theme in their election manifestos. For example, the election manifesto of the Indian National Congress stated:

- *The Congress will tackle the root causes of corruption and generation of black money. To a large extent, deregulation, removal of laws that have outlived their utility or have not fulfilled their social purpose, transparency in party financing and state funding of elections will help. Even so, the Congress is conscious of the havoc that corruption at all levels adds to the harassment of the common man and is determined to rid the country of this scourge.*

The manifesto of the National Democratic Alliance stated :

- *The NDA government is committed to giving corruption-free governance at all levels.*

The above are only illustrations on the basis of materials available with the Administrative Reforms Commission. Such affirmations are in the right direction. The Commission would like to recommend that a more inclusive and broad-based societal consensus should emerge in the fight against corruption.

## SYSTEMIC REFORMS

*“A fallacy promoted by some in the field of anti-corruption and at times also by the international community is that one “fights corruption by fighting corruption” - through yet another anti-corruption campaign, the creation of more “commissions” and ethics agencies, and the incessant drafting of new laws, decrees, and codes of conduct. Overall, such initiatives appear to have little impact, and are often politically expedient ways of reacting to pressures to do something about corruption, substituting for the need for fundamental and systemic governance reforms”<sup>53</sup>.*

**Monopoly + Discretion - Accountability = Corruption<sup>54</sup>**

### 6.1 Importance of Systemic Reforms

6.1.1 A holistic approach for combating corruption would require an optimum mix of punitive and preventive measures. Punitive measures act as a deterrent whereas preventive measures reduce opportunities for corruption by making systems transparent, increasing accountability, reducing discretion, rationalising procedures etc. Better preventive measures act as ‘Systemic Reforms’ as they seek to improve systems and processes. Some of the initiatives taken in recent years in this direction are listed below:

- **Railway Passenger Bookings** (Indian Railways): The computerization of railway passenger bookings, including ‘on-line’ booking and e-ticketing has eliminated the middlemen, decongested booking offices and brought considerable transparency to the Railway reservations process.
- **Common Entrance Test** (Karnataka) : This seeks to ensure merit-based selection to professional colleges in a timely and transparent manner.
- **Teachers Appointment Scheme** (Karnataka): This unique effort provided for a fool-proof, objective and a transparent system for appointing teachers.
- **Registration & Stamps** (Maharashtra): The intention was devising more transparent property valuation tables, computerization of records, setting time limits for returning a registered document, use of digital cameras for photos

<sup>53</sup> Source: Finance and Development; IMF, September 2005, Volume 42, Number 3; <http://www.imf.org/pubs/ft/fandd/2005/09/basics.htm>

<sup>54</sup> American economist Robert Klitgaard

and finger-printing, etc. The expedient of 'valuation tables' has virtually done away with arbitrary assessment of stamp duty and achieved the multiple objectives of minimizing corruption, ruling out harassment to purchasers of immovable property and augmenting tax collection.

- **Unit Area Scheme (Delhi):** This provided a system for the payment of property tax and registration of property involving self assessment and normative basis of calculation .
- **e-Cops (Punjab):** This seeks to ensure on-line registration of complaints and their systematic follow-up enabling complainants to ascertain the outcome and the higher police echelons to keep 'real time' watch over the manner the 'cutting edge' level functionaries act on complaints.
- **e-Governance in Andhra Pradesh (E- Seva), and Kerala (FRIENDS standing for Fast, Reliable, Instant, Effective Network for Distribution of Services):** These provide improved service delivery by simplifying transactions between government and citizens involving use of information technology for payment of utility bills or seeking different services on a single platform. Mention may also be made of the initiative 'E-Choupals' in Madhya Pradesh for the benefit of farmers selling their produce.
- **Rural Kiosks, known as RSDP (Rural Service Delivery Points) in Andhra Pradesh:** This ensures the reach of E-Seva through internet to facilitate payment of bills, information, downloading of forms, etc reducing public inconvenience and releasing employees to more 'substantive' public duties.

6.1.2 Such 'best practices' drive home the point that given a pragmatic approach to problem solving, proper leadership and planning; impressive results can be achieved in enhancing the quality of services and reducing corruption. But looking at the magnitude of existing corruption such initiatives are far too few. The lack of transparency that generally shrouds government operation and programmes is a fertile ground for corruption. The weakness of accountability mechanisms also provides opportunities for corruption. Bureaucratic complexity and procedures make it difficult for the ordinary citizen to navigate the system. What is required is large scale reform of both systems and procedures.

6.1.3 The range of activities undertaken by government is so vast that any meaningful systemic reform would require an in-depth study of each of these functions. However, certain general principles would apply to all functions of government at all levels and these are dealt with in this chapter.

## 6.2 Promoting Competition

6.2.1 Most public services in India are provided by government in a monopolistic setting. Such a situation by its very nature is conducive to arbitrariness, and complacency with a high probability of a section of functionaries taking advantage of the 'departmental hegemony' for corruption. Introduction of an element of competition in the provision of public services is thus a very useful tool to curb corruption. Two successful initiatives can be cited in this connection; *first*, the gradual de-monopolisation of the telecom sector; *second*, the growing role of private players in providing direct marketing services to farmers outside the government-controlled *mandis* in Madhya Pradesh.

6.2.2 The case of telecommunication is one of the most successful examples of curbing corruption through introduction of competition. Our telecommunication sector was, until recently, the exclusive preserve of government. Such monopolistic control lead to a high incidence of corruption. The Indian Telegraph Act, 1885, stipulated that it was only the Department of Telecommunication, which could operate as the policy maker, service provider and the licensor in the field of telecommunications. As a result of policy reforms, which introduced competition, private players have been allowed in the international and national long distance sectors as well as in the form of private cellular services. Policymaking has thus been separated from provision of services. The result has been a drastic lowering in the cost of services and the universal recognition of a major decline in corrupt practices.

6.2.3 The Agricultural Produce Marketing Act, 1972, of Madhya Pradesh permitted only the traders in the officially designated *mandis* to buy the produce of the farmers. The officials of the Mandi Samitis and the traders formed a monopsonistic nexus to cheat the farmers by paying them less than the fair price of their produce. The Act was later amended and now farmers and traders are no longer obliged to transact business only in designated *mandis*. This reduced corruption in the regulated markets indulged in by traders and officials.

6.2.4 Clearly, ending government's monopoly in a large number of service sectors and allowing others to compete can play a major role in reducing corruption. To a large extent, therefore, dismantling monopolies and introducing competition go together. However, deregulating in one area may increase corruption elsewhere. The process can itself be subverted and sometimes private agencies, which replace the government agencies in service delivery could be even more corrupt. It is, therefore, necessary that such demonopolisation and competition is accompanied by a 'regulation mechanism' to ensure performance as per prescribed standards so that public interest is protected.

### 6.2.5 Recommendations:

- a. Each Ministry/Department may undertake an immediate exercise to identify areas where the existing 'monopoly of functions' can be tempered with competition. A similar exercise may be done at the level of State Governments and local bodies. This exercise may be carried out in a time bound manner, say in one year, and a road map laid down to reduce 'monopoly' of functions. The approach should be to introduce competition along with a mechanism for regulation to ensure performance as per prescribed standards so that public interest is not compromised.
- b. Some Centrally Sponsored schemes could be restructured so as to provide incentives to states that take steps to promote competition in service delivery.
- c. All new national policies on subjects having large public interface (and amendments to existing policies on such subjects) should invariably address the issue of engendering competition.

### 6.3 Simplifying Transactions

6.3.1 The causal relationship between incidence and intensity of corruption and the complex nature of work methods needs no elaboration. An ordinary citizen who has just to pay a bill to the government could be condemned to making multiple visits to government offices. There is high probability of such a citizen ending up greasing the palms of officials to avoid harassment. Similarly, elaborate hierarchies not only breed complex work methods but also cause diffusion of responsibility. Time honoured practices like "territorial" distribution of work also, for instance, tend to cause overcrowding and consequent motivation to 'jump queues' by paying speed money or employing touts and middlemen. The practice of laying down methodologies through manuals has fallen in disuse. Properly deployed, and regularly upgraded, such documents can be a great source of demystifying administrative procedures and promoting accountability. In the era of Information Technology and Right to Information, such documents can be an excellent source for 'simplifying transactions' inasmuch as they would afford a degree of clarity to the literate service user.

6.3.2 One of the maladies of administration in India is the multiplicity of layers in every decision making process. Apart from delays, this contributes to corruption. Whenever abuse of authority is noticed, another layer of administration is added in the hope that this would act as a check. More often than not, each additional layer further adds to delay and corruption without solving the original problem. A classic example of this is of when, confronted with

the presence of large-scale black money in real estate transactions, a 'Competent Authority' was constituted in the Income Tax department to clear all sale transactions above a certain value. This 'Competent Authority' had the power to acquire properties, which were found to be undervalued. Very few properties were acquired but the arrangement proved extremely counter productive as it created a further incentive for undervaluation to avoid the process of getting a clearance from the 'Competent Authority'. After more than two decades of experimentation the provision has been deleted from the rulebook!

6.3.3 A single window clearance of all requirements or one-stop service centres is a step which can cut down on corruption as it simplifies procedures and reduces layers. In Canada, for instance, the single window gives all approvals in just two days. This requires not merely a single window but also fully automated back up of all related offices. Yet another administrative method is what is called 'positive silence' sanctions, an example of which is deemed sanction of an application upon expiry of the stipulated period for such sanction as in the case of deemed sanction of building permits (one has to take care however to avoid subsequent harassment by the building inspector who is sure to find violation of bylaws for possible extraction of a bribe). One of the most successful examples of one-stop service centres is Andhra Pradesh's E-Seva model. E-Seva offers the services of some 13 state and local government organisations, three central government organisations and nine private sector organisations under one roof. The services that E-Seva offers include the payment of public service bills, provision of birth and death certificates, payment of property tax, train and bus reservations, private mobile phone bill payments, receipt of passport applications and also, transfer of shares. A user survey conducted by the Administrative Staff College of India indicates that the expected benefits are being realized by E-Seva and that corruption has been reduced substantially.

6.3.4 Most of the procedures dealing with permissions, licenses and registration were laid down years ago. These procedures are quite complex and require documentation, which a common citizen finds difficult to complete. It is, therefore, necessary to have a review of all such procedures so that unnecessary procedural requirements are eliminated.

### 6.3.5 Recommendations:

- a. There is need to bring simplification of methods to the center-stage of administrative reforms. Leaving aside specific sectoral requirements, the broad principles of such reforms must be: adoption of 'single window' approach, minimizing hierarchical tiers, stipulating time limits for disposal etc.

- b. The existing Departmental Manuals and Codes should be thoroughly reviewed and simplified with a responsibility on the Head of the Department to periodically update such documents and make available soft-copies on-line and hard copies for sale. These manuals must be written in very precise terms, and phrases like 'left to the discretion of', 'as far as possible', 'suitable decision may be taken' etc should be avoided. This should be followed for all rules and regulations governing issue of permissions, licenses etc.
- c. A system of rewards and incentives for simplification and streamlining of procedures may be introduced in each government organization.
- d. The principle of 'positive silence' should generally be used, though this principle cannot be used in all cases. Wherever permissions/licenses etc are to be issued, there should be a time limit for processing of the same after which permission, if not already given, should be deemed to have been granted. However, the rules should provide that for each such case the official responsible for the delay must be proceeded against.

#### 6.4 Using Information Technology

6.4.1 The relationship of the government with its constituents, citizens and businesses, and also between its own organs can be transformed through the use of the tools of modern technology such as Information and Communication Technology (ICT). The digital revolution has the potential to transform and redefine processes and systems of governance. The most visible impact has been in access to information and data, in building management information systems and in the field of electronic service delivery. E-Governance is the logical next step in the use of ICT in systems of governance in order to ensure wider participation and deeper involvement of citizens, institutions, civil society groups and the private sector in the decision making process of governance. **The Commission proposes to examine this promising area of reforms in a subsequent Report and will, therefore, confine itself only to some broad aspects here in the context of reducing corruption.**

6.4.2 Some of the recent initiatives clearly demonstrate what such applications may achieve. The Gyandoot project in Madhya Pradesh is one such example. It seeks to provide information about prevailing agricultural produce prices at auction centres and easier processes for obtaining copies of land records. It involves installation of a low cost intranet linking various market centres and villages. In the project, local youth act as entrepreneurs running the kiosks on commercial lines and charging a user fee. The services provided at the kiosks include agricultural produce auction centre rates; copies of land records; online registration

of applications; online public grievance redress; village auction site; and updated information regarding beneficiaries of social security pension, rural development schemes, government grants of various kinds, etc. This has had the effect of empowering local communities. Some kiosks have installed photocopy machines. An interesting aspect of Gyandoot is that the entire expenditure of the project was borne by the panchayats and the local community. The average cost incurred by each village community was Rs 75,000/-. Evaluation shows that agricultural produce rates, land records and grievance services were the most popular, accounting for 95 per cent of the usage and that opportunities for corruption have been greatly reduced.

6.4.3 Another example is the Bhoomi Project in Karnataka, under which 20 million records of land ownership of 6.7 million farmers in the state were computerized. Previously, farmers had to seek out a village revenue official to get a copy of the record of rights, tenancy and crops (RTC), that is needed in many contexts, such as application for loans; and this often involved bribery. Today, for a fee of Rs15, a printed copy of the extract can be obtained online at computerized land record kiosks (Bhoomi Centres) in 177 offices. When a change of ownership takes place, the farmer files for a mutation of land record at the Bhoomi Centre. The computer automatically generates notices, and a revenue inspector stationed in the field approves the change after thirty days if no objection is received. There are plans to increase the number of kiosks through public-private partnerships. An independent evaluation conducted in 2002 showed significant impact on efficiency in delivery and reduction of corruption.

6.4.4 However, it is not always true that the use of IT by itself helps in reducing corruption. For example, Andhra Pradesh's scheme of the Computer-Aided Administration of Registration Department Programme (CARD), failed to arrest corruption in rural sub-Registrar Offices; there was no difference in corruption levels between computerized and non-computerized Sub Registrar Offices<sup>55</sup>. If the pilots referred to above and similar initiatives are to be mainstreamed, much greater preparation in terms of adapting the existing administrative structures to 'receive' and 'adapt' technologies needs to be worked out. The provider of technological inputs and the manager of public services need to understand the applicability of such technologies, including their limitations for achieving the desired results. The development of internet has added another dimension of transfer of the data and information over long distances at virtually no cost. It is this storage, retrieval, processing and transmitting power of IT, if properly harnessed that can make governmental processes more transparent and objective and reduce the scope for corruption. But, before any introduction of IT is attempted, it is necessary that the existing procedures are properly re-engineered and made computer adaptable.

<sup>55</sup> Source: Ramesh Ramanathan and Suresh Balakrishnan, "State of the Art as Art of the State, Evaluating e-governance Initiatives Through Citizen Feed Back," Public Affairs Centre, June 2000, p.13

6.4.5 There have been several successes in introduction of e-governance. But the greatest challenge has been their replicability and up-scaling. There are very few examples of e-governance examples with a nationwide impact (the railway reservation system is one of them). The lack of good infrastructure and the inadequate capability of the personnel have proved to be major bottlenecks in the spread of e-governance. Much greater attention needs to be paid to familiarize Departmental officials with the relevant processes and their capabilities. Apart from imparting on-the-job training, the Departmental officials involved with planning and implementations of such strategies may be sent to organizations, including some in the private sector, where these are already mainstreamed.

6.4.6 The National Informatics Centre (NIC) has played a useful role in facilitating e-Governance. The Commission feels that NIC may take concrete steps to build up skills and domain expertise among its personnel so that specific organizational needs are more fully understood by technology providers. The Ministry of Information Technology itself must assess new areas for computerization across the country.

#### 6.4.7 Recommendations:

- a. Each Ministry/Department/Organisation of government should draw up a plan for use of IT to improve governance. In any government process, use of Information Technology should be made only after the existing procedures have been thoroughly re-engineered.
- b. The Ministry of Information and Technology needs to identify certain governmental processes and then take up a project of their computerization on a nationwide scale.
- c. For computerization to be successful, computer knowledge of departmental officers needs to be upgraded. Similarly, the NIC needs to be trained in department specific activities, so that they could appreciate each other's view point and also ensure that technology providers understand the anatomy of each department.

### 6.5 Promoting Transparency

6.5.1 In public administration the term transparency is used to imply openness and accountability. An organisation is said to be transparent when its decision making and manner of working is open to public and media scrutiny and public discussion. A transparent system of administration helps to engender participation by the public in the decision making processes of government thus contributing to a grass roots level and functioning democracy.

6.5.2 India took a major step towards transparency in administration with the enactment of the Right to Information Act, 2005. The Commission has examined all aspects of 'Freedom of Information' in its First Report titled 'Right to Information: Master Key to Good Governance', and has made comprehensive recommendations.

### 6.6 Integrity Pacts

6.6.1 One mechanism that can help in promoting transparency and creating confidence in public contracting is the use of 'integrity pacts'. The term refers to an agreement between the public agency involved in procuring goods and services and the bidder for a public contract to the effect that the bidders have not paid and shall not pay any illegal gratification to secure the contract in question. For its part, the public agency calling for bids commits to ensuring a level playing field and fair play in the procurement process. An important feature of such pacts is that they often involve oversight and scrutiny by independent, outside observers. Such pacts have contributed significantly to improved transparency and public confidence in the manner in which major deals in Government and public sector organizations are concluded. Many national legal systems now give considerable weightage to such pacts (Source: the website of Transparency International India).

6.6.2 ONGC is the first PSU to have signed a MoU with Transparency International India and the CVC on April 17, 2006. A provision has been made in the revised Defence Procurement Procedure Manual, 2006 for adoption of an "Integrity Pact" in all defence contracts and procurements of more than Rs. 300 crores (Source: Defence Procurement Procedure Manual 2006 as posted on the website of Ministry of Defence, Government of India, <http://mod.nic.in>).

6.6.3 The Commission understands that Government organizations in the country have so far not shown much interest in adopting this healthy practice. The reluctance is said to be also on account of uncertainty about the place of such pacts in our legal framework. The Commission feels that this mechanism must be encouraged and integrated into government transactions in as many sectors as possible.

#### 6.6.4 Recommendation:

- a. The Commission recommends encouragement of the mechanism of 'integrity pacts'. The Ministry of Finance may constitute a Task Force with representatives from Ministries of Law and Personnel to identify the type of transactions requiring such pacts and to provide for a protocol for entering into such a pact. The Task Force may, in particular, recommend whether any amendment in the existing legal framework like the Indian Contract Act, and the Prevention of Corruption Act is required to make such agreements enforceable.

## 6.7 Reducing Discretion

6.7.1 Opportunities for corruption are greater in a system with excessive discretion in the hands of the official machinery particularly at lower levels. Such opportunities can be minimized by reducing discretion and maximizing transparency in the system and introducing strict accountability for actions. The most successful anti-corruption reforms are those that seek to reduce discretionary benefits, which are controlled by public officials. An interesting example of improved transparency is the system introduced for effecting transfers of teachers in Karnataka. Under the old system, the practice was that every year some 15000 school teachers used to request transfers to a place of their choice through written applications to several authorities, requiring initiation of action at different levels. Often, the process of decision-making was non-transparent and was riddled with corruption. Under the changed system, applicants are required to submit the reasons for the request for transfer and these are prioritized centrally. A computer-generated list containing the names of transfer seekers along with their ranking (based on the reasons for transfer) are published on the notice board of the department, and objections, if any, are invited. It is reported that this scheme contributed to considerably reducing corruption.

6.7.2 There are a large number of governmental activities where discretion can be totally eliminated. All such activities could be automated and supported by IT. Registration of 'Births and Deaths' and recruitment of teachers based on marks secured in qualifying exams are examples of this. Where it is not possible to eliminate discretion, then the exercise of powers should be bound by well-defined guidelines to minimize discretion. Effective checks and balances should be built over exercise of discretion.

### 6.7.3 Recommendations:

- a. All government offices having public interface should undertake a review of their activities and list out those which involve use of discretion. In all such activities, attempt should be made to eliminate discretion. Where it is not possible to do so, well-defined regulations should attempt to 'bound' the discretion. Ministries and Departments should be asked to coordinate this task in their organizations/offices and complete it within one year.
- b. Decision-making on important matters should be assigned to a committee rather than individuals. Care has to be exercised, however, that this practice is not resorted to when prompt decisions are required.
- c. State Governments should take steps on similar lines, especially in local bodies and authorities, which have maximum 'public contact'.

## 6.8 Supervision

6.8.1 Most governments and their agencies have a hierarchical structure. In such a structure, one of the important tasks of each functionary is to supervise the work of the official immediately next, reporting to him/her. As mentioned in earlier paras, there have to be effective checks and balances against the discretion vested in public functionaries. Supervision provides one such mechanism. The very fact that not many cases are initiated against corrupt officials by the department itself is an indicator that the supervision function is not being given the attention it deserves.

6.8.2 Controlling corruption in an office or an organization should primarily be the responsibility of the head of the office. Moreover, as all government offices/agencies have a hierarchical structure, each level should be responsible for taking preventive steps to minimize the scope of corruption for the levels below it. It has generally been observed that with the constitution of independent agencies to combat corruption, departmental officers feel that it is not their responsibility to curb corruption in their offices/subordinates or turn a Nelson's eye to the problem. It needs to be emphasized that the external anti-corruption machinery with their limited resources and reach can, in no way, be a substitute for anti-corruption measures taken by officers in leadership positions. These measures could be random inspections, surprise visits, confidential feedback from citizens/clients, putting procedures in place which make it difficult to seek bribe, use of decoy clients etc. It is, therefore, suggested that reporting officers while evaluating the performance of their subordinates should clearly comment on the efforts made by the latter to check corruption. There should be a column in the self-assessment portion of the Annual Performance Report wherein each supervisory officer should indicate the measures he/she took to check corruption in his/her office and amongst his/her subordinates, and what were the outcomes of such measures. The Reporting officer should then give his/her comments on this self-evaluation.

6.8.3 It has been observed that confidential reports of officials are not always recorded with due care and diligence by the reporting officers. Reporting officers tend to play 'safe' by not commenting objectively on the integrity of a public servant even when certain unethical practices have come to his/her notice. This is mainly because there is little accountability of reporting officers about the way they evaluate their subordinates. Colourless entries such as 'nothing adverse has come to notice' are quite common. There is, however, need to make supervision more proactive in rooting out corruption. In order to ensure that reporting officers evaluate and record accurately about the integrity of their subordinates, it should be mandated that in case a reporting officer has given a 'clean chit' in his assessment of any officer and such an officer is charged with any offence under the Prevention of Corruption Act and the corrupt act took place wholly or partly during the year under report, then the reporting officer should explain why that officer was given the 'integrity certificate'.

6.8.4 Surprise inspections by supervisory officer are yet another useful tool to detect wrong doing in public offices. Such inspections should be more rigorous in offices having dealings with the public, check posts, toll tax collection points, parking lots, pollution check mobile vans, weights and measures and meter checking centres, quarries, mines, works in progress, pay and accounts offices, relief distribution centres during calamities, etc. On-site inspection of works executed and verification of genuineness of beneficiaries is another variant of such surprise inspection. Surprise checks could extend to establishment sections and cash branches more particularly of taxation departments to verify prompt accounting of cash received, depositing of cheques and drafts in government account, accuracy of preparation of pay bills, remittances of recoveries from salaries of government employees in government account, etc in order to detect misappropriation of funds. Surprise verification of cash in the possession of officers having public dealings has had a salutary effect in discouraging acceptance of bribes while in the office. This is a measure, which should be extended through all offices, making it mandatory for senior officers to periodically undertake this function.

6.8.5 Reviews/checks could be conducted internally for information relating to price paid for a wide range of purchases made by different field departments, local bodies and parastatals for stationery, computer accessories and office equipment, consumables and department specific purchases like lighting and sanitation requirements, drugs and pharmaceuticals, hospital requirements; clothing requirements of hospitals, uniformed services, education institutions and hostels; books and other educational accessories and construction materials. These checks should not be limited to comparison of price of articles purchased in one office at a single point of time with market prices, but should extend to a period of say one or two years with the market price prevailing. Such comparison should extend to the price paid by different offices of the same department during the same period and also the prices paid by different departments for the same product. Similar comparative analysis could also be useful in departments which obtain periodical returns from citizens, such as various tax departments.

6.8.6 Corruption can take place when a public servant does something illegal in order to benefit the citizen. Passing an illegal assessment order to favour a tax assessee is an example. Corruption, as in the case of “speed money”, can take place even while doing the right thing. Corruption may take place through deliberate negligence on the part of the public servant. Allowing an illegal consignment through a checkpoint is an example of this. The creation of an institutionalized system to prevent corruption, after a careful analysis of instances of corruption, is an essential first step to effectively tackle corruption. This should be the primary responsibility of all supervisory officers.

#### 6.8.7 Recommendations:

- a. The supervisory role of officers needs to be re-emphasised. It bears re-iteration that supervisory officers are primarily responsible for curbing corruption among their subordinates, and they should take all preventive measures for this purpose.
- b. Each supervisory officer should carefully analyze the activities in his/her organization/office, identify the activities which are vulnerable to corruption and then build up suitable preventive and vigilance measures. All major instances of loss caused to the government or to the public, by officials by their acts of omission or commission should be enquired into and responsibility fixed on the erring officer within a time-frame.
- c. In the Annual Performance Report of each officer, there should be a column where the officer should indicate the measures he took to control corruption in his office and among subordinates. The reporting officer should then give his specific comments on this.
- d. Supervisory officers who give ‘clean certificates’ to subordinate corrupt officers in their Annual Performance Reports should be asked to explain their position in case the officer reported upon is charged with an offence under the Prevention of Corruption Act. In addition, the fact that they have not recorded adversely about the integrity of their subordinate corrupt officers should be recorded in their reports.
- e. Supervisory officers should ensure that all offices under them pursue a policy of suo motu disclosure of information within the ambit of the Right to Information Act.

#### 6.9 Ensuring Accessibility and Responsiveness

6.9.1 Departments of government have to be accessible to members of the public and responsive to their needs and aspirations and also responsible for prompt redressal of their grievances. To ensure this, it is necessary that the facilities, concessions and rights which are available to them in each department should be made public and the details about authorities who are competent to grant them together with the procedure for securing the same and getting their grievances redressed should be put in the public domain. There is need to define service standards. Every department should be required to take steps to understand

the problems of its customers, define the standards which the department would maintain in the provision of its services and specify the conditions which customers should fulfil to qualify for the same. Appeal procedures available in case the customers want further redressal should also be indicated. It is also essential to ensure timely disposal of applications. In order to do this, time limits need to be prescribed for disposal of different categories of applications. The Rustomjee Committee on Administrative Reforms had identified 187 services required by the citizens in different departments and had fixed time-limits for their disposal. A compilation of time-frames was made and the government released a booklet on 'Time-Frames' which was supplied to all government departments as well as representatives of the public. Such an attempt to codify the services provided in each Department, specify time-frames for provision of such services and make these details available in all offices and on the internet, needs to be re-emphasized and continued. The drive to have a citizens' charter for different services will be a right step in this direction.

6.9.2 Various small measures, too numerous to detail here, are possible to improve transparency in government offices. Help desks at the cutting edge level, prominent display of names of officials, automatic call centres and simplified computerized systems of service delivery are steps in the right direction. Concentration of tasks which are corruption prone in a few hands should be avoided. These tasks should be, as far as possible, broken up into activities which are handled by different people. Public interaction should be limited to the head of office and some designated officers. This can be supported by a 'single window front office' for providing information.

6.9.3 Accessibility of government servants to the public should be so designed as to ensure regular, time bound and courteous interaction between the citizens and official functionaries. To this end, business process in government departments should be re-engineered so that back office functions are segregated and take place in a time bound manner based on the principle of 'first in first out', with the minimum scope for discretion while the front office should be a "single window" for provision of services to citizens in full public view.

#### 6.9.4 Recommendations:

- a. Service providers should converge their activities so that all services are delivered at a common point. Such common service points could also be outsourced to an agency, which may then be given the task of pursuing citizens' requests with concerned agencies.
- b. Tasks, which are prone to corruption, should be split up into different activities that can be entrusted to different persons.

- c. Public interaction should be limited to designated officers. A 'single window front office' for provision of information and services to the citizens with a file tracking system should be set up in all government departments.

### 6.10 Monitoring Complaints

6.10.1 Recourse to complaints is an important tool in the hands of a citizen to get his/her grievance redressed. Very often these complaints are not handled with due care. Most public offices in India have a complaint monitoring system, but more often than not, the system does not work, as the complaint ends with the official against whom the charges are alleged. It usually takes several months for a complainant to get a response from the government (if at all there is a response). This contrasts adversely with the scenario in some countries. For instance, the ICAC in Hong Kong responds to a complaint within 48 hours. Similarly, in Singapore, a complainant to the office of the Commission is attended within five minutes, the complaint is looked into within 24 hours and an enquiry or investigation is completed within two months. While setting up such deadlines in a country of our size and complexity may be difficult, some attempts in the direction are necessary. Unless public bodies respond promptly, all efforts to give a voice to the citizen would be futile. Complaints must be monitored, followed up and an end result achieved within a specified period to be given in general or by the supervising officer for a particular case. The action taken must be regularly assessed.

#### 6.10.2 Recommendations:

- a. All offices having large public interface should have an online complaint tracking system. If possible, this task of complaint tracking should be outsourced.
- b. There should be an external, periodic mechanism of 'audit' of complaints in offices having large public interface.
- c. Apart from enquiring into each complaint and fixing responsibility for the lapses, if any, the complaint should also be used to analyse the systemic deficiencies so that remedial measures are taken.

### 6.11 Reforming the Civil Services

6.11.1 Civil Services reforms is the basic mandate of the Commission and any attempt to recommend systemic reforms on such a broad plane would not be appropriate or practical

in this Chapter. The issue of frequent and arbitrary transfers has been briefly dealt with in Chapter-9 of this Report and will be discussed in its entirety in a later Report. It is necessary, however, to briefly discuss here the present unsatisfactory state of accountability of civil servants as this is often cited as a major causative factor for corruption and misgovernance.

6.11.2 The administrative system should be transformed so that at every level of the civil service, there is a clear assignment of duties and responsibilities with structured and interlocking accountability in which the government servant can be held accountable for the manner in which he/she performs his/her duty. Such assignment should be specific and categorical and include in concrete terms the supervisory and oversight responsibilities of the controlling officers. This should go all the way up the line so that the interlocking accountability forces every level of government servants to function efficiently. There also has to be an in-built system of rewards and punishments, with criteria being laid down which can eliminate arbitrariness and subjectivity in granting rewards or awarding punishments. At present, there is no incentive to work diligently and efficiently and no adverse consequences of shirking work, indulging in corruption or failing to achieve an acceptable level of efficiency. At present, not only is there no performance audit but even the old system of awareness of an officer's strengths, weaknesses and reputation seems to have become a thing of the past. It is high time that a robust system of performance audit to periodically monitor and objectively evaluate the performance of officers is introduced for every level of the civil service. The Commission would be looking into all these aspects in greater detail in its Report on Civil Services Reforms.

### 6.12 Risk Management for Preventive Vigilance

6.12.1 The risk of corruption in government depends on the nature of the office and its activity and the character of the person holding that office. An office having more discretion and more public interface is more vulnerable to corruption than an office in which there are no discretionary powers. This implies that it may be possible to classify various positions in government as 'high risk of corruption', 'medium risk of corruption' and 'low risk of corruption'. To illustrate, the post of a tax assessing officer or an inspector at a border check-post could be classified as a 'high risk position', whereas the position of an official at an enquiry counter is a 'low risk position'.

6.12.2 Similarly, individual government servants vary in their level of integrity, ranging from those who indulge in outright extortion to those who are absolutely upright. A risk management system to prevent corruption should seek to minimize risk by ensuring that 'low risk personnel' should hold 'high risk jobs' and vice versa. This would work efficiently

only if a risk profiling is done for different jobs and also of government servants. The placement policy should then ensure deployment of 'low risk staff' to 'high risk jobs'.

6.12.3 Risk profiling of government officials poses a challenge in the sense that the present system of performance evaluation discourages a reporting officer from giving anything 'adverse'. Moreover, categorizing an official as 'high' risk based on an adverse rating by one reporting officer may not be fair (unless a glaring misconduct has come to notice). It would, therefore, be better if risk profiling of officers is done by a committee of 'eminent persons' after the officer has completed ten years of service, and then once in every five years. The committee should use the following inputs in coming to a conclusion:

- a. The performance evaluation of the reported officer.
- b. A self-assessment given by the reported officer focusing on the efforts he/she has made to prevent corruption in his/her career.
- c. Reports from the vigilance organization.
- d. A peer evaluation to be conducted confidentially by the committee through an evaluation form.

6.12.4 One method to assess the integrity of a person is the integrity test. It is like an ordinary 'paper-pencil' test wherein the candidate has to answer various questions. It is also similar to a personality test. These tests are used in some developed countries to identify suspected corrupt persons. The following extract from "Best Practices in Combating Corruption" published by the Office of the Coordinator for Economic and Environmental Activities, Vienna, Austria succinctly describes the technique of integrity testing, and its legality and benefits. *"Integrity testing has now emerged as a particularly useful tool for cleaning up corrupt police forces – and for keeping them clean. The object is to test the integrity of an official, and not to render an honest one corrupt through a process of entrapment. Most countries have agent provocateur rules in their criminal codes, which act as a judicial check on what is permissible. These rules vary from jurisdiction to jurisdiction, but they obviously have to be borne in mind"*.

6.12.5 Since 1994, the New York City Police Department (NYPD) has conducted a very intensive programme of integrity testing. The department's Internal Affairs Bureau creates fictitious scenarios based upon known acts of police corruption, such as the theft of drugs and/or cash from a street level drug dealer, to test the integrity of NYPD officers. The tests are carefully monitored and recorded using audio and video electronic surveillance as well as the placement of numerous "witnesses" at or near the scene. The NYPD strives to make the

scenario as realistic as possible and they are developed, based upon extensive intelligence collection and analysis. All officers are aware that such a programme exists and that their own conduct may be subjected, from time to time, to such tests. They are not, however, told about the frequency of such tests. This produces a sense that they are far more frequent than they actually are. The London Metropolitan Police has also initiated a similar programme of integrity testing, administered by specialist internal anti-corruption units. Early reports indicate that the London Police are getting similar benefits as the NYPD did.

6.12.6 Integrity tests, like all tests, are imperfect, and can lead to wrong conclusions and are thus not a foolproof method to evaluate integrity of a person. Therefore, taking disciplinary action based on such a test would not stand the scrutiny by a court, but these can be used as one of the inputs while risk profiling an officer.

#### 6.12.7 Recommendations:

- a. Risk profiling of jobs needs to be done in a more systematic and institutionlised manner in all government organizations.
- b. Risk profiling of officers should be done by a committee of 'eminent persons' after the officer has completed ten years of service, and then once in every five years. The committee should use the following inputs in coming to a conclusion:
  - i. The performance evaluation of the reported officer.
  - ii. A self-assessment given by the reported officer focusing on the efforts he/she has made to prevent corruption in his/her career.
  - iii. Reports from the vigilance organization.
  - iv. A peer evaluation to be conducted confidentially by the committee through an evaluation form.

### 6.13 Audit

6.13.1 The audit authorities often do not convey information which has come to their knowledge in respect of serious irregularities in which criminal misconduct is involved, to the anti-corruption bodies. The information becomes available to the anti-corruption bodies only when the audit report of the CAG is laid before the Parliament or the State Legislature

as the case may be. By the time a serious irregularity (which is detected in audit and reported to the department for response as an audit query and incorporated as a part of the annual audit report laid before the house), comes to the knowledge of the anti-corruption bodies, a lot of time is lost. Such delays not only alert the culprits in the organization but also give them enough time to cover their tracks and destroy the evidence and material records thus making it extremely difficult for the investigating agencies to successfully complete their investigations. In view of this, it would be desirable to make a standing arrangement with CAG and the AG to report such instances as soon as they are unearthed in audit. A second innovation in this regard would be to equip the agency concerned in the mechanics of forensic audit so that aspects crucial for criminal investigation could be taken due care of. It would be in the fitness of things if the anti-corruption bodies are equipped to undertake such forensic audit of government departments where major irregularities come to their notice. The idea is to have an in-house forensic team in these offices. Similar capability could be built in the local fund audit department. To start with, a forensic audit training course could be conducted to develop expertise in this regard. The Commission will examine the details of audit mechanisms in its report on 'Financial Management'. The entire process of audit must come into public gaze through publication of pending audit observations annually.

#### 6.13.2 Recommendations:

- a. It should be prescribed that as soon as any major irregularity is detected or suspected by the audit team, it should be immediately taken note of by government. A suitable mechanism for this may be put in place. It shall be the responsibility of the head of the office to enquire into any such irregularity and initiate action.
- b. Audit teams should be imparted training in forensic audit.
- c. Each office should make an annual public statement regarding pending audit queries.

### 6.14 Proactive Vigilance on Corruption

6.14.1 Preventive vigilance attempts to eliminate or reduce the scope for corruption in the long run. The current approach to proactive vigilance is based on the recommendations of the Santhanam Committee in 1964. The main emphasis in proactive vigilance has been on identifying suspected corrupt elements and then devising mechanisms to weed them out or to ensure that they do not occupy sensitive positions. In this regard, the following main tools have been evolved:-

- a. *List of Officers of Doubtful Integrity:* This is a list of Officers/Executives maintained in the organization/departments which contains the names of all officers against whom disciplinary action on some vigilance related issue is pending or who is undergoing punishment on a vigilance related matter.
- b. *Agreed List of Suspect Officers:* This is a list of Officers/Executives in PSUs/Banks on whom there is a strong suspicion of indulging in corruption. The list is prepared by the Chief Vigilance Officers of organizations and the Central Bureau of Investigation. These officers are kept under watch.
- c. *List of Undesirable Contactmen:* The Central Bureau of Investigation prepares a list of middlemen, touts etc. dealing with sensitive organizations and shares the information with senior officers in the concerned organizations on 'need to know basis'.
- d. *Annual Property Returns:* This is another tool to identify suspected corrupt elements/practices.
- e. *Vigilance Clearance:* Vigilance clearance is obtained from the CVC for Board level appointments in PSUs and PSBs. Besides, the Government of India has established procedures for getting vigilance clearance before appointing an officer.

6.14.2 The above listed measures are, by and large, at the initiative of the vigilance machinery. The Commission feels that such measures should also be initiated by the departments/organizations themselves, as the inputs available with them about their officials and the tasks they perform are much more than with an external machinery. Following are some measures which can be taken by the departments/organization:

- a. Timely submission and scrutiny of assets and liabilities statements of public servants should be ensured.
- b. These should be put in the public domain.
- c. Annual lists of public servants of doubtful integrity should be prepared in all departments in consultation with the anti-corruption agencies. The list should contain names of those officers who have been found to be lacking in integrity in the course of an inquiry or after an inquiry. For example:
  - i. those convicted in a Court of Law on a charge of lack of integrity or for an offence involving moral turpitude but on whom penalty other than dismissal, removal or compulsory retirement is imposed;

- ii. those awarded a major penalty departmentally for lack of integrity or on charges of gross dereliction of duty in protecting the interest of Government;
  - iii. those against whom major proceedings for a penalty, or trial involving lack of integrity or moral turpitude is in progress; and
  - iv. those who were prosecuted but acquitted on technical grounds.
- d. There should be a mandatory annual review of officers who have attained the age of 50/55 years or completed 25 years of service, based on Annual Reports, other records, and general reputation in order to retire officers of doubtful integrity compulsorily. This would presuppose that making realistic entries relating to integrity in the annual performance reports should be made mandatory unlike the present practice of being vague and silent on this aspect. Officers should be required to be graded based on levels of integrity.
  - e. Government servants, who display exemplary capacity to identify major irregularities and scandals and bring corrupt elements to book and plug major loopholes which cause substantial loss to public exchequer, should be rewarded. Such officers should be protected from harassment.
  - f. There should be public shaming of known corrupt officers.

Some of these would be dealt with in detail in the Commission's forthcoming Report on Civil Services Reforms.

#### 6.14.3 Recommendation:

- a. **Taking proactive vigilance measures should primarily be the responsibility of the head of the office. Some possible measures are indicated in para 6.14.2.**

### 6.15 Intelligence Gathering

6.15.1 Gathering intelligence about their own personnel is a practice followed by security and investigative agencies. There could be several ways of gathering intelligence about public servants. These include keeping surveillance over suspected public servants, studying their life-styles, studying the decisions they have made, analysis of complaints, feedback from citizens and peer group. Incentive money from secret funds are used at times to gather

such information. Although all such measures may not always be desirable or practical, a supervisory officer should assess the integrity of his/her subordinates based on his/her handling of cases, complaints and feedback from different sources. This could then become an important input for risk profiling of officers.

#### 6.15.2 Recommendation:

- a. Supervisory officers should assess the integrity of his/her subordinates based on his/her handling of cases, complaints and feedback from different sources. This could then become an important input for risk profiling of officers.

### 6.16 Vigilance Network

6.16.1 There are a large number of disciplinary cases and also criminal cases relating to corruption pending with various authorities. One reason for this large pendency is that these are rarely reviewed by supervisory officers. It would be desirable to create a national database of such cases updated regularly, which should be in the public domain. This, apart from providing a tool for monitoring of all such cases by authorities at different levels, would generate public opinion for quick action in such cases. This national database should have information on preliminary enquiries, regular inquiries with all enquiring agencies and all disciplinary authorities, investigation, prosecution trial, punishments and penalties, recovery of assets, and appeal, review and revision processes covering both disciplinary and criminal cases linking the entire government machinery and all departments and other organizations to which the executive power of the State extends. The network should cover cases of both elected and paid public servants, cases under the Prevention of Corruption Act, and other white collar economic offences by public servants involving public property or resources and public conduct under the Indian Penal Code. In addition, the internet should have information on all annual property statements and all other related information involving conflict of interest. It would be useful to incorporate in the network all information on officers of doubtful integrity, suspect officers, contractors, suppliers, etc blacklisted by government for corruption, information relating to touts, liaison men etc. Part of this information would be accessible to the general public, part to all the departments, and the entire information to anti-corruption bodies. The Central Vigilance Commission may take the lead in establishing such a networked database.

#### 6.16.2 Recommendation:

- a. A national database containing the details of all corruption cases at all levels should be created. This database should be in the public domain. Identified authorities should be made responsible for updating the database regularly.

### 6.17 Sector Specific Recommendations

Some of the cross-sectoral systemic issues have been discussed in this Chapter. The Commission has also examined some specific sectors which are prone to corruption and suggestions for some systemic reforms have been given in Annexures - VII(1) to VII(3).

## 7

## PROTECTING THE HONEST CIVIL SERVANT

7.1 The *raison d'être* of vigilance activity is not to reduce but to enhance the level of managerial efficiency and effectiveness in the organization. Risk-taking should form part of government functioning. Every loss caused to the organization, either in pecuniary or non-pecuniary terms, need not necessarily become the subject matter of a vigilance inquiry. One possible test for determining the *bona-fides* could be whether a person of common prudence working within the ambit of the prescribed rules, regulations and instructions, would have taken the decision in the prevailing circumstances in the commercial/operational interests of the organization.

7.2 Even more than in government, managerial decision-making in public sector undertakings and day-to-day commercial decisions in public sector banks offers considerable scope for genuine mistakes being committed which could possibly raise questions about the *bona-fides* of the decision-maker. The Central Vigilance Commission has recognized this possibility of genuine commercial decisions going wrong without any motive whatsoever being attached to such decisions. In view of the commercial shift in the role and functions of commercial banks, appropriate attention is being paid to this aspect while deciding on the involvement of a vigilance angle in the complaints/disciplinary cases relating to the banking sector. For that purpose, each bank has set up an internal advisory committee of three senior officers, to scrutinize the complaints received in the bank and also the cases arising out of inspections and audit etc, to determine involvement of vigilance angle, or otherwise, in those transactions. The committee records reasons for arriving at such a conclusion and sends it to the CVO. The CVO, while taking a decision in each case, considers the advice of the committee. Such records are maintained by the CVO and made available to an officer, or a team of officers of the Central Vigilance Commission for scrutiny when it visits the bank for the purpose of vigilance audit. All decisions of the committee on the involvement of the vigilance angle, are expected to be taken unanimously. In case of difference of opinion among the members, the majority view may be stated. The CVO refers its recommendations to the disciplinary authority. In case of difference of opinion between the disciplinary authority and the CVO, the matter is referred to the Central Vigilance Commission for advice. The investigation/inquiry reports of audit and inspection, involving a vigilance angle are required to be referred to the Vigilance Commission for advice even if

the competent authority in the bank decides to close the case, if the officer involved is of the level for which the Vigilance Commission's advice is required.

7.3 There are genuine apprehensions about the system's ability to protect an honest public servant. Fortunately, there are sufficient safeguards in the law and procedure to ensure protection of an honest civil servant against baseless, *mala-fide*, malicious and motivated complaints. The 'single point directive' which is now a statutory provision as a result of amendments made to the Delhi Special Police Establishment Act, requires prior permission of the Union Government for initiating investigation against an officer of the rank of a Joint Secretary and above in the Government of India and its equivalent in the Central Public Undertakings. Sanction for prosecution of a public servant is required from the Government or the appropriate authority under Section 19 of the Prevention of Corruption Act, 1988 and Section 197 of the Indian Penal Code as applicable in so far as such offences relate to and form part of official conduct. Investigation within the organization itself is subject to prior approval of the Superintendent of Police concerned in the case of CBI. A case under the Prevention of Corruption Act can only be registered by the Special Police Establishment of the CBI or the anti-corruption agency of a state and not by the civil police. Only a special judge is competent to take cognizance of an offence of corruption. By virtue of the procedural instructions, CVC has to recommend sanction of prosecution to Government in respect of civil servants coming within its jurisdiction. In States, where Vigilance Commissions are in existence, it is the Vigilance Commission who examines and recommends sanction for prosecution.

7.4 Both the 'single point directive' and the requirement of prior sanction for prosecution have been called to serious question as obstructive of the statutory right of the investigating agency and an unnecessary interference in the judicial process. The Supreme Court, in the *Jain Hawala* case, had annulled the then executive direction of the Union Government requiring its prior permission for commencing investigations in cases involving Joint Secretaries and above. It was to nullify this that the Union Government brought in a statutory requirement in the Delhi Special Police Establishment Act. The ground for this inclusion was to safeguard honest civil servants and senior public sector executives including from nationalized banks engaged in policy advice and commercial decisions respectively. While there is no doubt that honest public servants do require to be protected, it is equally essential to assure citizens that such provisions for prior permission for investigation and sanction for prosecution are not used as tools in the hands of Government to favour and protect corrupt public servants. The Central Vigilance Commission has instituted a mechanism for screening cases of public sector executives within its jurisdiction. The question is one of exercising due discrimination to protect an honest civil servant from being dragged through investigative processes involving harassment and loss of prestige and enormous anguish.

7.5 There is a general perception among officers and managers that anti-corruption agencies do not fully appreciate administrative and business risks and that they tend to misinterpret the motives where the decision has gone awry or where a loss is caused in a commercial transaction. Such a perception is not without foundation. It is essential therefore for the investigating agencies to establish that their actions are designed in such a way as to protect honest officers. This depends on the ethical standards and professional competence of the personnel manning anti-corruption agencies. Allegations can be made by dishonest subordinates against whom the officer has initiated disciplinary proceedings or he may have stood in the way of dishonest intentions of the corrupt subordinate. More sinister could be the role of “aggrieved” outsiders who failed to have their wrongful way.

7.6 It is generally assumed by the investigating agencies that (1) a decision should be wrong for there to be corruption, and (2) it is easier to involve everyone in the chain of decision-making and allege ‘conspiracy’ than to take pains to find out the individuals who are actually involved. It is often overlooked that a corruption can take place even when the decisions are correct and that it also takes place at specific points inside and outside the system. This entrenched approach to investigation has led to conviction rates being dismally low, honest functionaries getting demoralized and dishonest ones often going scot free.

7.7 The crucial question is one of ensuring a balance between equality before law and protection of an honest civil servant who has his reputation to safeguard, unlike a corrupt one. Such a balance could be achieved by an impartial agency which would screen cases of prior permission for investigation and sanction prosecution of public servants involved in corruption. The Commission has already recommended that the Central Vigilance Commission should be empowered to give such permission.

7.8 There is need for a special investigation unit reporting to the proposed Lok Pal (Rashtriya Lokayukta) to investigate allegations of corruption against investigating agencies. This unit should be multi-disciplinary and should also investigate cases of allegations of harassment against the investigating agency. Similar units should also exist in States under the State Lokayuktas.

#### 7.9 Recommendations:

- a. Every allegation of corruption received through complaints or from sources cultivated by the investigating agency against a public servant must be examined in depth at the initial stage itself before initiating any enquiry. Every such allegation must be analyzed to assess whether the allegation is specific, whether it is credible and whether it is verifiable.

Only when an allegation meets the requirements of these criteria, should it be recommended for verification, and the verification must be taken up after obtaining approval of the competent authority. The levels of competent authorities for authorizing verifications/enquiries must be fixed in the anti- corruption agencies for different levels of suspect officers.

- b. In matters relating to allegations of corruption, open enquiries should not be taken up straightaway on the basis of complaints/source information. When verification/secret enquiries are approved, it should be ensured that secrecy of such verifications is maintained and the verifications are done in such a manner that neither the suspect officer nor anybody else comes to know about it. Such secrecy is essential not only to protect the reputation of innocent and honest officials but also to ensure the effectiveness of an open criminal investigation. Such secrecy of verification / enquiry will ensure that in case the allegations are found to be incorrect, the matter can be closed without anyone having come to know of it. The Inquiry / Verification Officers should be in a position to appreciate the sensitivities involved in handling allegations of corruption.
- c. The evaluation of the results of verification/enquiries should be done in a competent and just manner. Much injustice can occur due to faulty evaluation of the facts and the evidence collected in support of such facts. Personnel handling this task should not only be competent and honest but also impartial and imbued with a sense of justice.
- d. Whenever an Inquiry Officer requires to consult an expert to understand technical /complex issues, he can do so, but the essential requirement of proper application of mind has to take place at every stage to ensure that no injustice is caused to the honest and the innocent.
- e. Capacity building in the anti-corruption agencies should be assured through training and by associating the required experts during enquiries/ investigations. Capacity building among public servants who are expected to take commercial / financial decisions should be built through suitable training programmes.
- f. The supervisory officers in the investigating agencies should ensure that only those public servants are prosecuted against whom the evidence is strong.

- g. There should be profiling of officers. The capabilities, professional competence, integrity and reputation of every government servant must be charted out and brought on record. Before proceeding against any government servant, reference should be made to the profile of the government servant concerned.
- h. A special investigation unit should be attached to the proposed Lokpal (Rashtriya Lokayukta)/State Lokayuktas/Vigilance Commission, to investigate allegations of corruption against investigative agencies. This unit should be multi-disciplinary and should also investigate cases of allegations of harassment against the investigating agency. Similar units should also be set up in states.

## INTERNATIONAL COOPERATION

8.1 Corruption transcends national boundaries. Therefore, national anti-corruption measures need reinforcement at the international level with mutual assistance and cooperative law enforcement initiatives against corruption in areas such as bribing of and by foreign nationals, mutual legal assistance, gathering and transferring evidence, money laundering, technical assistance and information exchange, extradition, tracing, freezing, seizure and confiscation of illicit funds transferred abroad, asset recovery and repatriation, etc. In particular, strengthening of provisions relating to the prevention of laundering of the proceeds of corruption and safeguards to prevent offshore financial centres from harbouring the proceeds of grand corruption are essential steps to control corruption.

8.2 The United Nations Declaration against corruption and bribery in international commercial transactions adopted by the General Assembly in December 1996 is an important milestone. It deals with both public and private sectors. The Declaration is in the nature of political commitment backed by actions to be taken through institutions at national, regional and international levels subject to each country's Constitution, fundamental legal principles, laws and procedures. The Declaration calls for enactment and enforcement of laws prohibiting bribery in international transactions, laws criminalizing the bribery of foreign public officials and laws ensuring that bribes are not tax deductible. It also calls for international cooperation in punitive measures relating to investigation, prosecution and extradition. Another UN initiative is the international Code of Conduct for public officials adopted in December 1996 to guide the member-states in their efforts against corruption through a set of guiding principles that public servants should follow in the performance of their duties in relation to loyalty, integrity, efficiency, effectiveness, fairness, impartiality, prevention of conflict of interest, disclosure norms, acceptance of gifts and favours, maintenance of secrecy and regulation of political activity consistent with impartiality and inspiring public confidence. In addition, the UN has prepared a manual on anti-corruption policy and an anti-corruption tool kit as a policy guide and an operational tool. The United Nations has also prepared a model law on money laundering and proceeds of crime.

8.3 The United Nations Convention against Corruption adopted by the UN General Assembly in October 2003 provides an effective international legal instrument against corruption

which has been signed by India but is yet to be ratified. The Convention binds the signatories to render specific forms of mutual legal assistance in gathering and transferring evidence for use in court to extradite offenders and to undertake measures to support tracing, freezing, seizure and confiscation of proceeds of corruption. Asset recovery is a fundamental principle of the Convention even though the needs of the countries seeking illicit assets have to be reconciled with the legal and procedural safeguards of the countries whose assistance is sought. The UN Office of Drugs and Crime (UNODC) has been coordinating meetings of experts to identify the main challenges in the area of repatriation of illegally transferred funds, the tracing and identification of such funds and the efforts and procedures required for the return of such funds to their countries of origin. Countries seeking the return of looted assets often face severe problems in recovery due to problems arising from diversity of legal systems, difficulties in meeting the evidentiary and procedural requirements of developed countries, intermingling of such proceeds with other assets etc. Developing countries are further constrained in these efforts due to the lack of financial resources and expertise to successfully investigate and prosecute such cases to a logical conclusion. Capacity building domestically combined with effective coordination at the international level, especially in the area of technical assistance, coordination and communication will be crucial for making headway in this critical area.

8.4 The ADB OECD Anti Corruption Action Plan for Asia Pacific which has been signed by the Government of India is not a binding agreement but a broad understanding to further the cause of inter-regional cooperation in the matter of prevention of corruption.

8.5 A Joint Statement as agreed upon by a number of international regional agencies at Singapore has already been referred to in para 1.14. As a backgrounder to the agreement, the leaders had the Uniform Framework for Preventing and Combating Fraud and Corruption prepared by an Anti Corruption Task Force established by the constituent International Financial Institutions. As per the Joint Statement, the signatory institutions “recognize that corruption undermines sustainable economic growth and is a major obstacle to the reduction of poverty”. Corruption affects growth by raising costs at a given level of efficiency of operations, and/or by reduction in efficiency. As for poverty, the most direct adverse impact will be seen if funds meant to combat poverty are misused and misappropriated.

8.6 The Uniform Framework has come up with the following definitions. A corrupt practice is “the offering, giving, receiving, or soliciting, directly or indirectly, of anything of value to influence improperly the actions of another party”. A fraudulent practice is “any act or omission, including a misrepresentation that knowingly or recklessly misleads, or attempts to mislead, a party to obtain a financial or other benefit or to avoid an obligation”. A coercive practice is “impairing or harming, or threatening to impair or harm, directly or indirectly,

any party or the property of the party to influence improperly the actions of a party”. A collusive practice is an “arrangement between two or more parties designed to achieve an improper purpose including influencing improperly the actions of another party”.

8.7 The principle and guidelines for investigations form the bulk of the Uniform Framework document. The relatively more important principles and guidelines are noted below. Each organisation will have a Investigative Office responsible for conducting investigations. The purpose of an investigation by the Investigative Office is to examine and determine the veracity of allegations of corrupt or fraudulent practices with respect, but not limited, to projects financed by the organisation and allegations of misconduct on the part of the organisation’s staff members. The Investigative Office is to perform its duties independently from those responsible for or involved in operational activities and from staff members liable to be the subject of investigations and shall also be free from improper influence and fear of retaliation. The investigative findings are to be based on facts and analysis, which may include reasonable inferences. Recommendations shall be based on such findings.

8.8 An important provision in the framework is about the source of complaints. The Investigative Office shall accept all complaints irrespective of their source, including complaints from anonymous or confidential sources. Since anonymous complaints too are accepted, a quantum jump in the number of complaints can be expected. The principles and guidelines are not limited to generalities only. There are instances of very specific and detailed ones as well. For instance, Paragraph 37 states that to the extent possible, interviews by the Investigative Office should be conducted by two persons, while Paragraph 38 provides for interviews to be conducted in the language of the person being interviewed.

8.9 International cooperation is not merely between governments but also between international private sector business and professional bodies and the national chapters; and international networking and mutual assistance between civil societies in the task of prevention of corruption in the public and private sectors. Private and public sector can have mutually cleansing or corrupting relations. Initiatives on the part of Indian private sector, professional groups and civil societies are also areas to be pursued.

## 9 RELATIONSHIP BETWEEN THE POLITICAL EXECUTIVE AND THE PERMANENT CIVIL SERVICE

9.1 The Indian Constitution provides for separation of powers between the legislature, executive and judiciary with well-defined roles and responsibilities for each one of them. Since India is a parliamentary democracy, there is an interface between the legislature and the executive at the level of the Council of Ministers, which is collectively responsible to the legislature. The Constitution separates the executive into two parts. In terms of Articles 53 and 154, the executive power of the Union and the States vests in the President or Governor directly or through officers subordinate to him. These officers constitute the permanent civil service and are governed by Part XIV of the Constitution.

9.2 The other part of the executive is the 'political'. The President or Governor is required to act according to the aid and advice of his Council of Ministers, appointed under Articles 73 and 163 of the Constitution. Because the advice is normally binding, such advice for the officers becomes an order which they must obey under Articles 77 and 166 respectively. The President and Governor frame rules for the conduct of business in the government. Work is allocated among Ministers as per the Government of India (Allocation of Business) Rules and the manner in which the officers are required to help the President or Governor to exercise his executive functions is governed by the Government of India (Transaction of Business) Rules. What this means is that though officers are subordinate to the President or Governor, they carry out the orders of the Council of Ministers in accordance with the rules framed in this behalf. The Rules of Business of Government do provide for the Secretary to the Government to advise his Minister about the course of action proposed in a particular matter and to submit to him a note which tells him about the propriety or legality of his orders and suggest that either such orders not be given or that they be suitably modified. The relationship between the Secretary and the Minister is organic. The Minister has the mandate of the people to govern, but the Secretary has an equivalent constitutional mandate to advise the Minister. Once his advice has been suitably considered, unless the Minister passes an illegal order, the Secretary is bound to implement it. The Minister, on his part, is required to support the Secretary who is implementing his order. Once a law is framed or rules and regulations are approved, they apply to everyone, whether a member of the political

executive or of the permanent civil service. A civil servant is required to implement the orders of government without bias, with honesty and without fear or favour. It is precisely in this area that a degree of a difference of opinion begins to emerge between the political executive and the civil servants.

9.3 This happens because there is no system of specifying of accountability, thus making the relationship between the political executive and the permanent civil servants only issue-sensitive. This underscores the criticality of defining the relationship between the Minister and the civil servant more objectively. This is possible only if we put the relationship in an output-outcome framework. Outputs or key results are specific services that the civil servants produce and deliver, and therefore, the civil servants should be held to account for the delivery of key results, which becomes the basis for evaluation of their performance. Outcome is the success in achieving social goals and the political executive decides what outputs should be included so that the desired outcomes or social goals can be achieved. In such a scheme, the political executive becomes accountable to the legislature and the electorate for the outcome. The political executive is judged on the basis of whether it has chosen the right outputs to achieve social goals. If this is done, the relationship between the political executive and permanent civil service would have been objectively defined.

9.4 Another area which has tension in the relationship is the arbitrary transfer and posting of civil servants at the behest of Ministers and other political leaders particularly in the states. Robert Wade, in his study of Andhra Pradesh, has shown how the process works. As Wade says,

*"The transfer is the politicians' basic weapon of control over the bureaucracy and thus the lever for surplus-extraction from the clients of the bureaucracy. With the transfer weapon not only can the politicians raise money by direct sale; they can also remove someone who is not being responsive enough to their monetary demands or to their request for favours to those from whom they get money and electoral support- in particular, the contractors. One is thus led to visualise a special circuit of transactions, in which the bureaucracy acquires the control of funds... then passes a portion to MLAs and especially Ministers, who in turn use the funds for distributing short-term material inducements in exchange for electoral support. These funds, it should be noticed, do flow through the public domain; but they are neither open to public scrutiny nor available for public expenditure programmes."*

9.5 In fact, the process of transfers of civil servants is perceived to be so lucrative that it is popularly known as the transfer industry. N N Vohra, a retired civil servant, has commented that:

*“Transfers of government functionaries have in many States, virtually assumed the status of an industry. Officials at all levels are repeatedly shifted from station to station in utter disregard of the tenure policies or any concern about the disruption of public services delivery and the adverse effect on the implementation of development programmes.”*

In Mohsina Begum’s case, the Allahabad High Court lamented that *‘whenever a new government is formed, there is a tidal wave of transfers of government servants on the basis of caste or community or monetary considerations’ leading to ‘total demoralisation of the bureaucracy and its division on caste and communal basis, besides spread of corruption’ and breakdown of all norms of administration’.*

9.6 H D Shourie of Common Cause had filed a Public Interest Litigation in the Supreme Court asking for a direction for framing of rules governing the process of transfer of civil servants. But the Supreme Court refused to do so on the ground that,

*We do not consider it necessary to entertain this writ petition...since the guidelines for taking such administrative decisions are well settled and it is obvious that all administrative decisions should satisfy the rule of non-arbitrariness and be honest and fair. Individual cases in which the decision-making process is vitiated for any such reason can always be challenged in a suitable manner.*

9.7 The Fifth Pay Commission was driven to make some adverse observations about the ‘transfer industry’. The Commission declared:

*There is a definite feeling that the instrument of transfer is widely misused in this country, particularly by politicians in power, to subjugate the government employees. Transfer is also used as an instrument of punishment.... Demands have, therefore, been made that no transfer before the expiry of three years in a post, should be made appealable, particularly if it has been made at the behest of politicians.*

9.8 The Fifth Pay Commission made several recommendations about evolving detailed, clear, and transparent transfer policies. First, the Commission recommended that detailed guidelines should be formulated and publicised by each department as part of a comprehensive transfer policy, so that arbitrariness in transfers is eliminated altogether, and transfers are effected in as transparent a manner as possible.

9.9 Second, in order to ensure administrative continuity and stability to incumbents, frequent transfers should be discouraged, and a minimum tenure for each posting of officers should be predetermined, and it should normally be three to five years, except in cases where longer tenures are justified on functional grounds, like continued availability of certain specialized skills. In the case of sensitive posts, where opportunities exist for developing vested interests, the tenure should be defined for a shorter period, which may be two to three years.

9.10 Third, any premature transfer before the completion of the prescribed tenure should be based on sound administrative grounds, which should be spelt out in the transfer order itself. The civil servant should be given the right to appeal against such an order if he feels aggrieved, and a provision for a summary procedure to deal with such a situation should be made within each department. In case of emergency, when such an order is made in the exigencies of public interest and has to be implemented at once, representation against the transfer order should be dealt with by an authority superior to the officer ordering the transfer after personal discussion, if possible, on the same day.

9.11 Fourth, the instrument of transfer should not be allowed to be misused either by bureaucrats themselves or by politicians in power. It should not be used as a means of punishment by circumventing the procedure laid down for disciplinary proceedings.

9.12 The issue was raised by many persons in every public hearing and press conference held by the Commission. Amongst the many letters/comments received by the Commission on this matter, is a detailed one written by Lokayukta of Karnataka. He says:

*Over the years, my experience as a Lawyer, Judge and now as Lokayukta has made me feel that the policy of the Government in regard to transfer of its officers requires serious re-consideration. I had several occasions to meet various officers both of State and Central Government and in the course of my discussion with them, I found there is lot of discontentment amongst them in regard to the transfer policies of their respective Governments. The common complaint seems to be that there is no proper policy at all and transfers are effected at the whims and fancies of the decision making authority which is mostly influenced by the pressure from the politicians’ various hues. Such transfers are likely to have serious adverse effect on the efficiency of the Government itself. Even otherwise, to have an independent attitude and peace of mind, a Government servant must have some assured tenure in any post to which he is posted before he is transferred. Transfers based on the recommendations of persons who are not connected with the Government in any way, which includes elected representatives, would certainly lead to corruption and undue favours being shown in favour of such beneficiaries. At the same time, transfers though shown for administrative reasons, quiet often seem to be the outcome of someone’s personal grievance, amounting to punishment. Such occasions will certainly have adverse effect on the performance of the Government.*

*There is a talk amongst the public that transfers to certain powerful posts are being made for collateral considerations which involves corruption. It is in this background I think it appropriate to write to you, requesting the Administrative Reforms Commission, to make suitable recommendations in regard to the transfer policies, both in the Central and at the State Government levels. One suggestion I could make in this regard, which may at the outset may seem to be rather rigid, is to leave the transfer to bureaucracy itself without there being any interference whatsoever*

*by the Ministry. In my opinion, in so far as the statewide transfer is concerned, the same should be done on the recommendations of a Committee consisting of the Chief Secretary of the State, next senior-most Secretary and the Secretary of the Department in which the transfer is sought to be effected. If this Committee is directed to perform its functions transparently, it will be open to the Ministry to oversee the complaints on the actions of the Committee and remedial actions could be taken. This would certainly take away the public perception that transfers are being done on political or collateral considerations. Similarly, in regard to transfer of officers at Divisional and District levels, the same should be effected through a Committee headed by the senior most officer of that Division or the District, and next senior officer of the department in which the transfer is sought to be effected.*

*Lastly and most importantly, there should be minimum of three years' fixed duration for the officers' stay in a particular post, which should not be normally reduced or enlarged except for good reasons to be recorded in writing.*

9.13 The National Commission to Review the Working of the Constitution has also commented on this. The Commission said:

*The questions of personnel policy including placements, promotions, transfers and fast-track advancements on the basis of forward-looking career management policies and techniques should be managed by autonomous Personnel Boards for assisting the high level political authorities in making key decisions. Such Civil Service Boards should be constituted under statutory provisions. They should be expected to function like the UPSC. The sanctity of parliamentary legislation under article 309 is needed to counteract the publicly known trends of the play of unhealthy and destabilizing influences in the management of public services in general and higher civil services in particular.*

9.14 The Draft Public Services Bill, 2006 moots the idea of constituting a Central Public Services Authority for good governance. In terms of Article 19(e) of the Bill, the Authority has been charged with the responsibility of ensuring that: *“the transfers and postings of public servants are undertaken in a fair and objective manner and the tenure of the public servant in a post is appropriately determined and is maintained consistent with the need to maintain continuity, and the requirements of good governance”*. However, the recommendations of the Authority in these matters cannot be mandatory, but only advisory.

9.15 Another likely area of conflict between the Minister and the officers is the influence exercised by the Minister in the day-to-day functioning of subordinate officers. Efficient running of activities of a ministry or department requires delegation of powers and functions to the various levels of bureaucracy. Once this delegation has been done, the bureaucracy should be allowed to discharge its duties, of course as per the delegated authority. It has

often been observed that Ministers issue instructions, formal or informal, to influence the decisions of the subordinate bureaucracy. It has also been observed that officers, instead of taking decisions on their own, look up to the Ministers for informal instructions. Several states have created an institution of 'District Incharge Minister' to review the development activities in the district. There have been instances when District Ministers have exceeded their brief and issued instructions on issues which come totally within the officer's domain. These practices are unhealthy as they can have a propensity to check an officer's initiative and impinge on the authority delegated to him. It could lead to decisions which are not in public interest and also demoralised a conscientious civil servant.

9.16 It is necessary to spell out the relationship between the political executive and the bureaucracy in a comprehensive manner. The Commission would suggest the details of the institutional and legal framework required to build a healthy relationship between the political executive and the bureaucracy in its forthcoming Report on Civil Services Reforms.

## CONCLUSION

This report must end on a note of optimism. Indians have always valued a world beyond the material and have embraced spiritualism as a way of life. Instances abound in our epics of good behaviour, of the triumph of good over evil, of the wisdom of sages. Stories of the honesty, generosity and piety of legendary kings such as Vikramaditya, are told to our children even today. There is no reason why Ram Rajya cannot be attempted.

In modern India, poverty, insufficiency and class conflicts are slowly giving way to a confident, inclusive, empowered India. On the Transparency International's Corruption Index, India's position has improved significantly, and hopefully will continue to do so. The vigilance of our enlightened people will ensure this.

The Commission believes that this Report on Ethics in Governance is among the most important that this Commission has been called upon to write, because increased honesty in governance would have a major impact on the everyday lives of the people of India. When the recommendations in this report are implemented, greater efficiency in government work and accountability would be achieved, because more public servants would work not with a private agenda but for the larger public good. Equally importantly, a more corruption free regime would lead to a much higher rate of growth of our GDP, bring an overall improvement in the economy and lead to greater transparency in government actions in serving its people. All this, in turn, will lead to greater empowerment of the people – the core need of a vibrant democracy.

## SUMMARY OF RECOMMENDATIONS

### 1. (2.1.3.1.6) Reform of Political Funding

- a. A system for partial state funding should be introduced in order to reduce the scope of illegitimate and unnecessary funding of expenditure for elections.

### 2. (2.1.3.2.4) Tightening of Anti-Defection Law

- a. The issue of disqualification of members on grounds of defection should be decided by the President/Governor on the advice of the Election Commission.

### 3. (2.1.3.3.2) Disqualification

- a. Section 8 of the Representation of the People Act, 1951 needs to be amended to disqualify all persons facing charges related to grave and heinous offences and corruption, with the modification suggested by the Election Commission.

### 4. (2.1.4.3) Coalition and Ethics

- a. The Constitution should be amended to ensure that if one or more parties in a coalition with a common programme mandated by the electorate either explicitly before the elections or implicitly while forming the government, realign midstream with one or more parties outside the coalition, then Members of that party or parties shall have to seek a fresh mandate from the electorate.

### 5. (2.1.5.4) Appointment of the Chief Election Commissioner/Commissioners

- a. A collegium headed by the Prime Minister with the Speaker of the Lok Sabha, the Leader of Opposition in the Lok Sabha, the Law Minister and the Deputy Chairman of the Rajya Sabha as members; should make

recommendations for the consideration of the President for appointment of the Chief Election Commissioner and the Election Commissioners.

#### 6. (2.1.6.3) Expediting Disposal of Election Petitions

- a. Special Election Tribunals should be constituted at the regional level under Article 323B of the Constitution to ensure speedy disposal of election petitions and disputes within a stipulated period of six months. Each Tribunal should comprise a High Court Judge and a senior civil servant with at least 5 years of experience in the conduct of elections (not below the rank of an Additional Secretary to Government of India/Principal secretary of a State Government). Its mandate should be to ensure that all election petitions are decided within a period of six months as provided by law. The Tribunals should normally be set up for a term of one year only, extendable for a period of 6 months in exceptional circumstances.

#### 7. (2.1.7.3) Grounds of Disqualification for Membership

- a. Appropriate legislation may be enacted under Article 102(e) of the Constitution spelling out the conditions for disqualification of Membership of Parliament in an exhaustive manner. Similarly, the States may also legislate under Article 198(e).

#### 8. (2.4.5) Ethical Framework for Ministers

- \*a. In addition to the existing Code of Conduct for Ministers, there should be a Code of Ethics to provide guidance on how Ministers should uphold the highest standards of constitutional and ethical conduct in the performance of their duties.
- \*b. Dedicated units should be set up in the offices of the Prime Minister and the Chief Ministers to monitor the observance of the Code of Ethics and the Code of Conduct. The unit should also be empowered to receive public complaints regarding violation of the Code of Conduct.
- \*c. The Prime Minister or the Chief Minister should be duty bound to ensure the observance of the Code of Ethics and the Code of Conduct by Ministers. This would be applicable even in the case of coalition governments where the Ministers may belong to different parties.

- \*d. An annual report with regard to the observance of these Codes should be submitted to the appropriate legislature. This report should include specific cases of violations, if any, and the action taken thereon.
- \*e. The Code of Ethics should inter alia include broad principles of the Minister-civil servant relationship and the Code of Conduct should stipulate the details as illustrated in para 2.4.3.
- \*f. The Code of Ethics, the Code of Conduct and the annual report should be put in the public domain.

#### 9. (2.5.7.6) Enforcement of ethical norms in Legislatures

- \*a. An Office of 'Ethics Commissioner' may be constituted by each House of Parliament. This Office, functioning under the Speaker/Chairman, would assist the Committee on Ethics in the discharge of its functions, and advise Members, when required, and maintain necessary records.
- \*b. In respect of states, the Commission recommends the following:
  - (i) All State legislatures may adopt a Code of Ethics and a Code of Conduct for their Members.
  - (ii) Ethics Committees may be constituted with well defined procedures for sanctions in case of transgressions, to ensure the ethical conduct of legislators.
  - (iii) 'Registers of Members' Interests' may be maintained with the declaration of interests by Members of the State legislatures.
  - (iv) Annual Reports providing details including transgressions may be placed on the Table of the respective Houses.
  - (v) An Office of 'Ethics Commissioner' may be constituted by each House of the State legislatures. This Office would function under the Speaker/Chairman, on the same basis as suggested for Parliament.

#### 10. (2.6.12) Office of Profit

- a. The Law should be amended to define office of profit based on the following principles:

- (i) All offices in purely advisory bodies where the experience, insights and expertise of a legislator would be inputs in governmental policy, shall not be treated as offices of profit, irrespective of the remuneration and perks associated with such an office.
- (ii) All offices involving executive decision making and control of public funds, including positions on the governing boards of public undertakings and statutory and non-statutory authorities directly deciding policy or managing institutions or authorizing or approving expenditure shall be treated as offices of profit, and no legislator shall hold such offices.
- (iii) If a serving Minister, by virtue of office, is a member or head of certain organizations like the Planning Commission, where close coordination and integration between the Council of Ministers and the organization or authority or committee is vital for the day-to-day functioning of government, it shall not be treated as office of profit.

(The use of discretionary funds at the disposal of legislators, the power to determine specific projects and schemes, or select the beneficiaries or authorize expenditure shall constitute discharge of executive functions and will invite disqualification under Articles 102 and 191, irrespective of whether or not a new office is notified and held.)

- b. Schemes such as MPLADS and MLALADS should be abolished.
- c. Members of Parliament and Members of State Legislatures should be declared as 'Public Authorities' under the Right to Information Act, except when they are discharging legislative functions.

#### 11. (2.7.12) Code of Ethics for Civil Servants

- \*a. 'Public Service Values' towards which all public servants should aspire, should be defined and made applicable to all tiers of Government and parastatal organizations. Any transgression of these values should be treated as misconduct, inviting punishment.
- \*b. Conflict of interests should be comprehensively covered in the code of ethics and in the code of conduct for officers. Also, serving officials should

not be nominated on the Boards of Public undertakings. This will, however, not apply to non-profit public institutions and advisory bodies.

#### 12. (2.8.5) Code of Ethics for Regulators

- a. A comprehensive and enforceable code of conduct should be prescribed for all professions with statutory backing.

#### 13. (2.9.23) Ethical Framework for the Judiciary

- a. A National Judicial Council should be constituted, in line with universally accepted principles where the appointment of members of the judiciary should be by a collegium having representation of the executive, legislature and judiciary. The Council should have the following composition:

- The Vice-President as Chairperson of the Council
- The Prime Minister
- The Speaker of the Lok Sabha
- The Chief Justice of India
- The Law Minister
- The Leader of the Opposition in the Lok Sabha
- The Leader of the Opposition in the Rajya Sabha

In matters relating to the appointment and oversight of High Court Judges, the Council will also include the following members:

- The Chief Minister of the concerned State
- The Chief Justice of the concerned High Court

- b. The National Judicial Council should be authorized to lay down the code of conduct for judges, including the subordinate judiciary.
- c. The National Judicial Council should be entrusted with the task of recommending appointments of Supreme Court and High Court Judges. It should also be entrusted the task of oversight of the judges, and should be empowered to enquire into alleged misconduct and impose minor penalties. It can also recommend removal of a judge if so warranted.

- d. Based on the recommendations of the NJC, the President should have the powers to remove a Supreme Court or High Court Judge.
- e. Article 124 of the Constitution may be amended to provide for the National Judicial Council. A similar change will have to be made to Article 217. Also, since the Council is to have the authority to oversee and discipline judges, further changes will need to be made to Article 217 (Clause 4).
- f. A Judge of the Supreme Court should be designated as the Judicial Values Commissioner. He/she should be assigned the task of enforcing the code of conduct. Similar arrangement should also be made in the High Court.

#### 14. (3.2.1.10) Defining Corruption

- a. The following should be classified as offences under the Prevention of Corruption Act:
  - Gross perversion of the Constitution and democratic institutions amounting to wilful violation of oath of office.
  - Abuse of authority unduly favouring or harming someone.
  - Obstruction of justice.
  - Squandering public money.

#### 15. (3.2.2.7) Collusive Bribery

- a. Section 7 of the Prevention of Corruption Act needs to be amended to provide for a special offence of 'collusive bribery'. An Offence could be classified as 'collusive bribery' if the outcome or intended outcome of the transaction leads to a loss to the state, public or public interest;
- b. In all such cases if it is established that the interest of the state or public has suffered because of an act of a public servant, then the court shall presume that the public servant and the beneficiary of the decision committed an offence of 'collusive bribery';
- c. The punishment for all such cases of collusive bribery should be double that of other cases of bribery. The law may be suitably amended in this regard.

#### 16. (3.2.3.2) Sanction for Prosecution

- a. Prior sanction should not be necessary for prosecuting a public servant who has been trapped red-handed or in cases of possessing assets disproportionate to the known sources of income.
- b. The Prevention of Corruption Act should be amended to ensure that sanctioning authorities are not summoned and instead the documents can be obtained and produced before the courts by the appropriate authority.
- c. The Presiding Officer of a House of Legislature should be designated as the sanctioning authority for MPs and MLAs respectively.
- d. The requirement of prior sanction for prosecution now applicable to serving public servants should also apply to retired public servants for acts performed while in service.
- e. In all cases where the Government of India is empowered to grant sanction for prosecution, this power should be delegated to an Empowered Committee comprising the Central Vigilance Commissioner and the Departmental Secretary to Government. In case of a difference of opinion between the two, the matter could be resolved by placing it before the full Central Vigilance Commission. In case, sanction is required against a Secretary to Government, then the Empowered Committee would comprise of Cabinet Secretary and the Central Vigilance Commissioner. Similar arrangements may also be made at the State level. In all cases the order granting sanction for prosecution or otherwise shall be issued within two months. In case of refusal, the reasons for refusal should be placed before the respective legislature annually.

#### 17. (3.2.4.3) Liability of Corrupt Public Servants to Pay Damages

- a. In addition to the penalty in criminal cases the law should provide that public servants who cause loss to the state or citizens by their corrupt acts should be made liable to make good the loss caused and, in addition, be liable for damages. This could be done by inserting a chapter in the Prevention of Corruption Act.

## 18. (3.2.5.6) Speeding up Trials under the Prevention of Corruption Act:

- a. A legal provision needs to be introduced fixing a time limit for various stages of trial. This could be done by amendments to the CrPC.
- b. Steps have to be taken to ensure that judges declared as Special Judges under the provisions of the Prevention of Corruption Act give primary attention to disposal of cases under the Act. Only if there is inadequate work under the Act, should the Special Judges be entrusted with other responsibilities.
- c. It has to be ensured that the proceedings of courts trying cases under the Prevention of Corruption Act are held on a day-to-day basis, and no deviation is permitted.
- d. The Supreme Court and the High Courts may lay down guidelines to preclude unwarranted adjournments and avoidable delays.

## 19. (3.3.7) Corruption Involving the Private Sector

- a. The Prevention of Corruption Act should be suitably amended to include in its purview private sector providers of public utility services.
- b. Non-Governmental agencies, which receive substantial funding, should be covered under the Prevention of Corruption Act. Norms should be laid down that any institution or body that has received more than 50% of its annual operating costs, or a sum equal to or greater than Rs 1 crore during any of the preceding 3 years should be deemed to have obtained 'substantial funding' for that period and purpose of such funding.

## 20. (3.4.10) Confiscation of Properties Illegally Acquired by Corrupt Means.

- a. The Corrupt Public Servants (Forfeiture of Property) Bill as suggested by the Law Commission should be enacted without further delay.

21. (3.5.4) Prohibition of 'Benami'<sup>1</sup> Transactions

- a. Steps should be taken for immediate implementation of the Benami Transactions (Prohibition) Act 1988.

## 22. (3.6.4) Protection to Whistleblowers

- a. Legislation should be enacted immediately to provide protection to whistleblowers on the following lines proposed by the Law Commission:
  - Whistleblowers exposing false claims, fraud or corruption should be protected by ensuring confidentiality and anonymity, protection from victimization in career, and other administrative measures to prevent bodily harm and harassment.
  - The legislation should cover corporate whistle-blowers unearthing fraud or serious damage to public interest by willful acts of omission or commission.
  - Acts of harassment or victimization of or retaliation against, a whistleblower should be criminal offences with substantial penalty and sentence.

## 23. (3.7.19) Serious Economic Offences:

- a. A new law on 'Serious Economic Offences' should be enacted.
- b. A Serious Economic Offence may be defined as :
  - (i) One which involves a sum exceeding Rs 10 crores; or
  - (ii) is likely to give rise to widespread public concern; or
  - (iii) its investigation and prosecution are likely to require highly specialized knowledge of the financial market or of the behaviour of banks or other financial institutions; or
  - (iv) involves significant international dimensions; or
  - (v) in the investigation of which there is requirement of legal, financial, investment and investigative skills to be brought together; or
  - (vi) which appear to be complex to the Union Government, regulators, banks, or any financial institution.
- c. A Serious Frauds Office (SFO) should be set up (under the new law), to investigate and prosecute such offences. It should be attached to the Cabinet Secretariat. This office shall have powers to investigate and

prosecute all such cases in Special Courts constituted for this purpose. The SFO should be staffed by experts from diverse disciplines such as the financial sector, capital and futures market, commodity markets, accountancy, direct and indirect taxation, forensic audit, investigation, criminal and company law and information technology. The SFO should have all powers of investigation as stated in the recommendation of the Mitra Committee. The existing SFIO should be subsumed in this.

- d. A Serious Frauds Monitoring Committee should be constituted to oversee the investigation and prosecution of such offences. This Committee, to be headed by the Cabinet Secretary, should have the Chief Vigilance Commissioner, Home Secretary, Finance Secretary, Secretary Banking/ Financial Sector, a Deputy Governor, RBI, Secretary, Department of Company Affairs, Law Secretary, Chairman SEBI etc as members.
- e. In case of involvement of any public functionary in a serious fraud, the SFO shall send a report to the Rashtriya Lokayukta and shall follow the directions given by the Rashtriya Lokayukta (see para 4.3.15).
- f. In all cases of serious frauds the Court shall presume the existence of *mens rea* of the accused, and the burden of proof regarding its non-existence, shall lie on the accused.

#### 24. (3.8.5) Prior Concurrence for Registration of Cases: Section 6A of the Delhi Special Police Establishment Act, 1946

- a. Permission to take up investigations under the present statutory arrangement should be given by the Central Vigilance Commissioner in consultation with the concerned Secretary. In case of investigation against a Secretary to Government, the permission should be given by a Committee comprising the Cabinet Secretary and the Central Vigilance Commissioner. This would require an amendment to the Delhi Special Police Establishment Act. In the interim the powers of the Union Government may be delegated to the Central Vigilance Commissioner, to be exercised in the manner stated above. A time limit of 30 days may be prescribed for processing this permission.

#### 25. (3.9.4) Immunity Enjoyed by Legislators

- a. The Commission, while endorsing the suggestion of the National Commission to Review the Working of the Constitution, recommends that suitable amendments be effected to Article 105(2) of the Constitution to provide that the immunity enjoyed by Members of Parliament does not cover corrupt acts committed by them in connection with their duties in the House or otherwise.
- b. The Commission also recommends that similar amendments may be made in Article 194(2) of the Constitution in respect of members of the state legislatures.

#### 26. (3.10.24) Constitutional Protection to Civil Servants – Article 311

- a. Article 311 of the Constitution should be repealed.
- b. Simultaneously Article 310 of the Constitution should also be repealed.
- c. Suitable legislation to provide for all necessary terms and conditions of services should be provided under Article 309, to protect the bona fide action of public servants taken in public interest; this should be made applicable to the States.
- d. Necessary protection to public servants against arbitrary action should be provided through such legislation under Article 309.

#### 27. (4.3.15) The Lok Pal

- a. The Constitution should be amended to provide for a national ombudsman to be called the Rashtriya Lokayukta. The role and jurisdiction of the Rashtriya Lokayukta should be defined in the Constitution while the composition, mode of appointment and other details can be decided by Parliament through legislation.
- b. The jurisdiction of Rashtriya Lokayukta should extend to all Ministers of the Union (except the Prime Minister), all state Chief Ministers, all persons holding public office equivalent in rank to a Union Minister, and Members of Parliament. In case the enquiry against a public functionary establishes the involvement of any other public official along with the public

functionary, the Rashtriya Lokayukta would have the power to enquire against such public servant(s) also.

- c. The Prime Minister should be kept out of the jurisdiction of the Rashtriya Lokayukta for the reasons stated in paras 4.3.7 to 4.3.11.
- d. The Rashtriya Lokayukta should consist of a serving or retired Judge of the Supreme Court as the Chairperson, an eminent jurist as Member and the Central Vigilance Commissioner as the ex-officio Member.
- e. The Chairperson of the Rashtriya Lokayukta should be selected from a panel of sitting Judges of the Supreme Court who have more than three years of service, by a Committee consisting of the Vice President of India, the Prime Minister, the Leader of the Opposition, the Speaker of the Lok Sabha and the Chief Justice of India. In case it is not possible to appoint a sitting Judge, the Committee may appoint a retired Supreme Court Judge. The same Committee may select the Member (i.e. an eminent jurist) of the Rashtriya Lokayukta. The Chairperson and Member of the Rashtriya Lokayukta should be appointed for only one term of three years and they should not hold any public office under government thereafter, the only exception being that they can become the Chief Justice of India, if their services are so required.
- f. The Rashtriya Lokayukta should also be entrusted with the task of undertaking a national campaign for raising the standards of ethics in public life.

#### 28. (4.4.9) The Lokayukta :

- a. The Constitution should be amended to incorporate a provision making it obligatory on the part of State Governments to establish the institution of Lokayukta and stipulate the general principles about its structure, power and functions.
- b. The Lokayukta should be a multi-member body consisting of a judicial Member in the Chair, an eminent jurist or eminent administrator with impeccable credentials as Member and the head of the State Vigilance Commission {as referred in para 4.4.9(e) below} as ex-officio Member. The Chairperson of the Lokayukta should be selected from a panel of

retired Supreme Court Judges or retired Chief Justices of High Court, by a Committee consisting of the Chief Minister, Chief Justice of the High Court and the Leader of the Opposition in the Legislative Assembly. The same Committee should select the second member from among eminent jurists/administrators. There is no need to have an Up-Lokayukta.

- c. The jurisdiction of the Lokayukta would extend to only cases involving corruption. They should not look into general public grievances.
- d. The Lokayukta should deal with cases of corruption against Ministers and MLAs.
- e. Each State should constitute a State Vigilance Commission to look into cases of corruption against State Government officials. The Commission should have three Members and have functions similar to that of the Central Vigilance Commission.
- f. The Anti Corruption Bureaus should be brought under the control of the State Vigilance Commission.
- g. The Chairperson and Members of the Lokayukta should be appointed strictly for one term only and they should not hold any public office under government thereafter.
- h. The Lokayukta should have its own machinery for investigation. Initially, it may take officers on deputation from the State Government, but over a period of five years, it should take steps to recruit its own cadre, and train them properly.
- i. All cases of corruption should be referred to Rashtriya Lokayukta or Lokayukta and these should not be referred to any Commission of Inquiry.

#### 29. (4.5.6) Ombudsman at the Local Levels

- \*a. A local bodies Ombudsman should be constituted for a group of districts to investigate cases against the functionaries of the local bodies. The State Panchayat Raj Acts and the Urban Local Bodies Act should be amended to include this provision.

- \*b. The local bodies Ombudsman should be empowered to investigate cases of corruption or maladministration by the functionaries of the local self governments, and submit reports to the competent authorities for taking action. The competent authorities should normally take action as recommended. In case they do not agree with the recommendations, they should give their reasons in writing and the reasons should be made public.

### 30. (4.6.6) Strengthening Investigation and Prosecution

- \*a. The State Vigilance Commissions/Lokayuktas may be empowered to supervise the prosecution of corruption related cases.
- \*b. The investigative agencies should acquire multi-disciplinary skills and should be thoroughly conversant with the working of various offices/ departments. They should draw officials from different wings of government.
- \*c. Modern techniques of investigation should also be deployed like electronic surveillance, video and audio recording of surprise inspections, traps, searches and seizures.
- \*d. A reasonable time limit for investigation of different types of cases should be fixed for the investigative agencies.
- \*e. There should be sustained step-up in the number of cases detected and investigated. The priorities need to be reoriented by focussing on 'big' cases of corruption.
- \*f. The prosecution of corruption cases should be conducted by a panel of lawyers prepared by the Attorney General or the Advocate General in consultation with Rashtriya Lokayukta or Lokayukta as the case may be.
- \*g. The anti-corruption agencies should conduct systematic surveys of departments with particular reference to highly corruption prone ones in order to gather intelligence and to target officers of questionable integrity.

- \*h. The economic offences unit of states need to be strengthened to effectively investigate cases and there should be better coordination amongst existing agencies.

### 31. (5.1.12) Citizens' Initiatives

- \*a. Citizens' Charters should be made effective by stipulating the service levels and also the remedy if these service levels are not met.
- \*b. Citizens may be involved in the assessment and maintenance of ethics in important government institutions and offices.
- \*c. Reward schemes should be introduced to incentivise citizen's initiatives.
- \*d. School awareness programmes should be introduced, highlighting the importance of ethics and how corruption can be combated.

### 32. (5.2.5) False Claims Act

- a. Legislation on the lines of the US False Claims Act should be enacted, providing for citizens and civil society groups to seek legal relief against fraudulent claims against the government. This law should have the following elements:
  - i. Any citizen should be able to bring a suit against any person or agency for a false claim against the government.
  - ii. If the false claim is established in a court of law, then the person/ agency responsible shall be liable for penalty equal to five times the loss sustained by the exchequer or society.
  - iii. The loss sustained could be monetary or non-monetary as in the form of pollution or other social costs. In case of non-monetary loss, the court would have the authority to compute the loss in monetary terms.
  - iv. The person who brought the suit shall be suitably compensated out of the damages recovered.

## 33. (5.3.5) Role of Media

- \*a. It is necessary to evolve norms and practices requiring proper screening of all allegations/complaints by the media, and taking action to put them in the public domain.
- \*b. The electronic media should evolve a Code of Conduct and a self regulating mechanism in order to adhere to a Code of Conduct as a safeguard against malafide action.
- \*c. Government agencies can help the media in the fight against corruption by disclosing details about corruption cases regularly.

## 34. (5.4.2) Social Audit

- \*a. Operational guidelines of all developmental schemes and citizen centric programmes should provide for a social audit mechanism.

## 35. (6.2.5) Promoting Competition

- \*a. Every Ministry/Department may undertake an immediate exercise to identify areas where the existing 'monopoly of functions' can be tempered with competition. A similar exercise may be done at the level of State Governments and local bodies. This exercise may be carried out in a time bound manner, say in one year, and a road map laid down to reduce 'monopoly' of functions. The approach should be to introduce competition along with a mechanism for regulation to ensure performance as per prescribed standards so that public interest is not compromised.
- \*b. Some Centrally Sponsored schemes could be restructured so as to provide incentives to States that take steps to promote competition in service delivery.
- \*c. All new national policies on subjects having large public interface (and amendments to existing policies on such subjects) should invariably address the issue of engendering competition.

## 36. (6.3.5) Simplifying Transactions

- \*a. There is need to bring simplification of methods to the center-stage of administrative reforms. Leaving aside specific sectoral requirements, the broad

principles of such reforms must be: adoption of 'single window' approach, minimizing hierarchical tiers, stipulating time limits for disposal etc.

- \*b. The existing Departmental Manuals and Codes should be thoroughly reviewed and simplified with a responsibility on the Head of the Department to periodically update such documents and make available soft-copies on-line and hard copies for sale. These manuals must be written in very precise terms, and phrases like 'left to the discretion of', 'as far as possible', 'suitable decision may be taken' etc should be avoided. This should be followed for all rules and regulations governing issue of permissions, licenses etc.
- \*c. A system of rewards and incentives for simplification and streamlining of procedures may be introduced in each government organization.
- \*d. The principle of 'positive silence' should generally be used, though this principle cannot be used in all cases. Wherever permissions/licenses etc are to be issued, there should be a time limit for processing of the same after which permission, if not already given, should be deemed to have been granted. However, the rules should provide that for each such case the official responsible for the delay must be proceeded against.

## 37. (6.4.7) Using Information Technology

- \*a. Each Ministry/Department/Organization of Government should draw up a plan for use of IT to improve governance. In any government process, use of Information Technology should be made only after the existing procedures have been thoroughly re-engineered.
- \*b. The Ministry of Information and Technology needs to identify certain governmental processes and then take up a project of their computerization on a nationwide scale.
- \*c. For computerization to be successful, computer knowledge of departmental officers needs to be upgraded. Similarly, the NIC needs to be trained in department specific activities, so that they could appreciate each other's view point and also ensure that technology providers understand the anatomy of each department.

## 38. (6.6.4) Integrity Pacts

- \*a. The Commission recommends encouragement of the mechanism of 'integrity pacts'. The Ministry of Finance may constitute a Task Force with representatives from Ministries of Law and Personnel to identify the type of transactions requiring such pacts and to provide for a protocol for entering into such a pact. The Task Force may, in particular, recommend whether any amendment in the existing legal framework like the Indian Contract Act, and the Prevention of Corruption Act is required to make such agreements enforceable.

## 39. (6.7.3) Reducing discretion

- \*a. All government offices having public interface should undertake a review of their activities and list out those which involve use of discretion. In all such activities, attempt should be made to eliminate discretion. Where it is not possible to do so, well-defined regulations should attempt to 'bound' the discretion. Ministries and Departments should be asked to coordinate this task in their organizations/offices and complete it within one year.
- \*b. Decision-making on important matters should be assigned to a committee rather than individuals. Care has to be exercised, however, that this practice is not resorted to when prompt decisions are required.
- \*c. State Governments should take steps on similar lines, especially in local bodies and authorities, which have maximum 'public contact'.

## 40. (6.8.7) Supervision

- \*a. The supervisory role of officers needs to be re-emphasised. It bears re-iteration that supervisory officers are primarily responsible for curbing corruption among their subordinates, and they should take all preventive measures for this purpose.
- \*b. Each supervisory officer should carefully analyze the activities in his/her organization/office, identify the activities which are vulnerable to corruption and then build up suitable preventive and vigilance measures. All major instances of loss caused to the government or to the public, by officials by their acts of omission or commission should be enquired into and responsibility fixed on the erring officer within a time-frame.

- c. In the Annual Performance Report of each officer, there should be a column where the officer should indicate the measures he took to control corruption in his office and among subordinates. The reporting officer should then give his specific comments on this.
- d. Supervisory officers who give clean certificates to subordinate corrupt officers in their Annual Performance Reports should be asked to explain their position in case the officer reported upon is charged with an offence under the Prevention of Corruption Act. In addition, the fact that they have not recorded adversely about the integrity of their subordinate corrupt officers should be recorded in their reports.
- e. Supervisory officers should ensure that all offices under them pursue a policy of suo motu disclosure of information within the ambit of the Right to Information Act.

## 41. (6.9.4) Ensuring Accessibility and Responsiveness

- \*a. Service providers should converge their activities so that all services are delivered at a common point. Such common service points could also be outsourced to an agency, which may then be given the task of pursuing citizens, requests with concerned agencies.
- \*b. Tasks, which are prone to corruption, should be split up into different activities that can be entrusted to different persons.
- \*c. Public interaction should be limited to designated officers. A 'single window front office' for provision of information and services to the citizens with a file tracking system should be set up in all government departments.

## 42. (6.10.2) Monitoring Complaints

- a. All offices having large public interface should have an online complaint tracking system. If possible, this task of complaint tracking should be outsourced.
- b. There should be an external, periodic mechanism of 'audit' of complaints in offices having large public interface.

- c. Apart from enquiring into each complaint and fixing responsibility for the lapses, if any, the complaint should also be used to analyse the systemic deficiencies so that remedial measures are taken.

#### 43. (6.12.7) Risk Management for Preventive Vigilance

- \*a. Risk profiling of jobs needs to be done in a more systematic and institutionlised manner in all government organizations.
- \*b. Risk profiling of officers should be done by a committee of 'eminent persons' after the officer has completed ten years of service, and then once in every five years. The committee should use the following inputs in coming to a conclusion:
  - (i) The performance evaluation of the reported officer.
  - (ii) A self-assessment given by the reported officer focusing on the efforts he/she has made to prevent corruption in his/her career.
  - (iii) Reports from the vigilance organization.
  - (iv) A peer evaluation to be conducted confidentially by the committee through an evaluation form.

#### 44. (6.13.2) Audit

- \*a. It should be prescribed that as soon as any major irregularity is detected or suspected by the audit team, it should be immediately taken note of by government. A suitable mechanism for this may be put in place. It shall be the responsibility of the head of the office to enquire into any such irregularity and initiate action.
- \*b. Audit teams should be imparted training in forensic audit.
- \*c. Each office should make an annual public statement regarding pending audit queries.

#### 45. (6.14.3) Proactive vigilance on corruption

- \*a. Taking proactive vigilance measures should primarily be the responsibility of the head of the office. Some possible measures are indicated in para (6.14.2).

#### 46. (6.15.2) Intelligence Gathering

- \*a. Supervisory officers should assess the integrity of his/her subordinates based on his/her handling of cases, complaints and feedback from different sources. This could then become an important input for risk profiling of officers.

#### 47. (6.16.2) Vigilance Network

- \*a. A national database containing the details of all corruption cases at all levels should be created. This database should be in the public domain. Identified authorities should be made responsible for updating the database regularly.

#### 48. (7.9). Protecting the Honest Civil Servant

- \*a. Every allegation of corruption received through complaints or from sources cultivated by the investigating agency against a public servant must be examined in depth at the initial stage itself before initiating any enquiry. Every such allegation must be analyzed to assess whether the allegation is specific, whether it is credible and whether it is verifiable. Only when an allegation meets the requirements of these criteria, should it be recommended for verification, and the verification must be taken up after obtaining approval of the competent authority. The levels of competent authorities for authorizing verifications/enquiries must be fixed in the anti-corruption agencies for different levels of suspect officers.
- \*b. In matters relating to allegations of corruption, open enquiries should not be taken up straightaway on the basis of complaints/source information. When verification/secret enquiries are approved, it should be ensured that secrecy of such verifications is maintained and the verifications are done in such a manner that neither the suspect officer nor anybody else comes to know about it. Such secrecy is essential not only to protect the reputation of innocent and honest officials but also to ensure the effectiveness of an open criminal investigation. Such secrecy of verification/enquiry will ensure that in case the allegations are found to be incorrect, the matter can be closed without anyone having come to know of it. The Inquiry / Verification Officers should be in a position to appreciate the sensitivities involved in handling allegations of corruption.

- \*c. The evaluation of the results of verification/enquiries should be done in a competent and just manner. Much injustice can occur due to faulty evaluation of the facts and the evidence collected in support of such facts. Personnel handling this task should not only be competent and honest but also impartial and imbued with a sense of justice.
- \*d. Whenever an Inquiry Officer requires to consult an expert to understand technical / complex issues, he can do so, but the essential requirement of proper application of mind has to take place at every stage to ensure that no injustice is caused to the honest and the innocent.
- \*e. Capacity building in the anti-corruption agencies should be assured through training and by associating the required experts during enquiries/ investigations. Capacity building among public servants who are expected to take commercial / financial decisions should be built through suitable training programmes.
- \*f. The supervisory officers in the investigating agencies should ensure that only those public servants are prosecuted against whom the evidence is strong.
- \*g. There should be profiling of officers. The capabilities, professional competence, integrity and reputation of every government servant must be charted out and brought on record. Before proceeding against any government servant, reference should be made to the profile of the government servant concerned.
- \*h. A special investigation unit should be attached to the proposed Lokpal (Rashtriya Lokayukta)/State Lokayuktas/Vigilance Commission, to investigate allegations of corruption against investigative agencies. This unit should be multi-disciplinary and should also investigate cases of allegations of harassment against the investigating agency. Similar units should also be set up in States.

*Annexure I(1)*

National Colloquium on  
“Ethics in Governance – Moving from Rhetoric to Results”

Organized by  
The Administrative Reforms Commission and  
The National Judicial Academy

Valedictory Address  
(02<sup>nd</sup> September, 2006)

Justice Y. K. Sabharwal,  
Chief Justice of India

Ever since independence, India has been one of the front-runners in the comity of nations that cherish principles of civil society. India sought to redeem the pledge taken in this behalf by evolving a Constitution that dreamt of establishing an egalitarian society based on principles of equality, fairness and justice, one characterized by the belief that all people should have equal political, social and economic rights. Our system of governance is founded on the lofty principle of rule of law, wherein the State power is divided amongst three chief organs, each under a duty to conduct itself in a manner that subserves the common good of all and achieve the objectives of a welfare State. The checks and balances were put as inherent safeguards designed to ensure compliance with the maxim “Be you ever so high, the law is above you”. The dicta of the Constitution is crystal clear; namely, the goal of good governance.

After having seen the way our polity works on the demands of the civil society, the Government of the day had set up, in 1966, a Commission of Inquiry that came to be known as the Administrative Reforms Commission. The recommendations of the said first Administrative Reforms Commission brought about qualitative changes in the system of governance in our country focusing, in the process, on issues as wide ranging as the structure of the administrative machinery, decentralization of powers & functions, revamp of financial management and, of course, the issue of dealing with corruption, a subject that has been the mother of all issues from times immemorial.

Much water has flown down the Ganges ever since. India has come a long way in many ways. The population of the country has multiplied geometrically; the expectations of the

people of India for social justice and guarantee of their fundamental rights today are far more acute and vociferous than ever before, in particular in matters concerning equality of status, equality before law, equality in the matter of opportunities for public employment, equitable distribution of resources and national income etc.

India is no longer an impoverished State always looking for financial help even to feed millions of its population living in inhuman conditions below poverty line. We are today a modern State having taken giant strides in the spheres of development and economic progress. Ours is an economy that is perceived even by the developed nations of the west as one on the springboard for being catapulted into the position of a global power in near future. The changes in policies and planning over the last two decades or so have contributed, to a great degree, to the successes that we have witnessed in recent times, particularly in matters concerning development and economic activity. As a result of liberalization, the role of public functionaries has gradually been undergoing a change. Strict State controls are yielding place to regulatory mechanisms. Generally speaking, a sense of synergy pervading all stakeholders has been perceptible across the board.

The flip side is that the massive economic progress notwithstanding, the fruits of development have not seen equitable distribution. In spite of Constitutional mandate through 73<sup>rd</sup> and 74<sup>th</sup> Amendments for decentralization of State power by setting up Panchayati Raj institutions, regional imbalances arising out of extraneous & unhealthy considerations of caste or creed continue to dog us. The goal of total literacy remains a distant dream. Vast rural areas continue to be denied opportunities for gainful employment, public health services, or basic amenities like electricity, potable water, transportation etc. The holders of public offices still treat the authority in their hands as one bestowing, upon them, the status of a ruler rather than one in public service. Criminalization of politics and politicization of bureaucracy firmly block the passage for attitudinal change, resulting in nepotism, non-responsive conduct, apathy and degeneration at all levels. The hydra of corruption in public life remains our constant companion.

After elapse of almost four decades since the first Administrative Reforms Commission concluded its task, it was in the fitness of things for the Government of India to constitute another Administrative Reforms Commission, particularly with the object of achieving “a pro-active, responsive, accountable, sustainable and efficient administration for the country at all levels of the Government”. The inclusion of this objective in the terms of reference only rekindles the hope that India is still alive to the goal of clean governance that we had set for ourselves through the Constitution adopted in 1950.

The areas of study by the Administrative Reforms Commission include organizational structure of the Government, refurbishing of personnel administration, strengthening financial management systems, effective administration at state, district and panchayat level, Social Capital, Trust and participative public service delivery, public order etc. But, the subject of “ethics in governance”, to my mind, is of the paramount importance since it goes to the root of other issues on the agenda of the Commission. The theme of ethical governance is closely connected with the menace of corruption in public life. There cannot be corruption and also ethical governance at the same time. Both are incompatible. Hence the imperative need for debate about effectiveness of anti-corruption measures. It is an area which concerns all the three organs of the State. It is most appropriate that the Administrative Reforms Commission has organized this National Colloquium jointly with the National Judicial Academy so as to ascertain the views of various stake-holders including the judicial functionaries.

Since we talk of ethics in governance, it is necessary to understand, may be once again, the concept of “governance” which is as old as human civilization. Ever since humanity decided to organize itself into political entities, the society comprised within each unit would evolve a system of governance through which its internal affairs and external relations could be regulated so as to afford to it the optimum benefit. In its most simplified form, the expression “Governance” simply means the process of decision-making and the process by which decisions are implemented. It entails, as described by the Human Development Report, “the exercise of power or authority – political, economic, administration or otherwise – to manage a country’s resources and affairs”.

From this perspective, it encompasses “the mechanisms, processes and situations through which citizens and groups articulate their interests, exercise their legal rights, meeting their obligations and mediate their differences”. As a necessary corollary to the above, the act of governance involves “the interface through which citizens mediate and interact with the State”. This indicates that quality of governance depends largely upon the indulgence shown by the subjects. Speaking on basis of experiences of medieval period and the times of colonial rule, in particular in the continents of Africa and Asia, some political scientists would use sarcasm in describing the system of governance in the words that I quote:

*“the marvel of all history is the patience with which men and women submit to burdens unnecessarily laid upon them by their governments”.*

The world has come afar from the times of such skepticism. The majority of the member States of the free world today are founded on the principle of “Welfare State”, run with full participation of their respective inhabitants, striving to achieve the common good and in the process affording optimum opportunity and involvement for growth of the individual so as to attain societal interests. This has led to evolution of “Good Governance”, as opposed to mere governance, as the umbrella concept embracing within a system of governance that is able to unequivocally discover the basic values of the society where standards concern economic, political and socio-cultural issues including those involving human rights, and one that follows the same through an accountable and upright administration.

Good governance is not a mirage or a utopian concept. It only signifies the way an administration ameliorates the standard of living of the members of its society by creating, and making available, the basic amenities of life; providing its people security and the opportunity to better their lot; instills hope in their hearts for a promising future; providing, on an equal & equitable basis, access to opportunities for personal growth; affording participation and capacity to influence, in the decision-making in public affairs; sustaining a responsive judicial system which dispenses justice on merits in a fair, unbiased and meaningful manner; and maintaining accountability and honesty in each wing or functionary of the Government.

Baseness and depravity in governance and public life has been a cause of unease even in advanced societies at different times in their history. In a quote that has been attributed to Abraham Lincoln, it has been said: -

*“I see in the near future a crisis approaching that unnerves me and causes me to tremble for the safety of my country. . . . . an era of corruption in high places will follow, and the money-power of the country will endeavour to prolong its reign by working upon the prejudices of the people until the wealth is aggregated in a few hands and the Republic is destroyed.”*

As per the United Nation’s Commission on Human Rights, the key attributes of good governance include transparency, responsibility, accountability, participation and responsiveness to the needs of the people. Good governance is thus linked to an enabling environment conducive to the enjoyment of Human Rights and promoting growth and sustainable human development. The world community endorses ‘rights based approach’ to development and tests the track record of each member State on its anvil. The expectation of every civil society of its Government is that it would fulfill its commitments and provide

an equitable atmosphere conducive for individual’s growth. A Government is expected to be fully accountable to its people and transparent in the employ of public resources. It enforces the Human Rights including economic, social & cultural rights and has no place for corruption of any kind since dishonesty is anathema to economic well-being as it transmits public money allocated for development unjustly into private coffers depriving the citizenry of its use for their welfare. This is the prime reason why the World Bank views good governance and anti-corruption measures as central to its poverty alleviation mission.

Mr. R. Venkataraman, former President of India said that a good Government is one that “is stable and truly representative of the majority of the people; maintains its territorial integrity and national sovereignty; accelerates economic growth and development; ensures the welfare of all sections of people; and renders justice without delay”.

Since human rights are also designed to attain human development, good government has the protection of human rights as the top most priority on its agenda. Good Governance, in nutshell, entails effective participation in public policy-making, the prevalence of the rule of law and an independent judiciary, besides a system of institutional checks & balances through horizontal and vertical separation of powers, and effective oversight agencies. Researchers at the World Bank Institute have similarly distinguished amongst the main dimensions of good governance, key attributes including political stability; Government effectiveness, which includes the quality of policy making and public service delivery; accountability; civil liberties; rule of law, which includes protection of property rights; Independence of the judiciary; and control of corruption. The views evolved in UN Economic & Social Commission for Asia & the Pacific are almost identical. It holds that “Good Governance has 8 major characteristics. It is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law. It assures that corruption is minimized, the view of minorities are taken into account and that the voices of the most vulnerable in society are heard in decision-making. It is also responsive to the present and future needs of society.”

All these expressions convey theories pregnant with time-tested concepts. The “participation” in order to be effective, needs to be informed & organized and, therefore, depends upon the availability to the subjects “freedom of association & expression” on one hand and existence of “an organized civil society” on the other. This necessarily is a pointer to “representative democracy”. The attribute of “rule of law” inheres as prerequisites “fair legal frameworks” that are enforced impartially and particularly “full protection of human rights”, especially of

the vulnerable sections of the society. The factor of “transparency” requires that information is freely available and the decisions are taken or enforced in a manner that adheres to the rules and regulations. The attribute of “responsiveness” necessitates that all public institutions and their processes strive “to serve all stake holders within a reasonable time frame”.

Good Governance depends upon endeavour to work out a broad consensus in the society so as to achieve sustainable human development. This factor again underscores the significance of representative democracy as the form of Government best suited to provide good governance. Such form of Government only can claim inclusiveness and assure an environment that offers equity and optimum opportunities for improvement and growth. Of course, the output would depend upon the efficiency in the sustainable use of resources that are available. The goal of good governance, however, would elude a society if its system of governance does not have in place the mechanism to hold the persons wielding State power accountable.

Democracy, liberty and the rule of law together represent the troika that is universally accepted now as the index of a civil society. Democracy signifies a government of, by and for the people. The protection of individual liberties follows the notion of democracy as a natural corollary. This entails the espousal of a methodical configuration of laws by which society might be regulated and different conflicting interests can be harmonized to the fullest extent. This is why “the rule of law” is indispensable. It envisages the pre-eminence of law as opposed to anarchy or capricious dictates. It involves equal accountability of all before the law irrespective of high or low status.

Democracy has been evolved through centuries of experience amongst the people, who care for human person, dignity & rights as the best and most acceptable form of good governance. It is a concept that occasions the idea that all citizens have a right to participate in the decision-making processes that lead to adoption of policies that are applicable to the societies. It also means that there are some limits on majority decision-making and, hence the inevitability of certain basic rights being protected. It rests on maintaining a necessary equilibrium between the numerous competing interests, demands, constrains and compulsions that exist in any civic society eager for development.

Thus, the key principles that constitute the foundations of a modern democracy wedded to the concept of “welfare state” and that of the theory of “good governance” are common; namely full participation of all stake holders in the decision-making process ensured through free and fair elections; guarantee of basic rights conducive for growth of individual & society

including freedom of speech and press, equality before law and of opportunities; rule of law and independent & effective judiciary. From this perspective, “true democracy” is synonymous to “good governance”.

The Constitution makers in India were wary of the caution in the words: “When the legislative and executive powers are united in the same person or body, there cannot be liberty... ..where the power of judging joined with the legislature, the life and liberty of the subject would be exposed to arbitrary control”, and further, “where the power of judging joined to the executive power, the judge might behave with all the violence of an oppressor”.

Thus, in order to ensure that the basic structure of the Constitution is not eroded; that the Fundamental Rights are not abridged; that the rule of law always prevails; and that the Constitution remained “supreme lex”, the fundamental and paramount law of the land, the concept of judicial review has been planted as the instrumentality and the Constitution has been declared to be the touch stone of validity of all acts of each organ. Further, in order to guarantee that the rule of law would inure to, and for, everyone and the promises made by the Constitution would not remain mere paper promises, the Constitution makers made provisions for independence of the judiciary.

One of the most important principles of just democratic governance is the presence of constitutional limits on the extent of government power. Such limits include periodic elections, guarantees of civil rights, and an independent judiciary, which allows citizens to seek protection of their rights, and redress against government actions. These limits help render branches of government accountable to each other and to the people. An independent judiciary is important for preserving the rule of law and is, therefore, most important facet of good governance.

But then, it takes more than strong courts to ensure that a nation’s laws are enforced constantly and fairly. The law must willingly bind all branches of government. The rule of law also is the basis for business formation and the establishment of capital markets, which underpin economic development. Citizens, directly or through their elected representatives have to be involved in all levels of lawmaking. Participation in this process gives people a stake in the law and confidence that the law will preserve their personal and property rights.

The judicial system has an important role to play ultimately in ensuring better public governance. There may be introduced a plethora of regulations, rules and procedures. But

when disputes arise, they have to be settled in a court of law. There could be, of course, alternative dispute resolution mechanism like arbitration. Ordinarily, however, it is the judiciary that must first step in and ensure that healthy practices prevail.

Going by the agenda of this National Colloquium, I am confident that the scope for corruption and its overall impact on the governance in various aspects of the human activity have already been deliberated upon at length by the delegates over these two days. It is a matter of universal acknowledgement that corruption renders governance into a state of “non governance”. It would be fruitless to narrate, once again, the instances of corruption in different walks of public life in our country. The stories of defilement at all levels in our institutions, public or private, float around at regular intervals. Certain overzealous and highly charged sections of the media have made it a matter of routine for sting operations to lead to exposé of corrupt practices in almost each rung of the administrative hierarchy that governs us. I must hasten to add here that the methodology adopted in such sting operations at times is subject matter of ongoing debate. Be that as it may, this by itself can never condone the misdemeanor that has been bared to the public glare by such efforts adding to the disgust and revulsion felt by law-abiding citizenry. The cases of corruption by public figures are not limited to taking of paltry financial gains as illegal gratification for doing or abstaining from doing the official duties. They would extend to brazen abuse of office or authority for unjust enrichment of self or of the kith and kin, personal gain rather than financial rules dictating the award of public contracts or state patronage, favouritism on considerations of caste, creed etc., use of discretion for extraneous considerations, use of public sector enterprises as personal chattel, protection of the corrupt by their superiors thereby indicating, almost openly, community of design and so on and so forth.

It is perhaps not possible to draw up a comprehensive list of areas of activity that give rise to scope for corruption. The discretionary powers with which public authorities are vested by the administrative rules are perhaps the biggest source of unethical practices. It is not that the entire work force in the civil services stands compromised or has sold its conscience on account of extraneous influences. The difficulty stems from the fact that those who refuse to bow down to the dictates of unscrupulous elements, out to abuse the authority of the public office to secure a favourable action, are easily marginalized while such public servants as treat the authority vested in them akin to a saleable commodity manipulate the process so that they are able to oblige and amuse the powers-that-be and, in the bargain, shift their career graph into fast track mode. No wonder, in this scenario, “transfer industry” mushrooms and functions as a highly productive unit in different Government departments. No wonder,

an unholy politician-criminal-bureaucrat nexus evolves and thrives. No wonder, certain institutions in our polity are not stirred to function unless proper palms are greased.

While we all know that cancer of corruption has seeped into the blood stream of our polity, the million dollar question that stares us in the face is what can be done other than what we have been doing in the name of combating this evil all along. If a part of human body suffers from gangrene, doctors might advise surgery. When gangrene spreads to all nooks and corners, probably surgical amputation cannot be the mode of management. The punitive methods in the form of criminal law on corruption and disciplinary action for breach of conduct rules of the public servants on one hand and preventive measures in the form of pro-active vigilance on the other may need to be strengthened and the loopholes plugged. But, to my mind, this may not suffice. As history shows, unscrupulous elements have always been one step ahead of the law. We need to do something over and above law enforcement.

The predicament that we face today reminds me of a Chapter from Mahatma Gandhi’s autobiography “My Experiments with Truth”. Bapu had established, in 1911, an institution that became famous by the name of Tolstoy Farm in South Africa. Taking it to be his filial patrimonial duty to organize education for the children of the inhabitants at the farm, he made certain arrangements leading by example, as always, himself assuming the role of a schoolmaster. He was confronted with the issue as to what kind of education would be appropriate for the young children taken under his wings. Expressing his thought process on the subject, the foremost of which mandated that the instruction must lead to spiritual growth of the young minds, he conceived a teacher as a person who would represent an “eternal object lesson” for his pupils. He expounded on this further in the words that I quote: -

*“It would be idle for me, if I were a liar, to teach boys to tell the truth. A coward teacher would never succeed in making his boys valiant, and a stranger to self-restraint could never teach his pupils the value of self-restraint”.*

It has been said in Brihadaranyka Upanishad:-

*“You are what your deep, driving desire is.  
As your desire is, so is your will.  
As your will is, so is your deed.  
As your deed is, so is your destiny.”*

In Ramayana, Maharshi Valmiki has underscored a very basic principle of governance in simple words “*Yatha Raja Tatha Praja*”. The message is loud and clear. The general erosion in values, ethics morality or integrity that is seen in a society only mirrors the character of those who run the affairs of that society.

What I am trying to lay stress on is that if any paradigm change has to come in the matter of ethics in governance, it has to come from the top in every section of our society. Like charity, may be more than that, sense of morality also must begin from the door of the leader who preaches it. When those wielding power of governance, whichever wing of the State they may belong to, set about standardizing norms for conduct, they must first do so for themselves.

Government servants are controlled by Code of Conduct that is a part and parcel of their service rules, infraction of which is expected to result in disciplinary action. Almost every Government department has devised such a Code for its purposes, so much so that there seems a plethora of such Codes prevailing. On the other hand, the penal law called the Prevention of Corruption Act takes care of the role of criminal justice system in dealing with the hazard.

The common features of the Code of Conduct for different categories of Government servants include expectation that he shall maintain absolute integrity; devotion to duty; do nothing which is unbecoming of a public office held by him; render his best judgment in the performance of his official duties; be prompt and courteous; not involve himself in acts of moral turpitude; not take part in party politics; not be associated with activities that are pre-judicial to the interests of the sovereignty and integrity of India or public order; not to engage himself in interviews with media, except with the lawful authority of his superiors; not divulge official information which has been entrusted to him in confidence; not accept pecuniary advantage, in particular, from those with whom he is involved in official duties; not to engage himself in private trade or business while holding public office; not to indulge in alcoholism or gambling; to manage his financial affairs in such a manner that he is always free from indebtedness and not to involve himself in transactions relating to property with persons having official dealings with him.

The general impression that seems to prevail all over is that these disciplinary rules and the criminal law are meant to deal with misconduct in the nature of corruption by Government servants only. Every time a political leader is caught on the wrong foot, defences like “politically motivated” apart, a debate commences as to what is the import of the expression

“public servant” for whose control these measures are designed. The jurisdiction to deal with corrupt elements under the conduct rules is generally seen to be invoked with great hesitation. A tendency seems to prevail to brush the scandals of corruption under the carpet, almost giving impression that the authorities are more interested in shielding the corrupt rather than cleansing the system. The statutory provisions of mandatory sanction meant to protect the honest public servants against malafide actions are used as an umbrella to save *ex facie* guilty public servants from criminal prosecution. The debate on the propriety and justification of “Single Directive” continues with the issue shuttling between different arms of the State. There is a school of thought that would also hold Article 311 responsible for lack of sufficient and timely action in this area. The political class has always laboured under the belief that no code of ethics binds them in their conduct vis-à-vis the people in whose service they claim to be active.

In May 2000, the then Speaker of Lok Sabha had constituted a Parliamentary Committee on Ethics. The said Committee on Ethics had submitted its First Report on 31<sup>st</sup> August 2001. The Report indicates that the Committee was of the view that norms of ethical behaviour for members of the legislature had been “adequately provided for” in the rules & procedure, directions by the Speaker and in the conventions which have evolved over the years on the basis of recommendations made by various Parliamentary Committees. The Committee was of the view that remedy with regard to unethical behaviour on the part of the legislators lay in the strict enforcement of the existing norms.

Apart from this, the Committee recommended certain additional norms that it chose to call as “general ethical principles”. The thrust of these “general ethical principles” recommended by the Committee was that the legislators must utilize their position to advance general well-being of the people and in case of conflict between their personal interest and the public interest, they must resolve it so that personal interests are subordinate to the duty of their public office. It was recommended that conflict between private financial interests should not result in public interest being jeopardized and the legislators must maintain high standards of morality, dignity, decency and values in public life and keep uppermost in their minds, the fundamental duties listed in Part IV A of the Constitution.

The Report itself indicated that the enforcement of the said general ethical principles is a slave of the discretion of the legislatures’ Committee of Privileges. It is common knowledge that the instances of such Committees actually finding legislators guilty of misdemeanor have been too scant to be of real deterrent value. We cannot feed on mere platitudes.

In the face of prevalent circumstances, some of which have been highlighted by me, our efforts at combating corruption suffer for three basic reasons: -

- (i) Absence of a basic or minimal code of conduct that applies uniformly to every holder of public office or authority, irrespective of the wing of the State to which he belongs;
- (ii) A procedure that offers escape routes, at every step of the way, to the delinquent; and
- (iii) Lack of will or initiative on the part of authorities in catching the bull by the horns.

India is not alone in the quest for clean governance. The then Prime Minister of United Kingdom had set up a Committee on Standards in Public Life in October 1994 which came to be known as the 'Nolan Committee'. The Nolan Committee submitted its first report in May 1995 focusing its attention at that time on the code of conduct for members of Parliament, Ministers and Civil Servants etc. as this, in the views of the Committee, was a matter of "the greatest public concern". The Committee examined the issues with a view to suggest adoption of measures to reinforce public confidence in the holders of public offices. It took note of cases of bribery, abuse of office, impropriety, rewards for past or future favours, states largesse etc. It observed that instances indicating slackness in observance and enforcement of high standards on the part of certain public figures, whose cases get publicized in the media, generate widespread suspicion that more misconduct occurs than comes to be revealed to the public gaze. The Committee was of the view that if corrective measures were not promptly taken, there was a danger that anxiety and suspicion would give way to disillusionment and cynicism. The Committee evolved seven general principles of conduct that underpin public life, the maintenance of which can restore the public confidence.

To my mind, these seven general principles are of great merit and significance for our purposes. They include the following: -

1. **Selflessness:**  
*Simply put, this means holders of public offices are expected to conduct themselves such that they subserve public interest, as against interest of the self.*

2. **Integrity:**  
*The concept is well known. A public authority must insulate itself from extraneous influences in matters concerning official duties.*
3. **Objectivity:**  
*The duties of public office vest, in the holder, authority to take decisions including making appointments, awarding contracts, recommending benefits etc. The choices cannot be allowed to be made on any criteria other than merit. The decisions must be based on reasons free from the vice of caprice. The executive can take a leaf out of the book of judiciary by suo motu supply of reasons for every action. The requirement of recording reasons is by itself a great safeguard that inhibits the decision maker from being subjective.*
4. **Accountability:**  
*Any public office is an office of trust. Therefore, public figure exercising any state function, and this includes members of the legislature, is accountable for all actions taken in performance of the functions of that office. It naturally flows from this that every act of commission or omission has to yield to scrutiny, whether by way of internal or external audit mechanism. I am using the expression "audit" not in the narrow sense of audit of accounts but appraisal of the causes or consequences of every state action.*
5. **Openness:**  
*There is no better disinfectant than sunlight. Transparency has to be the mantra of all official acts. Judiciary follows this scrupulously by conducting its proceedings in the open. Transparency brings along inherent checks. The introduction of "Right to Information" regime has indeed set the administrative set up in our country on the right course.*
6. **Honesty:**  
*In Judiciary, we follow the rule that justice is not only to be done but must be seen to be done. The rules of natural justice that govern judicial ethics require essentially that a person cannot be a Judge in his own cause. It is a travesty of the concept of honesty if an administrative authority is taking decisions in matters which involve private interests of those closely connected with the authority. In this view, it is essential that holders of public office must be obliged to declare their private interests so that they can always be held accountable in case there has been any conflict involving their public duties. This also means the assets and liabilities of public functionaries must be a matter in public domain. The mandatory declaration at the time of entry in public office and periodically, thereafter, would only ensure the kind of probity we would like to be in place.*

7. **Leadership:**

*This principle is articulation of the same idea as I referred in the context of Mahatma Gandhi's Experiments with Truth. A true leader will always lead by own example. If a leader is honest, sincere and committed to the task assigned to him, the vibes created percolate down the hierarchy cleansing the system that he controls.*

I referred to politicization of bureaucracy and criminalization of politics. These two phenomenon together seem to constitute the major cause of all that ails in our polity today. Vested interests tend to control State actions by offering pelf or using arm-twisting tactics through the aegis of their henchmen in political executive, which acts through compromised sections of the bureaucracy. It is common knowledge that civil services consist of various lobby groups. Every time there is a change in the political climate of a State the group of bureaucrats loyal to the new political party in power takes over positions of authority at appropriate levels. The undue and unholy loyalty to political masters reflects in the decisions taken by such civil servants. It is commonplace to see senior bureaucrats vying with each other for political patronage, offices of profit, rewards, awards and post-retiral settlement, at times in constitutional authoritative positions. Take for example, the eminent office of Governor. It was conceived in the Constitution as one to be filled by a detached non-partisan person. Sarkaria Commission had, in fact, recommended that an aspirant for such a position should be a person who has not taken too great a part in politics generally and particularly in the recent past. In practice, however, the office of Governor is connected by a revolving door with two passages, one leading to civil services and other to active politics. No wonder, senior loyal bureaucrats assume responsibilities of governorship immediately after laying down the offices of civil servant or are ready to enter politics by way of nomination to the legislatures.

Judiciary follows the norm of certain restrictions against active legal practice after one has demitted judicial office. This serves public interest in many ways including insulation of the judicial functionary from offers of future patronage. The principle needs to be extended and made part of a universal Code of Conduct prohibiting joining of active politics by civil servants and those holding constitutional positions after superannuating, for sufficiently long compulsory waiting period.

Code of Conduct breach whereof entails disciplinary action on one hand and penal law governing corruption in public life, dealt with under the criminal justice administration, form two concentric circles. The authorities that deal with the two processes necessarily differ, the procedure applicable, the standard of proof and the consequences also being distinct. Yet, the common feature that runs through the rules or law governing both spheres

arises out of a common legitimate expectation of corruption free governance. The demands of office connected with various services that are comprised in the State may be distinct. For example, the expectation from holders of judicial offices for fairness and non-partisan judgment are perhaps of the highest order. This is why, unlike in the case of civil services, members of the judiciary are generally expected to be asocial.

But the fact remains that there are certain minimum standards of ethics and proper conduct in public life that can be applied to every person connected with governance or public duties, right from the inferior most up to the highest authority of the land. It has perhaps become necessary to evolve such a minimum Code of Conduct for universal application across the board for holder of every public office, breach whereof should be construed as indiscipline for purposes of control under the service jurisprudence on one hand and an offence for penal consequences to follow, through the mechanism of criminal justice apparatus on the other.

The difficulty with our system is that we tend to engage ourselves more in debate than real action. One example that I can quote in this context is the subject of police reforms, in particular reforms concerning accountability of police forces to the public at large and to rule of law on one hand and insulation of investigative police agencies from political interference on the other. Reforms have been suggested on almost identical lines, over the last three decades, by various Commissions and Committees. Yet, we continue to be governed by Police Act that was given to us by the aliens in 1861, in the initial years of British Rule in India.

In the same context, I would like to touch upon one of the several deficient provisions of the criminal law on corruption. The law provides for the assets acquired as a result of corruption to be attached, impounded or forfeited. Courtesy the Criminal Law Amendment Ordinance of 1944 vintage, this process is governed by civil procedure. The investigating or prosecuting agencies find the process of attachment of illicit assets of corrupt public servant too cumbersome. In cases where this process is initiated, it runs parallel to the criminal proceedings. This creates further difficulties for the criminal law apparatus. The public servant, as the defendant in each of these matters, derives undue advantage by taking resort to dilatory tactics. Should the concerned department also initiate disciplinary proceedings under the conduct rules, the public servant actually starts enjoying at the cost of the exchequer. He would delay each proceeding taking the excuse of pendency of the other. And when the proceedings reach the stage of recording of evidence, he would add to the confusion by referring to contradictions in the evidence of the common set of witnesses at different stages.

Under the existing rules of evidence, this pushes the prosecuting agency against the wall.

In 1996, Supreme Court pointed out the inadequacy of the anti-corruption measures in the case of **Delhi Development Authority v. Skipper Construction Co. (P) Ltd** [(1996) 4 SCC 622]. The Court recommended enactment of a SAFEMA like law that “should place the burden of proving that the attached properties were not acquired with the aid of monies/properties received in the course of corrupt deals upon the holder of that property”.

The Law Commission of India took the above suggestion of the Supreme Court seriously and suggested in its 166<sup>th</sup> report the enactment of a special law, also taking pains of drafting its Bill called the “Corrupt Public Servants (Forfeiture of Property) Bill” which was sent to the Government of India in February 1999. We still await the outcome of the said proposal.

The right of silence on the part of an accused facing criminal charge needs reconsideration, in certain cases, balancing genuine & bonafide rights of accused on one hand and quest for truth on the other. While there is a good case for need to protect, and possibly reward, honest public servants, there is indeed a greater need to punish the black sheep since it is they who seem to be gradually taking on the mantle of role models. Deterrent punishment for the corrupt, through proceedings that are expeditious, is an object in which the judiciary and the executive will have to play a concerted role.

No reforms in governance can ever be complete unless the measures also take into account the expectations of the people at large for judicial reforms. It is common knowledge that government is the major litigant in each rung of the judicial hierarchy. Therefore, if judicial reforms lead to expeditious disposal of cases, the Government would be the main beneficiary. Suggestions for appropriate mechanism to review the position taken by the Government in disputes coming before the courts of law have been made from time to time. The object of such a review mechanism is to curtail unnecessary and avoidable litigation. Unfortunately, these suggestions have always received half-hearted response. The State can ill-afford wastage of resources by engaging itself in legal disputes that are not going to serve public interest. A sense of accountability has to be brought about by sensitizing the officialdom at appropriate levels so that there is periodic appraisal of each ongoing litigation involving Government and irresponsible contest or prosecution of cases is not resorted to.

Judicial reforms are part of the process of legal reforms. The legislature has introduced in recent times a number of amendments in procedural laws governing the courts of law. While dealing with issues concerning new measures in the Code of Civil Procedure, the

Supreme Court in the case of **Salem Advocate Bar Association (II) v. Union of India**, (2005) 6 SCC 344, mooted certain further reforms to make the right to fair, speedy and inexpensive justice a real one.

One of the areas on which the Court focused in the case of **Salem Advocate Bar Association** was the apathetic attitude of administrators facing the prospect of litigation. The court has pointed out that a more responsive and responsible action in the wake of notice u/s 80 CPC can save the exchequer from wastage of public money. The following observations of the Court need reiteration:-

*“38. ... Wherever the statutory provision requires service of notice as a condition precedent for filing of suit and prescribed period therefor, it is not only necessary for the Governments or departments or other statutory bodies to send a reply to such a notice but it is further necessary to properly deal with all material points and issues raised in the notice. The Governments, government departments or statutory authorities are defendants in a large number of suits pending in various courts in the country. Judicial notice can be taken of the fact that in a large number of cases either the notice is not replied to or in the few cases where a reply is sent, it is generally vague and evasive. The result is that the object underlying Section 80 of the Code and similar provisions gets defeated. It not only gives rise to avoidable litigation but also results in heavy expenses and costs to the exchequer as well. A proper reply can result in reduction of litigation between the State and the citizens. In case a proper reply is sent either the claim in the notice may be admitted or the area of controversy curtailed or the citizen may be satisfied on knowing the stand of the State. There is no accountability in the Government, Central or State or the statutory authorities in violating the spirit and object of Section 80.*

*39. These provisions cast an implied duty on all Governments and States and statutory authorities concerned to send appropriate reply to such notices. Having regard to the existing state of affairs, we direct all Governments, Central or State or other authorities concerned, whenever any statute requires service of notice as a condition precedent for filing of suit or other proceedings against it, to nominate, within a period of three months, an officer who shall be made responsible to ensure that replies to notices under Section 80 or similar provisions are sent within the period stipulated in a particular legislation. The replies shall be sent after due application of mind. Despite such nomination, if the court finds that either the notice has not been replied to or the reply is evasive and vague and has been sent without proper application of mind, the court shall ordinarily award heavy costs against the Government and direct it to take appropriate action against the officer concerned including recovery of costs from him”.*

The Court has suggested, amongst others, examination by the Central Government of the issue of making adequate provision of subordinate courts commensurate with the needs of the times, and making it obligatory for “judicial impact assessment” to be made whenever any such legislation is introduced as has the possibility of generating new litigation and to make budgetary provision for providing judicial infrastructure to meet its challenge. Since the amended CPC lays stress on alternative dispute resolution methods, the Central Government has been called upon by the Court to examine the suggestion that the expenditure on compulsory reference of cases to mediation or conciliation ought to be borne by the State. A positive response from the Government would be in line with its constitutional obligation under Articles 14, 21, 37, 38, 39A and 247.

I have already touched upon the abuse of the legal provisions regarding sanction for prosecution under Prevention of Corruption Act for purposes of shielding the corrupt. Pursuant to directions of the Supreme Court in the case of **Vineet Narain [(1998) 1 SCC 226]**, the Central Vigilance Commission has been accorded statutory status. It is the apex authority on the subject of vigilance in the country. If we are serious on the question of administrative reforms leading to ethics in governance, it is high time CVC is vested with the authority to consider the question of sanction for prosecution in a manner that is final and binding on one and all. Keeping it as an authority whose recommendations can be flouted with immunity renders it to the position of a white elephant. Since it is a high powered body with special expertise in the subject of vigilance, its role rather needs to be expanded so as to arm it with the power to monitor the investigation and prosecution of cases of corruption involving the high functionaries, at least such cases as are investigated by CBI.

Last but not the least, optimism being one of my weaknesses, I am still hopeful that we shall see, within our life time, the institution of Lok Pal being put in position as that would be the mother of all reforms for dealing with unscrupulous elements in the high echelons of our system of governance and without which the proper results can never be attained. Such Ombudsman, however, will have to be a truly independent, autonomous and self-sustaining authority which is equipped with powers of investigation, prosecution and necessary follow-up.

Any machinery is as good as the man working it. The widespread corruption that we notice all around only mirrors the general erosion of morality and ethics in our society. H.M. Seervai, in his address as part of Sir Chimanlal Setalvad Lectures series in 1970, had observed: -

*“The ultimate guarantee against abuse of power, legislature, judicial and executive, lies in the political and legal safeguards against such abuse, in a vigilant public opinion, and in the sense of justice in the people generally.”*

If we want to reform, attitudinal reforms will have to be first brought about even in our private lives. I would conclude by borrowing the words of Andre Beteille. He said: -

*“A Constitution may indicate the direction in which we are to move, but the social structure will decide how far we are able to move and at what pace”.*

**Speech of Shri M Veerappa Moily, Chairman,  
Second Administrative Reforms Commission on the occasion of the  
National Colloquium on  
Ethics and Governance – Moving from Rhetoric to Results.  
September 1, 2006**

Respected Justice J S Verma, Honourable Shri Suresh Pachouri, the Minister of State for Parliamentary Affairs and Personnel, Public Grievances & Pensions, Government of India, invited dignitaries, distinguished participants, the members of the Second Administrative Reforms Commission, ladies and gentlemen,

I am happy to be here today, addressing this general session as a part of the National Colloquium on Ethics in Governance - Moving from Rhetoric to Results. To me, the title of the subject that the Colloquium addresses today and tomorrow is very apposite. We have talked ad nauseam about corruption: its causes and pervasiveness, its costs and consequences. Even at the risk of sounding self-deprecating, I should admit that our discourses on corruption, profound and moving as they are, have been long on precept and short on actionability. Time has come for us to make the necessary transition from rhetoric to results.

But, let me point out one thing that the rhetoric on corruption did: it produced some useful metaphors. There is one that I particularly cherish. It is where corruption is portrayed using the symbolism of serious illness – as cancer. Something that spreads relentlessly from official to official, department to department, undermining institution after institution until the whole system perishes. These illness metaphors are stark and forbidding, but they do deliver an important message. Corruption can be a frightening problem in which governance and social conditions deteriorate irreversibly and venality takes the centre stage. The conclusion is inescapable: corruption must be eradicated so that the system can be nursed back to health, or, even better, it needs to be stopped before the primary graduates to the secondary.

Corruption is not a recent phenomenon. It has been with us through several centuries. Even at the time Kautilya wrote Arthashastra, commenting on the political economy of the Maurya era, he had said,

- Just as it is not possible not to taste honey or poison placed on the surface of the tongue, even so it is not possible for one dealing with the money of the king not to taste the money in however small a quantity.

- Just as fish moving inside water cannot be known when drinking water, even so officers appointed for carrying out works cannot be known when appropriating money.
- It is possible to know even the path of birds flying in the sky, but not the ways of officers moving with their intentions concealed.
- And he should make those who have amassed (money wrongfully) yield it up and should change them in (their) works, so that they do not consume (the king's) property or disgorge what is consumed.
- But those who do not consume (the king's) goods and increase them in just ways, should be made permanent in their offices, being devoted to what is agreeable and permanent to the king.

The fact remains that the costs and consequences of corruption have been debilitating. Information on the harm that corruption does to the country's growth agenda, its economy, and the polity is not known because data on corruption is difficult to obtain. Luckily for us, research is now possible because of compilation of data in the form of multinational corruption index. This is to provide information to international companies trying to decide which countries to invest in. These data sets are based on the impressions of people knowledgeable about the countries concerned such as investors, bankers, and financial analysts.

The most comprehensive multinational corruption index is prepared by the Transparency International. The Corruption Perception Index (CPI) prepared by the Transparency International, which ranks 85 countries, is a 'poll of polls', drawing upon numerous distinct surveys of expert and general public views of the extent of corruption, it reflects the perceptions of business people who participate in these surveys. Such data may not perhaps be as well-documented or replicable as social scientists would like them to be, but they are the best macrolevel data available in a difficult area such as corruption.

Using data sets of such multinational corruption index, a number of recent cross-country studies are now in a position to establish the macroeconomic impact of corruption. For example, Paolo Mauro's study indicates that high levels of corruption are associated with lower levels of investment as a share of the GDP in a cross-section of the countries studied. Mauro demonstrates that countries with high levels of corruption invest very little in human capital and in particular, investment in education is only minimal. This is because education

provides fewer opportunities for corruption when compared to other types of more capital-intensive public spending such as infrastructure and defence. Knack and Keefer's study shows that high levels of corruption mean reduced investment, a lack of credible guarantees of property and contract rights, and poor institutionalization of the government. A study by Shang-Jin Wei linking corruption to international investment proves that corruption acts like a tax on foreign direct investment. While a one point increase in the tax rate reduces FDI by 5 per cent, an increase in the corruption level from that of Singapore to Mexico is the equivalent of 32 percentage point increase in the tax rate. In another study, a one standard deviation (2.4) improvement in the corruption index is associated with over a 4-percentage point increase in the investment rate and half a percentage increase in the annual growth rate of per capita GDP.

There are also a number of studies, which tell us about the health of a society, which experiences high levels of corruption. Robert Cooter's study shows that a society with high levels of corruption, has low levels of social interaction and weaknesses of the rule of law. Cooter, using game theory, shows that where people freely interact on a repeated basis, they are more likely to form strong and legitimate norms. According to Cooter, survey and interview research on popular conceptions of right and wrong suggests that most citizens judge civil servants by social norms learned in these everyday interactions. Cooter also points out that in countries which experience low corruption, a range of social groups – trade and professional associations, or community groups – have functioned as 'law merchants', and they have succeeded in promulgating codes of good practice and have been in a position to impose anti-corruption sanctions.

Two studies by Isham, Kaufmann, and Pritchett demonstrate that societies with high levels of corruption have low levels of mass participation in politics and weak protection of civil liberties. The study by Easterly and Levine establishes that a society with large incidence of corruption is characterized by deep ethnic divisions and conflicts.

In other words, these studies establish how corruption is closely correlated to reduced growth, reduced investment, and poor economic competitiveness. In essence, corruption hurts the economy. The studies also tell us how in the longer run, societies with high levels of corruption have low levels of social interaction and weaknesses of the rule of law, low educational attainment, low levels of participation in politics, weak protection of civil liberties, and deep ethnic divisions and conflicts.

On the whole, corruption, apart from being worrisome for those who have to pay bribes, has more fundamental implications for the economy and the society. High levels of corruption hurt the economy and make the society very sick. These cross-country studies provide sickness metaphors, and they need to be taken seriously.

What has been done to combat corruption? Traditionally, it has been done by using control systems.

#### ***Control System***

Control systems are mechanisms designed to detect, punish and curtail corruption. Control systems can be of several types: the penalty rate, internal controls, external controls, and social control.

#### ***Penalty***

The instrument most commonly used is penalty. Penalties - typically of a legal nature - can range from prison sentences to termination of employment to recovery of assets acquired illegitimately. For example, the Prevention of Corruption Act in Singapore stipulates penalty for corruption at imprisonment for five years and a fine of S\$ 10,000. The Act further provides that a civil servant, against whom charge of corruption is proved, has to pay back the amount of bribe in addition to the judicial penalty. A separate legislation, the Corruption (Confiscation of Benefits) Act, 1989, empowers the Corrupt Practices Investigation Bureau to confiscate gains made by corruption.

Most countries provide high penalties for corruption. Thailand is a case in point. The Thai Penal Code prescribes life imprisonment or death penalty for an offender convicted of corruption. In fact, punishment in the Thai penal system is significantly higher than the punishment provided for similar offences in other countries. Yet, Thailand figures among countries with the highest level of corruption.

Stringency of penalty may not necessarily provide the needed deterrence. What is important is that penalties should be capable of being implemented. At a minimum, corruption, if proved, should be penalized with termination of government employment. Where employment in the civil service is highly regarded and brings prestige, dismissal means disgrace for the entire family, and therefore, members of the family have an incentive to discourage corruption. A stipulation prohibiting employment of such civil servants in the private sector makes the cost of indulging in corruption even higher.

Korea has made such stipulations. The General Administrative Reform Movement of 1975 prohibited the private sector from reemploying civil servants who had been dismissed on charges of corruption. The Movement even went a step further. A person who initially recommended the case of the official who was later found to be guilty of corruption, was also dismissed, and prohibition in respect of reemployment was extended to the sons and grandsons of a person found guilty of corruption.

In fairness, penalties should be directed at not merely those who receive bribes but also those who pay them. This, unfortunately, is not a common practice, and most countries have been shy of punishing those who pay bribes. It is only in the United States that the Foreign Corrupt Practices Act imposes sanctions against multinational companies offering bribes.

#### *Internal Control Systems*

All departments have a Chief Vigilance Officer assisted by Vigilance Officers down the line to handle complaints of corruption and disciplinary proceedings. We have the Central Vigilance Commission to advise the Central Government in respect of all matters pertaining to maintenance of integrity in administration. The CBI collects information, conducts checks and searches, and takes necessary action to bring the corrupt to book. But the fact remains that the combined efforts of all these anti-corruption bodies have not been able to rise the stakes for corruption.

At the level of the State Governments, similar vigilance and anti-corruption organizations exist, although the nature and staffing of these organizations vary between and across State Governments. While some states have vigilance commissions, others have anti-corruption bureaus as a part of the police department.

The State Vigilance Commissions, wherever they exist, are patterned on the Central Vigilance Commission and headed by a person with the status of a Judge of the High Court. The State Vigilance Commissions are empowered to examine complaints against corrupt civil servants. In conducting investigations, State Vigilance Commissions are assisted by police officers on deputation from the State Governments.

Some State Governments have set up the institution of Lokayukta, an anti-corruption institution which is legally independent of the executive. Although the institution of Lokayukta was set up following the recommendation of the First Administrative Reforms Commission, there is a great deal of variation in the structure of the institution across states.

In general, there is an impression that the institution of the Lokayukta has not been given the degree of independence, which is necessary for it to function effectively as an autonomous anti-corruption body. The common refrain in the complaints of the Lokayuktas of various states is that they do not get sufficient information from the government departments which would enable them to function effectively.

The internal control system has not worked in India. This is for several reasons. First, there is collusion at work at all levels of the government and a sharing of the gains from corruption. As a result, there have been very few cases in which corruption is reported, and even in those few cases, there are the usual delays and soft actions, which characterize the process of investigation in India.

Second, investigating and prosecuting agencies are not independent of the executive government. In other words, the working of the investigative and prosecuting agencies has not been insulated from possible interference. A regular vehicle of interference has been power of the executive government to appoint and transfer key functionaries of the investigative agencies. The result, unenviably, has been lax investigation and prosecution.

Third, even in the few cases which end up being investigated, there is wilful sabotage of the investigation process. There is no mechanism to monitor the investigation process by a non-partisan, professional body like the Director of Prosecutions in the United Kingdom or the Special Independent Council in the United States.

Fourth, the final decision to proceed against the corrupt civil servant criminally or punish him departmentally, rests with the executive government. Even the autonomous anti-corruption bodies like the Lokayukta headed by individuals with judicial background, can only recommend prosecution or departmental action for the consideration of the executive government. And in such cases, the collusive network ensures that the decision goes in favour of the corrupt civil servant.

Fifth, the procedural snarls involved in the proceedings are just too many. For example, there are twelve stages in a departmental action. These stages start with the preparation of a definite charge sheet and end with the imposition of a penalty. The numerous stages are procedurally necessary because of the constitutional safeguards guaranteed to a civil servant. In fact, the safeguards provided to a civil servant in India are more demanding than in most other countries. The constitutional safeguards have generally worked in favour of the corrupt.

On the whole, the internal control system in India, impressive as it is on paper, has not worked. There is a proverb in Bengali that neatly paraphrases the current health of the internal control system in India: 'If there are ghosts in the mustard seeds, how will the same mustard seeds exorcise the ghosts?'

#### *External Control System*

The external control system acts as a formal mechanism of restraint, and in an administration that provides for separation of powers, checks and balances are exercised by other branches of the government. In India, an external control system is fully in place – it consists of an external audit and an independent judiciary.

#### *Audit*

There is a system of audit, represented by the Comptroller and Auditor General (CAG). The CAG is an independent authority created by the Constitution of India. The independence of audit is assured by providing it protection and privileges under the provisions of the Constitution. Its independence is further reinforced by enumerating the powers of the audit in a legislative enactment - the Comptroller and Auditor General of India (Duties, Powers and the Conditions of Service) Act, 1971.

What are the conditions under which an audit can be effective in tackling corruption? First, audit should be independent of the executive and external to it. An independent and external audit assures expenditure control by exposures and sanctions against corruption. The CAG in India is independent of the executive and external to it. It has also been given the power, the means and the resources to scrutinize corrupt practices by civil servants and recommend action.

Second, there should be mechanisms to act on the observations of the audit. In India, such mechanisms exist, but in practice, the executive in India has been reluctant to act on the observations of the audit.

Third, no significant lag should be caused between acts of corruption and their exposure in the audit, that is, the audit and action on it should be quick so that corrupt civil servants are brought to book on the basis of the audit reports well in time. But because of delays in audit and the slow process involved in the consideration of the audit reports by public accounts committees, the impact of audit as an effective instrument of restraint has been only marginal. In fact, as is the common experience, audit reports relate to transactions which are several years old. During the intervening years, it is very likely that civil servants who were involved

in questionable practices might have been transferred to other departments, or even worse, might have retired from government service, or even died.

In fairness, the audit does create an impact, but only marginally. The report of the CAG does a great deal of agenda-setting for national debates on corruption in high places. But in most cases, the time-lag between the actual act of corruption and reporting about it in audit is so big that corrupt practices are rarely exposed in time.

The Fifth Pay Commission highlighted this aspect, and it recommended that in order to cut down on the time-lag, audit should be concurrent. In the words of the Commission,

*“Audit should try to be as concurrent as possible. Scandals and scams are known even while they are being planned and executed. If audit draws attention to them forthwith in a well-publicized manner, such scandals can be halted in mid-stride. Post-mortems are useful but can only be conducted while the patient is dead. It is better to cure the patient and try to keep him alive.”*

#### *The Judiciary*

The other external control system, namely an independent judiciary, also exists in India. The judiciary in India is called upon to act as an important instrument of restraint, because both the Indian Penal Code and the Prevention of Corruption Act make corrupt practices punishable in a court of law. The judiciary in India is independent – it is independent of the executive.

The judiciary, although independent, has not been able to act as an effective instrument of restraint. There are several reasons. First, not many corruption cases are brought before the courts for trial. This is because of the fact that the power of sanctioning prosecution in corruption cases rests with the executive, and as we have seen, the number of cases that have been sanctioned for prosecution, have been only few and far between.

Second, the prosecutorial system as laid down in the Indian laws and followed in corruption cases, is weak and unprofessional. It has been difficult to obtain evidence, particularly of the kind required under the acts, to prove corruption and obtain conviction.

Third, long delays in obtaining a decision from the courts in corruption cases have been a significant barrier. It is not uncommon to see a corrupt civil servant being convicted long after the crime, and in most cases, only after the civil servant has retired. In other words, there is no judicial effectiveness, and the judiciary in India seems to be incapable of expeditiously disposing off corruption cases.

As if to compound matters, the safeguards and procedures prescribed under Article 311 have been so interpreted by the courts in India as if to ensure, unintentionally of course, that the cases go in favour of the corrupt on technical grounds. In fact, as the Santhanam Committee on Prevention of Corruption wryly remarked, 'Article 311 of the Constitution as interpreted by our courts has made it very difficult to deal effectively with corrupt civil servants'. Even after Article 311 was amended, the panoply of safeguards and procedures still available is interpreted in such a manner as to make the proceedings protracted, and therefore, effete in the ultimate analysis. There is no gainsaying that the provisions of Article 311 have come in the way of bringing the corrupt civil servants to book. Article 311 would require a revisit.

Of late, there has been a refreshing change. The interpretation of the law by the Supreme Court of India, and following this example, by a few high courts, particularly in corruption-related public interest litigation cases, has been extremely liberal. Public interest litigation petitions have been filed before these courts by concerned citizens, and the subject-matter of many of these petitions has been corruption.

The Supreme Court, through a liberal interpreting of Article 142 of the Indian Constitution (which authorizes the Supreme Court to enforce decrees and orders that it considers necessary for doing 'complete justice in any cause or matter pending before it'), has succeeded in giving a positive direction to corruption cases involving people in high places. Judges of the Supreme Court have gone to the extent of personally supervising the process of investigation if only to ensure that the investigation is not endlessly stonewalled by the investigating agencies at the behest of influential persons.

The proactive stand of the Supreme Court of India has created the desired impact, but, this, even at its best, can only provide a lead. Most corruption cases, however, have to be brought before the ordinary courts as required under the provisions of the Prevention of Corruption Act. So, if the judiciary has to act as an effective instrument of restraint, the necessary burden has to be borne by the entire judicial system, and not merely by the Supreme Court of India.

The point needs to be clarified in the context of the varieties of official corruption which exist in India. Official corruption can, very broadly, be divided into two general categories. One is the corruption of scams, as in the case of large contracts and big favours at the higher levels of the government. This normally involves politicians directly. It is in respect of scams that the Supreme Court of India has been successful in taking an activist stand.

The other variety is the retail corruption. This is extortionary corruption which touches the lives of most citizens in the country. Retail corruption is more widespread - the Public Affairs Centre's recent studies provide evidence on the extent of retail corruption in India. According to these studies, every fourth person in Chennai ends up paying a bribe in dealing with agencies such as the urban development authority, electricity board, municipal corporation and telephones, while in Bangalore, it is one in eight persons, and in Pune, one in seventeen persons. Clearly, retail corruption is widespread and deserves to be addressed with the same degree of seriousness as scams, if not more, because it touches the lives of citizens in myriad extortionary ways.

For the judiciary to act as an effective instrument of restraint, four conditions should be met. The four conditions are judicial independence, judicial enforcement, free access to the judiciary and judicial effectiveness. The judiciary in India is independent. There is judicial enforcement - the judiciary in India is capable of enforcing its decisions. There is access to the judiciary. But in respect of the most important condition, there is no organizational efficiency in the judiciary in disposing off cases without long delays.

#### *Social Control*

A strong and vigilant civil society can be a check on corruption and form the basis for countervailing action. Corrupt states abound in anti-corruption bodies and watchdog organizations which eventually end up concealing and protecting corruption instead of punishing it, because no one outside the state structure is in a position to demand accountability if the results are unsatisfactory. Even the most comprehensive set of formal democratic institutions may not be in a position to produce the needed accountability in the absence of a strong and vigilant civil society to energize them.

As far as civil society in India is concerned, the hangover of old attitudes and inhibitions continues to persist. This has been in two ways. First, civil society in India is not too keen to look into the actual processes of the State, reinforcing in the process as it were, the view of state functionaries that the operations of the State are in the nature of a black box. Second, there is a shared belief - an inheritance from the past, once again - that it is perfectly alright for those occupying public offices to use the State, its structure and resources, in a manner that they choose i.e, in furtherance of their private interest.

The main dimension, of course, is that the civil society in India does not share a common vision or values so far as corruption is concerned. It has not developed strong and legitimate norms about what is right and wrong, and as a result, it is not in a position to promulgate

codes of good practice. Since there is no widely-shared popular conception of right and wrong, which can be used as a benchmark to judge the behaviour of civil servants, there has been no judgement at all. This perhaps explains the fact that although quite a few groups are working in the area of civil liberties and human rights, there are not many groups working in the area of fighting corruption. H.D. Shourie of Common Cause had put up a brave but solitary fight, mainly through the courts, against corruption. The only other group - Samuel Paul's Public Affairs Centre in Bangalore - is better known abroad than in India.

#### *Information*

Information about the government is a precondition for any meaningful anti-corruption effort by civil society. In India, a citizen was entitled to have access to government information only if he could satisfy the authorities that his life is affected by such information.

The Official Secrets Act was a convenient smokescreen to deny members of the public access to government information. The bottom line is that knowledge is power, and therefore, the Official Secrets Act is a handy weapon in the hands of civil servants to hold on to as much of it close to their chest as possible. It has the blessings of ruling politicians who, in any case, would scarcely wish to account for their dubious decisions.

The Right to Information Act, which has recently been enacted, is a path-breaking legislation, which signals the march from darkness of secrecy to the dawn of transparency. The Right to Information Act will be a powerful means for fighting corruption. It will increase the flow of official information to members of the public, and in that sense, supplement the process of effective overseeing of governmental processes by civil society. In addition, this Administrative Reforms Commission has already recommended to the Government that the Official Secrets Act, 1923 should be repealed.

#### *Citizens' Voice*

Citizens' voice can be used to expose, denounce and restrain corrupt behaviour. In Japan, for example, social disapproval has been the principal means of regulating the behaviour of civil servants. Social disapproval in Japan is expressed in several ways. One is social shaming of civil servants of questionable integrity. The other is political embarrassment, and as Japanese civil servants admit, political embarrassment can be a very effective form of expressing social disapproval of official conduct.

Social disapproval can be particularly effective as a mechanism of restraint in hierarchical bureaucratic structures in which the top civil servants are held responsible for the acts of their subordinates. In the Japanese system, social disapproval has played a key role in limiting corruption. Social disapproval in Japan is as much directed at the erring civil servant as at the senior civil servants supervising his work. Therefore, in cases where official misconduct is exposed in the courts, the media or the Diet, the impact is felt throughout the agency concerned as senior civil servants along with the Minister-in-charge, suffer the social consequences of the resulting public disapproval.

Klitgaard has shown the effectiveness of shaming those guilty of corruption. But social disapproval can be effective only in those countries in which tradition has placed a high premium on the civil servants, and the civil servants, on their part, value the opinion of society.

It is necessary, therefore, that civil society should come forward to denounce corruption and express its disapproval. Unfortunately, this is not the case in countries where there is a high societal acceptance of corruption. Such acceptance is essentially an expression of social capitulation, and it is detrimental to the detection and punishment of corruption, because citizens do not come forward to cooperate with the government in reporting corruption. In fact, such social capitulation is a familiar sight in most countries. In these countries economic development is slow, negative and uneven; there are institutional monopolies and a lack of economic and political alternatives; and people see corruption as inevitable and efforts to fight it as futile. In such a setting, there are few alternatives to dealing with corrupt civil servants except on their terms, and it is in the interest of corrupt civil servants to preserve the captive situation for as long as they can.

I have always been impressed by how Hong Kong has reduced corruption in its government, and more importantly, has broken the mindset of the people about the inevitability of corruption.

#### *Hong Kong's ICAC*

Hong Kong's Independent Commission Against Corruption (ICAC) has used extensive legal and investigative powers and innovative social strategies to produce significant reductions in corruption and change public attitudes. Corruption in pre-ICAC Hong Kong was certainly entrenched. Worse, most citizens saw it as inevitable, and resistance as futile. Thus

independence is essential: accountable only to top governmental leadership, and with its own officials forbidden to work in other public agencies for years after leaving, the ICAC is as free from networks of corruption as its architects could make it. Its powers are remarkable too: business as well as official corruption falls within its mandate. It can seize personal and business records with ease and can place the burden of proving innocence on the suspect.

Many democracies would not confer such powers, but they can learn from the ICAC's focus on civil society. Its massive, well-produced public relations campaigns have broken the belief that corruption is inevitable. Television advertisements publish a telephone number for complaints and promise protection. Corruption is portrayed, in such campaigns and in materials distributed to school children, as harmful to families, to the economy, and to traditional Chinese values. ICAC-funded concerts and sporting events foster social interaction with an anti-corruption theme.

Many people in Hong Kong now report abuses to the ICAC, and watch as wrongdoers are publicly disgraced. By the 1980s, young people in Hong Kong took a stricter view of corruption than did their elders - one of the few societies where that was the case. The ICAC has changed a social environment that tolerated corruption and helped sustain it.

The clearest lesson that Hong Kong's experience has to offer is that the attitudes of people can be changed through focussed efforts. On the whole, people need to be exposed to information about incentives to have a corruption free government. Change will come when the incentives to throw out a corrupt system become stranger than the incentives to retain such a system.

I am sure the distinguished gathering here will deliberate on the various issues concerned with ethics in governance. The issues proposed to be discussed are important and comprehensive: they range from policy and incentives to institutional framework. I am sure the colloquium will come up with findings that will help the Administrative Reforms Commission to make important recommendations to the Government. I wish the National Colloquium all success in its endeavours.

**Presidential Address by Shri Suresh Pachouri, Hon'ble Minister of State for  
Personnel, Public Grievances & Pensions and Parliamentary Affairs  
at the Colloquium on  
“Ethics in Governance – Moving from Rhetoric to Results”  
held at the National Judicial Academy, Bhopal  
on 1<sup>st</sup> and 2<sup>nd</sup> September, 2006**

Hon'ble Justice J.S. Verma, former Chief Justice of India, Esteemed Shri Veerappa Moilyji, Chairman, Administrative Reforms Commission, Prof. G. Mohan Gopal, Director, National Judicial Academy, Hon'ble Lokayuktas and Up-Lokayuktas, Hon'ble Justices and Judges, distinguished experts and officials, ladies and gentlemen,

It gives me great pleasure to be here with you this morning at the National Colloquium on 'Ethics in Governance' organized by the Administrative Reforms Commission and the National Judicial Academy.

At the outset, I compliment and congratulate the Organizers for organizing this National Colloquium on a subject of great contemporary importance and relevance.

I also take this opportunity to express my deep appreciation for the work being done by the Administrative Reforms Commission under the able leadership of its Chairman Sri Veerappa Moilyji. The Commission has already submitted two reports focusing on effective implementation of two path-breaking enactments made by the UPA Government, namely, the Right to Information Act and the National Rural Employment Guarantee Act. I am sure the recommendations of the Commission will pave the way for making our public administration more transparent, accountable, efficient and sensitive to the needs of the common man.

It is a matter of great privilege and honour for us to have Justice J.S. Verma amongst us today. Justice Verma is celebrated, amongst other achievements, for strengthening the framework to combat corruption through his 1998 landmark judgment in the renowned Vineet Narain case. The enactment of Central Vigilance Commission Act, 2003 by the Parliament is the direct outcome of this judgment. This Act contains provisions to ensure independent functioning of CBI and it places CBI under the superintendence of a statutory Commission in relation to corruption cases. Credit for putting in place yet another important anti-corruption mechanism known as 'Whistle Blower's Resolution' also largely goes to our judiciary. I feel greatly privileged in acknowledging the commendable contribution made by the judiciary in combating corruption in our country.

Before I come to the topic of the day, I would also like to thank Dr. G. Mohan Gopal, Director of this Academy for making such impressive arrangements for hosting this meet. I have known Dr. Gopal for several years now and I am sure under his able guidance this premier institution of judiciary shall achieve new heights of excellence.

‘Ethics in Governance’ essentially refers to customary values and rules of conduct in public administration. Selflessness, integrity, objectivity, accountability, openness, honesty, leadership were the seven principles of public life identified by the Lord Nolan Committee in UK. Openness and accountability are essentially procedural in nature and procedures can be devised to ensure openness and accountability. Objectivity and leadership are performance related. The biggest challenge, however, is to make our public servants act with integrity, honesty and selflessness. These are the attributes solely ethical in nature and therefore pose difficulty in setting measurable standards for them.

The Prime Minister, emphasizing the importance of ethics in governance, recently said and I quote “As a society, we must evolve to a level where probity becomes a way of life, where honesty is a routine expectation. If we have integrity, then nothing else matters, if we don’t have integrity then also nothing else matters. I firmly believe that we must set personal standards of integrity as public servants and the message should flow from the top downwards and not the other way round. The values of integrity, impartiality and merit remain the guiding principles of our civil services.” Unquote.

Anticipating perhaps the crisis of ethics that lay in the future, Mahatma Gandhi, the father of the nation, warned us against “Seven Deadly Sins”: Wealth without work, pleasure without conscience, science without humanity, knowledge without character, politics without principle, commerce without morality, worship without sacrifice.

The issue of ethics in public life, has also been discussed by Justice Verma in the Vineet Narain judgment wherein he very aptly observed and I quote – “holders of public office are entrusted with powers to be exercised in public interest alone, and therefore, the office is held by them in trust for the people. Any deviation from the path of rectitude by any of them amounts to a breach of trust and must be severely dealt with instead of being pushed under the carpet.” “Unquote.

None can disagree that for our survival as an independent, democratic and prosperous society, it is essential that we as a people and all of us in government must maintain the highest ethical standards. The challenge, however, is ensuring that ethical values are followed and

applied in our daily lives, and in particular, in the matter of governance. This is a challenge faced today not only by India but by the whole world. While on one hand, the world is witnessing many positive developments of great promise, on the other, greed, selfishness, materialism and dishonesty are threatening our social fabric.

What is needed is collective action from policy makers, law enforcement agencies and all right thinking people to stem the rot. All of us recognize that mounting political corruption is one of the most important areas of concern. There is need to evolve a political consensus on electoral and institutional reforms needed to check political corruption. All major political parties should place national interest above individual and party considerations and come together to evolve a consensus on the electoral and institutional reforms necessary to eliminate political corruption while ensuring that the independence, integrity, inclusiveness and openness of our democratic system and our electoral processes is not compromised.

Prompt and effective investigation, prosecution and punishment of corruption cases is equally vital for strengthening enforcement of anti-corruption laws. In fact, in the Vineet Narain judgment, speaking for the Supreme Court of India, the then Chief Justice of India, Justice J.S. Verma said and I quote – “corruption must be prosecuted expeditiously so that the majesty of the law is upheld and the rule of law vindicated. It is the duty of the judiciary to enforce the rule of law and, therefore, to guard against erosion of the rule of law.” Unquote. Expeditious trial of corruption offences depends on the effectiveness of investigation and prosecution. These aspects need to be strengthened considerably to reduce incentive for corruption. I appreciate that the Supreme Court and High Courts are giving priority to the expeditious disposal of corruption cases. We need to work together to ensure that corruption cases are dealt with by courts speedily and that arrears in this regard are cleared as soon as possible. I have no doubt that we will get the full cooperation of the judiciary in this regard.

UPA Government in its Common Minimum Programme has made a solemn pledge to the people of our country to provide a government that is corruption-free, transparent and accountable at all times, and to provide an administration that is responsible and responsive.

In fulfillment of its pledge, UPA Government has taken several measures to provide a corruption-free, transparent and accountable administration to the people. Right to Information Act has been enacted to radically alter the administrative ethos and culture of secrecy and control and bring a new era of openness, transparency and accountability in governance. The impact of this historic legislation in achieving its objectives is already quite visible. An aware and participative public will in future take more and more recourse to this Act to get information which will perforce bring probity and transparency in public offices.

Citizens' Charters have been formulated by various Government offices and efforts are being made to make available public services to citizens within the time-frame laid in these charters. Central Vigilance Commission has issued a number of instructions to bring in transparency in public procurement and tender processes. Vigilance Administration Machinery and public grievance redress mechanism has been greatly strengthened. A three-pronged strategy of preventive vigilance, surveillance and detection and deterrent punitive action has been devised to combat corruption.

A number of reforms are also being introduced to improve the functioning of the civil services. A new system of mandatory mid-career training at various points in the career of a civil servants has been devised. Performance appraisal system for senior civil servants is being changed to provide for a more objective numerical grading based assessment of performance of the officer. Bench mark scores for promotion/empanelment are being prescribed and institutional means for ascertaining reputation of the officer are being established. Prime Minister's awards have been instituted to reward excellence amongst civil servants. Steps are being taken to provide assured minimum tenure to civil servants.

A very select group of Lokayuktas, senior officials responsible for anti-corruption wings of State and Central Governments, other government officials, academicians and civil society activities have assembled here today to discuss and develop specific recommendations and action points for strengthening the fight against corruption. I am especially happy that several High Court Judges are also amongst us today.

I look forward to the deliberations and the recommendations that you will formulate and recommend. We need to redouble our efforts to fight corruption. We have had many occasions to debate and discuss the measures to reduce corruption. The time for action has now come and I am sure your efforts today will help the government in taking firm measures to combat corruption.

I wish the National Colloquium all success.

Thank you.

## LIST OF PARTICIPANTS

### JUSTICES/LOKAYUKTAS/UP-LOKAYUKTAS:

1. Hon'ble Mr. Justice J.S. Verma, Former CJI
2. Hon'ble Mr. Justice Faizanuddin, Former Judge, Supreme Court of India
3. Hon'ble Mr. Justice Dr. M.K. Sharma, Chairman, Committee for Formulation of Training Programme, Delhi
4. Hon'ble Mr. Justice A.S. Naidu, Judge, Orissa High Court, Cuttack
5. Hon'ble Mr. Justice J. Chelameswar, Judge, Andhra Pradesh High Court
6. Hon'ble Mr. Justice H.L. Dattu, High Court of Karnataka
7. Hon'ble Mr. Justice J.S. Khehar, High Court of Punjab and Haryana
8. Hon'ble Mr. Justice S.H.A. Raza, Lokayukta, Uttaranchal
9. Hon'ble Mr. Justice Mohd. Shamim, Lokayukta, NCT, Delhi
10. Hon'ble Mr. Justice N.K. Sud, Lokayukta, Haryana
11. Hon'ble Mr. Justice Lakshman Uraon, Lokayukta, Jharkhand
12. Hon'ble Mr. Justice Ripusudan Dayal, Lokayukta, Madhya Pradesh
13. Hon'ble Mr. Justice Daljit Dhaliwal, Lokayukta, Punjab
14. Hon'ble Mr. Justice Samaresh Banerjee, Lokayukta, West Bengal
15. Hon'ble Mr. Justice N.K. Mehrotra, Lokayukta, Uttar Pradesh
16. Hon'ble Mr. Justice R.N. Prasad, Lokayukta, Bihar
17. Hon'ble Mr. Justice G. Patri Basavana Goud, Up-Lokayukta, Karnataka
18. Hon'ble Mr. Justice Suresh Kumar, Up-Lokayukta, Maharashtra
19. Hon'ble Mr. Justice M. Shivaratna, Up-Lokayukta, Andhra Pradesh

### CHIEFS OF STATE JUDICIAL ACADEMIES, ETC

20. Sh. Anant Vijay Singh, Director, Judicial Academy, Jharkhand, Ranchi
21. Sh. Arali Nagaraj, Director, Karnataka Judicial Academy, Bangalore
22. Sh. Bidhu Prasanna Parija, Director, Orissa Judicial Academy, Cuttack
23. Sh. George, Director, H P State Judicial Academy, Shimla
24. Sh. N. Ravi Shankar, Director, A P State Judicial Academy, Secunderabad
25. Sh. M.K. Tiwari, Director, Chattisgarh State Judicial Academy, Bilaspur
26. Sh. Kanchan Chakrabarty, Addl. Director, W B Judicial Academy, Kolkata
27. Sh. K.B. Zinjarde, Jt. Director, Judicial Officers' Training Institute, Nagpur
28. Director, Bihar Judicial Officers' Training Institute, Patna

### CVC/VIGILANCE COMMISSIONERS/ANTI CORRUPTION BUREAU/CBI

29. Sh. Balvinder Singh, Addl. Secretary, CVC, Delhi
30. Sh. S.K. Upadhyaya, IPS, Director, Vigilance & Anti Corruption, Government of Tamil Nadu, Chennai
31. Dr. Ashok Narain, Vigilance Commissioner, Government of Gujarat
32. Sh. R.C. Samal, Vigilance Commissioner, Government of Andhra Pradesh, Hyderabad

33. Sh. J.D. Virkar, IPS, Director General, Anti Corruption Bureau, Government of Maharashtra, Mumbai
34. Sh.B.K. Bhatt, Secretary, Gujarat Vigilance Commission, Gandhinagar
35. Sh. R.R. Swain, DIG, SVO, Government of Jammu & Kashmir
36. Sh. M.S. Ahlawat, IPS, DIG, State Vigilance Bureau, Government of Haryana, Panchkula
37. Sh. Paramvir Singh, IPS, JD (AC/HQ), CBI, New Delhi
38. Sh. C.S.R. Reddy, IGOP-cum-Director, Vigilance Bureau, Government of Punjab, Chandigarh
39. Smt. Mamta Upadhyaya Lal, Director CVC, Delhi
40. Sh. Ranvir Singh, Director, CVC, Delhi
41. Sh. Vineet Mathur, DS, CVC, Delhi
42. Sh. A.K. Pateria, DIG, CBI, ACR, Bhopal
43. Sh. M.C. Sahni, SP, CBI, ACB, Bhopal

**OTHERS**

44. Sh. M.N. Buch, IAS (Retd.)
45. Sh. P.C. Parakh, IAS (Retd.)
46. Sh. Ajai Singh, DGIT (Inv.), Patna
47. Sh. A.K. Samant Ray, Additional Secretary, Law & Legislative Affairs Department, Government of Chhattisgarh, Raipur
48. Sh. S. Satyanarayana, CEO, NISG, Hyderabad
49. Dr. G. Narendra Kumar, Secretary (Administrative Reforms), Government of NCT, Delhi
50. Sh. Basant Singh, Resident Commissioner, Govt. of Manipur, New Delhi
51. Sh. I.P. Singh, Former Deputy CAG, Delhi
52. Sh. Padamvir Singh, Principal Secretary, PWD, Bhopal
53. Sh. P.K. Tripathy, Director, DOPT, New Delhi
54. Ms. Sangeeta Singh, Director, DOPT, New Delhi
55. Dr. N. Bhaskara Rao, Chairman, CMS, New Delhi
56. Ms. Madhu Bhaduri, Parivartan, Delhi
57. Sh. P.S. Bawa, Transparency International India, Delhi
58. Sh. S. Sen, Coordinator (Development Projects), CII, Delhi

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59. Sh. M. Veerappa Moily, Chairman, ARC
60. Sh. V. Ramachandran, Member, ARC
61. Dr. A.P. Mukherjee, Member, ARC
62. Dr. A.H. Kalro, Member, ARC
63. Ms. Vineeta Rai, Member Secretary, ARC

**Group Recommendations****Workshop 1**

**Topic: What are the gaps in India's anti-corruption policies and procedures when measured against international standards? What needs to be done to fill these gaps?**

- Section 19 of the Prevention of Corruption Act, 1988 (PCA) should be suitably amended so that the requirement of sanction does not become a pre-requisite in case of disproportionate assets and trap cases.
- Corruption should be defined in a comprehensive manner in the PCA.
- Giving or attempt to give bribe should also be covered as a primary offence in the PCA.
- Corruption by private sector which is related to public utility services should be included under the scope of corruption in the PCA.
- A separate legislation may be enacted analogous to the US False Claims Act as suited to prevailing circumstances in India.

**Workshop 2**

**Topic: Ethics Infrastructure**

- All Codes should incorporate the seven elements of ethics which are: Selflessness, Integrity, Objectivity, Accountability, Openness, Honesty and Leadership.
- There should be separate Code of Conduct for Ministers, members of legislature and other elected representatives.
- The Code of Conduct for civil servants should be amplified. It should prohibit them from associating with NGOs and hold elected office even in any club or social organization.
- Lokpal/Lokayukta Bills should be passed. These institutions should be empowered to entertain complaints against Ministers, MPs and MLAs and even to permit their investigation and prosecution.
- In respect of appointments, empanelment, promotions, transfers and disciplinary action in respect of civil servants of the rank of Joint Secretary and above, an independent Civil Service Commission should be created. This Commission

should be appointed by a Committee consisting of Prime Minister/CM, Leader of Opposition, Chief Justice and should be headed by a judge of Supreme Court/High Court.

- In respect of professional bodies, even though Codes of Conduct exist, they are not implemented. This should change.

### Workshop 3

#### Topic: Making Anti-corruption Institutions more effective

- In DA cases and cases of direct demand/acceptance of bribe, there should be no need for prior concurrence for registration of criminal case. Even for preliminary enquiries, if required, concurrence should be given by CVC.
- There is no need for sanctioning authority to appear as witness.
- More effective use of F.R. 56J should be made to weed out incompetent persons of doubtful integrity. The rule also needs to be reviewed and strengthened in the context of judicial pronouncements which have reduced its effectiveness.
- Internal vigilance systems and procedures should be made foolproof against rent opportunities.
- There was a difference in opinion as to whether the PM should also be included within the jurisdiction of Lokpal.

### Workshop 4

#### Topic: How can investigations be made more effective?

- The investigative agency should be brought under the superintendence of the Lokayukta.
- Necessity of sanction should be dispensed with or the Lokayukta should be made the sanctioning authority for the purposes of Sec.19 of PCA and Sec.197 of Cr.PC.
- Superintendence of prosecutions should also vest in the Lokayukta and public prosecutors should be specifically appointed for corruption cases.
- The Lokayukta should also have jurisdiction over redressal of grievances arising from mal-administration.

- Constitution shall be amended and a Central Law enacted to ensure that the institution of Lokayukta exists in every state /UT, the selection process is robust and impartial, proper personnel are provided, victimization of deputed officers does not take place on repatriation and there is financial autonomy. The provisions of Karnataka Lokayukta Act should be incorporated.

### Workshop 5

#### Topic: What specific steps can be taken to reduce the incentives for corruption?

- The manner in which the laws are implemented needs to be re-structured. Knowledge about the laws among citizens has to be dealt with to bring transparency.
- Moral deprivation in the larger perspective and increased consumerism should also be addressed.
- Market forces with regulatory mechanism should be brought to play wherever large public enterprises, large delivery systems, high technology and foreign investments are involved.
- Monitoring and vigil in a decentralized fashion should be introduced.
- Shortages should be eliminated.
- Areas which affect vulnerable sections of the society should be targeted on priority. Citizen centric services should be introduced. Outsourcing should be promoted. Delivery systems in education, health etc should be re-engineered.
- Ministries with high risk should have in-house arrangement to review procedures.
- Village records should be accessible.
- Internal supervision should be the primary responsibility of the Head of the Department.
- There should be transaction and process audit rather than concentrating on financial audit.
- There is no accountability on the part of the auditors. The whole functioning of the CAG would have to be revamped.

**Workshop 6**

**Topic: How can the accountability, integrity and transparency in the functioning of service regulatory agencies and professional regulatory agencies be ensured? Whether it should be systematically monitored and what should be the legal framework? What should be the legal institutional and procedural framework required to achieve accountability, integrity and transparency without affecting the operational autonomy for the effective functioning of these bodies?**

**What steps should be taken to ensure accountability, transparency of non- governmental agencies whose projects are either funded or sponsored by the government or by funding agencies without compromising their autonomy and operational flexibility?**

- Law should be enacted on the lines of Karnataka Transparency Act to ensure accountability and transparency.
- The regulatory body should be an independent body and appointments should be made in consultation with the presiding officer of the legislature(s) and leader(s) of opposition. There should also be an adjudicatory body as an appellate and supervisory body for this regulatory body. The decisions of the appellate body should be made challengeable only in Supreme Court of India.
- All members of statutory professional bodies should be brought under the definition of public servant for the purpose of PCA, IPC and Lokayukta Act. Similarly, all cooperative societies and societies under Societies Registration Act as notified by the government for this purpose should also be included.

**Workshop 7**

**Topic: What should be the main elements of a practicable strategy to combat corruption? Should/can the fight against corruption be prioritized? Which are the areas on which to focus first? What should be the sequence? Are there “low hanging fruits” where reforms can produce quick wins with wide public benefits? (For Government of India and its agencies)**

- The sectors which could give fast results with substantial impact in this regard are: disaster management, public distribution system, rural employment, civil works, land information, taxation (direct & indirect), municipal services, licensing and police-public interface.

- With regard to vicarious responsibility, there should be interlocking accountability and the supervising officer should be made answerable for his subordinates.
- There should be a system of profiling of officers and postings should be based on such profiling.
- Anonymous and pseudonymous complaints should be ignored.

**Workshop 8**

**Topic: What should be the main elements of a practicable strategy to combat corruption? Should/can the fight against corruption be prioritized? Which are the areas on which to focus first? What should be the sequence? Are there “low hanging fruits” where reforms can produce quick wins with wide public benefits? (For State Government and their agencies)**

- IT tools should be introduced in a big way, as in the case of e-Sewa Kendra in Andhra Pradesh, e-Sampark Kendra in Chandigarh and e-Bhumi (computerization of all records).
- Discretion should be minimized. Non-discretionary matters should be automated.
- Priority areas for the fight against corruption should be: where public contact is maximum, large revenue areas and large public spending areas. Especially in areas of municipal property tax matters, e-sewa kendras and community policing resource centres (as in the case of Punjab), results could be achieved sooner.
- Except in situations of mala fide, placing responsibility on superior officer may not be appropriate.
- Sensitive posts should be identified and persons of doubtful integrity should not be posted there.
- There should be stability of tenure in key posts and profiling of officers should be done so that long-term record can come to the rescue of honest officers.

**Workshop 9**

**Topic: What are the weaknesses in existing system of investigation, prosecution and trial? How can these weaknesses be removed through legal/procedural changes?**

- Change of IO, IO burdened with cases, IO under political/bureaucratic influence, hostile witnesses, unavailability of adequate number of prosecutors, non-accountability of prosecutors, lapses in examination of witnesses in court, shortage of funds etc. are the weaknesses of the system.
- By placing the superintendence and control of all aspects of anti-corruption establishment and investigation with the Lokayukta, adopting the mode of video recording of statements, providing security to witnesses, making prosecutors accountable, conducting trials on a day-to-day basis, placing anti-corruption cases on higher priority by the courts etc are some ways to strengthen the system.
- Disciplinary proceedings should be completed in a time bound manner.

**Workshop 10****Topic: Procurement and Government Contracting**

- E-procurement process should be encouraged for greater transparency with suo motu disclosures at each step.
- Rate contracts reduce corruption but do not eliminate it. Hence inspections at the manufacturers' premises and at the receiving end should be done.
- In case of highly specialized procurements, professional consultants should be appointed and supplies to other parties should be examined.
- Pre-audit is desirable in case of major procurements but it can only be done by internal audit with the help of technical experts.

**Workshop 11**

**Topic: How can civil society activities and public participation in governmental decision making (including at the panchayat level) reduce corruption? What measures should be taken to enhance transparency through greater transparency and use of IT and RTI.**

- RTI should be used to enhance transparency. Initially, State Governments should put information about processes and rationale for decision making in the public domain. PIOs should be educated.

- E-governance should be used extensively.
- Mobile courts may be useful in bringing justice to the local level. Court processes may be made transparent by use of video cameras.
- Investigative journalism coupled with the use of RTI can enable citizens to become more aware.
- Independent surveys and opinion polls should be used, albeit carefully, towards making it an instrument of transparency.

**QUESTIONNAIRE****Ethics in Governance****I - LEGAL FRAMEWORK**

1. Should there be a national policy for eradication of corruption? What should such a policy enunciate?
2. Is the definition of corruption as per the Prevention of Corruption Act, adequate? Is there a need to expand the definition in view of the UN Convention to which India is a signatory? Should corruption in the private sector also get included in the definition?
3. Should India have a law similar to the US False Claims Act?
4. Is India over regulated? Are there laws/rules which create a climate for which facilitates corruption?
5. Shortages of goods and services lead to creation. How can these shortages be eliminated?
6. Does the Constitution and laws give undue protection to the civil servants? Is there a case to revisit Article 311?
7. Should controlling officers be held answerable for misdemeanours of their subordinates for not exercising proper supervision?
8. Are new laws required, such as dealing with the wealth acquired through illegitimate means?

**II - ETHICS INFRASTRUCTURE**

1. What specific measures are required to strengthen the ethical foundations of the fight against corruption?
2. What legal/institutional/administrative measures are required to effectively tame political corruption?
3. Should we have a Code a Conduct for Ministers? What should it include?
4. Should we have a Code of Conduct for elected members? What should it include?

5. What should be the necessary ingredients of a Code of Conduct for civil servants?
6. Should there be a Code of Conduct for professionals and professional bodies?

**III - INSTITUTIONAL MECHANISM AT THE GOVERNMENT OF INDIA**

1. Is the existing institutional mechanism, comprising the CVC and the CBI adequate to combat corruption?
2. Have controlling officers, over period of time been giving less attention to curb corruption among their subordinates? Would creation of institutions by itself eliminate corruption? Are external institutional mechanisms a substitute to internal vigilance? How to strengthen internal vigilance?
3. Is the procedure for obtaining vigilance clearance for officers before posting them in Government of India, effective? If not what measures should be taken to improve it?
4. What mechanism is required to ensure that only upright officers are posted to sensitive jobs?

**IV - INSTITUTIONAL MECHANISM AT THE STATE GOVERNMENTS**

1. What should be the relation between the Lokayukta, the State Vigilance Commission and the Anti Corruption Bureaus?
2. The institution of Lokayukta differs from state to state. Can best features of each one of these be picked up to have a uniform framework in all states?
3. How to ensure autonomy for these institutions and at the same time holding them accountable?
4. Corruption at cutting edge levels hurts the common man. Are special measures required to combat this?
5. What needs to be done to transfer power closer to people so that the decision making power point is near to the people? Would this increase accountability?

**V - PROCEDURAL ISSUES**

1. How to ensure that persons with integrity are posted in sensitive posts?

2. Should there be a mechanism for keeping a watch over the integrity of civil servants? Which agency should be entrusted this task?
3. At present there is a system of getting vigilance clearance? How can this be improved?
4. What safeguards are required to protect honest officials from harassment? Does the existing provision of taking prior sanction of Government before registration of cases, necessary? How to ensure that this does not become a shield for corrupt officers?
5. Is the requirement of taking prior sanction of government before registering a case, a hindrance in fight against corruption? How does one safeguard honest official from harassment?
6. Would outsourcing of some functions by regulatory agencies lead to reduction in corruption? What functions could be outsourced?

#### VI - PREVENTIVE MEASURES

1. Introducing competition gives choice to users/consumers. How can competition be introduced in service delivery by governmental agencies?
2. Over-regulation increases scope for corruption. Which are the areas where regulation can be reduced?
3. Should mandatory pre-audit of all major procurements/contracts be carried out?
4. Systemic reforms can help in reducing scope for corruption. Which are the sectors which lend themselves for such systemic reforms? How can such systemic reforms be brought about?
5. Use of technology can help in reducing discretion and thus bring in objectivity? What are the obstacles in use of modern technology in governance? How can these be overcome?
6. Should there be a Whistleblowers Act?
7. Is there a necessity to have 'Civil Service Values' spelt out in a separate Civil Services Law?

#### VII - CITIZENS' INITIATIVES

1. What mechanism is required to actively involve citizens in fight against corruption?
2. Could the 'sting operations' be given a legal backing?
3. How can the stakeholders be involved in monitoring corruption in service delivery organizations?
4. Should there be a system of evaluating and ranking offices based on corruption indices and then linking incentives to such evaluation?

### Systemic Reforms in Government Procurements

**1. Growth in government procurement:** The war effort during the Second World War called for massive mobilization and consequential procurement followed by the growth of the welfare state with state control of the commanding heights of the economy and planned economic development after Independence all of which led to manifold increase in government activity and resulted in exponential growth of public procurement by the Union and State Governments. Today, the world-over public procurement is big business. A World Bank estimate<sup>56</sup>, puts the total value of public procurement at all levels and by all agencies put together in the country at around \$100 billion representing 13% of the total budget and over 20% of the Gross Domestic Product.

**2. Definition of procurement:** Procurement may be defined “as the process which creates, manages and fulfills contracts relating to the provision of supplies, services or engineering and construction works, the hiring of anything, disposals and the acquisition or granting of any rights and concessions”. (Watermeyer).

**3. Emergence of large-scale corruption in procurements:** The Santhanam Committee had as early as in the 1960s observed that “we were told by a large number of witnesses that in all contracts of construction, purchase, sales and other regular business on behalf of the government, a regular percentage is paid by the parties to the transaction, and this is shared in agreed proportions among the various officials concerned”.

A Confederation of Indian Industry (CII) study of 1999 involving 210 private sector firms found 60% of the firms confirming 2-25% of the contract value to be the price payable to secure a government contract. The World Bank assessment of December 2003 referred to above also found that “both the officials and contractors, who were interviewed, confirm to its prevalence; but while the officials believe that it does not exceed 5% of the contract price, the contractors assert that the amount may be as much as 15% to cover all branches of government and is built into the price.”

There are various reasons for corruption in procurement. The significant ones are:

- a. The Union and State Governments and their agencies allot large sums of money for various development activities. Execution of these activities entails a substantial amount of purchase of goods and services. These purchases are carried out at all levels - the Government of India, State Governments, the district, the sub-district and panchayat levels. Indeed, procurement of goods and services

would perhaps be the single biggest item of expenditure in the government budget. Although the local bodies have been empowered to procure goods and services, a substantial share of such procurement has been centralized in order to obtain economy of scale and exercising better control over the purchase process. All procurement transactions involve payment of large sums to suppliers. This provides an opportunity to the corrupt officials to seek gratification even though the entire transaction might have been as per the prescribed rules and regulations. This practice is seen to prevail in many other situations where payment is involved.

- b. As procedures stipulated placing of orders on the party quoting the lowest rates (L1), a large number of prospective suppliers who are interested in obtaining the order as it represents a significant business opportunity for them, were willing to use illegitimate means of getting this business. Such corrupt practices multiplied when it was noticed by officials that this was indeed an easy avenue to becoming rich and that too at a seemingly low risk. Gradually this degenerated into a well-organized system of corruption.
- c. Sometimes the supplier, in order to sell goods, not meeting the quality standards prescribed, was able to induce the officials to accept such goods.
- d. Despite an elaborate procedural framework, which among other objectives, seeks to minimize corruption, there are lacunae and loopholes, which are exploited, by both supplier and buyer to indulge in corrupt practices.
- e. Sometimes, in spite of the existing procedural framework there may be extraneous influences, which force the procurement agencies to indulge in wrong practices.
- f. Despite elaborate Rules, the procurement process is not really transparent.

The risks of corruption substantially depend upon the value of the contract, the complexity of technology, the urgency of acquisition or immediacy of the project, the extent of discretion vesting in the officials, the opacity and complexity of the processes involved in

#### Weaknesses in the Procurement Regime

- a. Absence of a dedicated policy making department/agency.
- b. Absence of a Central law.
- c. Absence of a credible complaint/challenge/grievance procedure.
- d. Absence of standard tender documents.
- e. Preferential treatment in procurement.
- f. Negotiations.
- g. Delay in tender processing and award decision.
- h. Antiquated procedures for work contracts.
- i. Over-dependence on traditional recordkeeping.

Source: India, Country Procurement Assessment Report, 2003; Document of the World Bank

procurement, the absence or inadequacy of the complaint redress mechanisms, the chances of detection of malpractice as reflected in the efficiency of pre, concurrent, post audit, and other accountability mechanisms, the certainty and speed of investigation and punitive action taken by the internal vigilance and external vigilance, investigation and oversight bodies and, above all, the prevailing politico-social climate.

The situation in States is also similar. There is a decline in the capability of personnel handling procurement as one goes down from the state level to sub-district and panchayat/local bodies levels. Cases of corruption are found at all levels. Negotiations with several bidders are held routinely and sometimes contracts are divided among many or all the bidders making a mockery of the tender process. In some States there is excessive use of annual 'rate contracts' which get extended year after year on some excuse or other, avoiding new tenders, thus favouring the current contract holders often for corrupt reasons.

Contracts are sometimes manipulated by the procurement agency through tailor-made specifications intended to favour particular parties, selective information about contracting opportunities, invocation of urgency to avoid or limit competition, breaching the confidentiality of parties to favour somebody, unfair prequalification requirements giving inadequate response trust, recording false measurements, acceptance of bribes to manipulate decisions etc. On the supply side, the intending parties could collude to fix bid prices, take recourse to discriminatory technical standards, interfere in the evaluation of the tenders through political or other influence and directly offer bribes.

**5. Institutional and legal framework:** The institutional and legal framework for procurement derives from the Constitution of India. Article 298 authorizes the Union and State Governments to contract for goods and services and requires the executive to protect the fundamental rights of all citizens to be treated equally. Article 299 of the Constitution deals with contracts on behalf of the Union and State Governments and Article 300 with suits and proceedings thereon.

The broad framework for contracts is regulated by the Contract Act, the Sale of Goods Act, the Arbitration Act, the Limitation Acts and the recent Right to Information Act, 2005. There is no Union law governing procurement in India. The policies, procedures, guidelines and delegation of authority relating to procurement are issued by the Government of India primarily through the finance ministry, supplemented by orders of each Ministry/Department. The DGS&D in the Government of India and 'Stores Purchase Departments' at the State level, helped the governments in procuring goods a process of 'rate contracts' wherein rates

for different items to be purchased as well as the suppliers are fixed periodically and then all government departments and agencies can place orders on such suppliers directly.

The GFR provides procedure to be followed for purchase of goods and services by the government departments. The State governments/Central Public Sector Units (CPSU's) have their own general financial rules based on the broad principles outlined in the GFR. The CAG and the Local Fund Audit Departments of State Governments are the primary oversight agencies to ensure accountability. The Central Public Accounts Committee and the State Public Accounts Committees examine the reports of the CAG. The Central Vigilance Commission, a statutory authority also issues guidelines in regard to procurement and has powers of oversight in the case of criminal misconduct and corruption on the part of public servants involved in public contracts. The Civil Courts and the High Courts and the Supreme Court provide judicial remedy in matters involving irregularities in procurement. The civil society organizations and the media also play a part in bringing corruption in public procurement to light.

The World Bank while commenting on the procedures for procurement observed:

*“the basic procedural framework being followed in this country is no different from the World Bank guidelines or the UNCITRAL Model Law and the Government Procurement Agreement of the WTO and other good models of public procurement. Thus there is a reasonably framework of rules, procedures and documents and a few good practitioners as well.”*

The country procurement assessment made by the World Bank published in 2003 after a study of the Union, Central Public Sector and select State Government processes came to the conclusion that by and large, procurement by the Union Government ministries, departments and sub-agencies works satisfactorily when compared to public procurement in other developing countries and when compared to the performance in the States. However, this good performance is marred by cases of mal-practices, corruption and occasional scandals.

Several measures have been taken by the Union and State Governments to reduce the scope of corruption in procurement. A beginning has been made by the Governments of Tamil Nadu and Karnataka to provide a formal legal framework to regulate public procurement for the first time in the country in the late 1990s, the pioneering effort in this context being by the Tamil Nadu Government when it enacted the Tamil Nadu Transparency in Tenders Act, 1998. This was followed by the Karnataka Transparency in Public Procurement Act,

1999. The Central Vigilance Commission has issued guidelines for procurement of goods and services.

**6. Prevention and Control-The Road Ahead:** Anti-corruption measures that are needed to prevent and to control corruption in procurement can be broadly classified as generic measures applicable to the polity as a whole and specific sectoral measures relating to procurement processes. The generic measures or integrity pillars can be categorized as follows viz.,

- a. An effective criminal justice system which punishes the wrong doers.
- b. Effective administrative supervision and management control systems inherent in the system of governance;
- c. An efficient civil service system with well laid down code of integrity and conduct;
- d. Right of access to information;
- e. Effective audit to ensure value for money by an independent audit authority
- f. Anti-corruption commission and investigative agencies to ensure effective enforcement;
- g. Independent ombudsman to investigate high level corruption; and
- h. Strong laws relating to corruption, whistleblower and witness protection and civil remedies to secure compensation for loss sustained.

These generic measures need to be supplemented by specific remedial measures for misconduct in relation to procurement. Some of the specific measures are:

- a. All procurements should be after competition between suppliers. The specifications should be so designed that there are always a few suppliers who could meet the requirement.
- b. All States and the Union should have a 'Transparency in Procurement Act'. This law should stipulate the methodology for procurement, lay down the authorities for procurement decisions, stipulate an appellate mechanism to look into irregularities etc.

- c. The terms and conditions governing the procurement process should be clearly spelt out without any ambiguity; It should be ensured that all bidders are informed about these terms and conditions, and their doubts if any should be clarified before the bidding begins.
- d. Information about decisions made and the reasons thereof should be placed in the public domain.
- e. The criteria for evaluation of the bids should be laid down before the bidding begins and it should be made known to all bidders. Under no circumstances should the criteria be changed midway.
- f. Evaluation of bids involving large amounts should be carried out by committees.
- g. Procurement wings of departments should carry out market research to arrive at reasonableness or otherwise of the bids.
- h. Increasingly recourse should be made to Information Technology in order to make the procurement process transparent and efficient.
- i. Only officials with proven integrity should be involved in the procurement process.
- j. Payments to the suppliers should be settled promptly.
- k. Integrity pacts should be made use of in purchases of high value.
- l. The tender contracts should include a condition making it possible for the government to forfeit payments if bribery is detected.

**Systemic Reforms in Corruption in Taxation Departments:  
(Case of Income Tax Department)**

**1. Introduction:** Opportunities for corrupt practices exist in all government departments. These opportunities basically arise due to constraints on the supply side, procedural bottlenecks and discretionary powers related to public service delivery on the one hand and collusion for private gain on the other. But in case of government departments responsible for tax collection and administration, opportunities also exist due to the perceived unwillingness on the part of the tax payer to pay taxes. This unwillingness gets more exacerbated in the case of direct taxes such as income tax for the simple reason that whereas the indirect taxes (excise, service tax etc.) either go unnoticed by the consumers or leave no choice with them or are seen as a part of business and considered as cost of doing business, income tax is construed as a tax on one's hard earned income.

**2. Public Perception of Corruption:** In a study taken up by Transparency International India in alliance with Centre for Media Studies (CMS) entitled 'India Corruption Study 2005' respondents were queried about the services provided by the Income Tax Department. For the purpose of the study, states were divided into three broad categories on the basis of Net State Domestic Product (NSDP): High, Medium and Low. **The study leaves out of its purview corrupt practices undertaken by taxpayers themselves to minimize their tax liability in their interactions with the department.** The following table presents the perception about the extent of corruption in the department as per this study:

Perception of Corruption	State's NSDP			
	High	Medium	Low	Total
Disagree	15	22	11	16
Neither Agree nor Disagree	20	24	18	20
Agree	61	49	67	60
Can not say	04	05	04	04

This study indicated that the perception of corruption was relatively higher in the low income states. The study also focused on the purpose for paying bribes. The outcome is presented in the table below:

(Figures in per cent)

Purpose for paying bribe	State's NSDP			
	High	Medium	Low	Total
Filing returns	52	26	49	43
Under-assessment	09	06	19	13
Issuing PAN Card <sup>57</sup>	09	09	15	12
Ensuring Income-tax refunds	17	10	30	21
Ensuring case does not come under scrutiny	05	06	08	07
Ensuring closure of scrutiny	06	06	08	07
To reduce penalty	05	25	03	10
To get Income-tax exemptions	03	01	05	03
For getting back-dated collection of returns	05	08	10	08

The high percentage of corruption related to filing of returns indicates the following:

- there is lack of knowledge about filing of returns, or
- there is lack of knowledge about jurisdictional office, or
- there is a tendency to file returns on the very last date, or
- returns are being filed in jurisdictions where the chances of being picked up for scrutiny are less.

**3. Departmental Initiatives:** The Income Tax Department has taken several initiatives to facilitate payment of tax by the assesses and also to reduce the scope for corrupt practices. Significant among these are:

- Simplification of laws, procedures and various forms to be filled up by the assessee
- Allotment of PAN and issuance of PAN Cards completely outsourced
- Massive drive for computerization in full swing

- Computerised processing of returns
- Time bound disposal of rectification of mistakes apparent
- Online payment of refunds also being tested out

#### 4. The Road Ahead

**A. Issues related to service delivery:** A very significant number of taxpayers are either salaried employees or have relatively small business/professional income. Corruption related to service delivery is concentrated to a large extent in the interface of the department with these taxpayers. The main reasons for their interface with the department arises due to :

- i. Filing of returns of income
- ii. Processing of returns
- iii. Claim of refund and issue of refunds
- iv. Inaccuracies/ mistakes apparent in the return resulting in issuance of notices of tax demand on processing of returns on the computer
- v. Procedural bottlenecks involved in rectification of mistakes apparent.

**B. Suggestions:**

- i. Information about jurisdictional offices should be made public every year well in advance through print media and on the web
- ii. Clear instructions should be issued for first time filers
- iii. Returns should be acceptable at other public offices (as was done in 2006) at least one week before last date for filing
- iv. Processing of returns should be separated functionally from the jurisdictional offices and assigned to specialized computerized offices. Such centres should upload the information about the returns processed on a daily basis.

- v. Issuance of intimation for demand and refunds should be separated functionally from both the jurisdictional offices and the processing centres. The net output should be uploaded daily at such specialized centres. Refunds should be paid electronically wherever the option is available.
- vi. The integrity of the computerized processing of returns should be checked regularly and a list of common mistakes made by tax payers while filing the returns should be made and regularly updated. Based on this list, the department should periodically educate the public so that the mistakes do not recur and interface with the department is minimized. This could be done by publishing easy to understand and descriptive booklets and by placing it on the website. The information should be updated regularly. Similarly, common mistakes occurring while processing the return on the computer should also be tabulated. The staff doing the processing work should also be educated and trained accordingly.
- vii. The procedure for rectification of mistakes apparent should be made simpler and effective (there disposal has already been made time-bound).
- viii. Computerisation should not lead to further increase in procedural levels and manual checks.

**C.** As regards collusive corruption, the basic principle is simple enough: “**payment of bribe should not pay**”. In other words, if the tax payer is made to realize that even by paying bribes, there is no certainty of his having escaped the long arm of the law, the incentive for collusive corruption will diminish drastically. This will require the following steps:

- i. The scheme of ‘revision of orders prejudicial to revenue’ should be strengthened. This could be done , by way of illustration, by:
  - Extending its purview from orders passed within previous two financial years (the present scheme) to six financial years.
  - Defining what is ‘prejudicial to revenue’ in the Act itself. The definition should be simple enough so that appeals before Income Tax Appellate Tribunals get decided on merit and not on technical grounds.

- ii. The scheme of 'reopening of assessment' should be strengthened. This could be done by:
- Simplifying the provisions relating to reassessment (if need be, 'income chargeable to tax escaping assessment' may be defined in the Act in a simple way).
  - Uniform and unconditional application to six financial years (presently limited to four years generally and six years conditionally).
- iii. Building adequate safeguards and review mechanism regarding abuse of these provisions.
- iv. The organizational structure of the department's 'Central Information Bureau' (CIB) should be strengthened and its role should be expanded and redefined (the CIB has the mandate for collection and dissemination of information). A surfeit of information from multiple sources, its utilization and a proper review of action taken on available information is the surest way of conveying the message that collusion will not pay. The steps needed would include:
- Collection of information from various sources regarding cash transactions/financial transactions/property transactions etc.
  - Linking PAN to credit card usage and other financial transactions.
  - Reporting of cash transactions above a specified limit to CIB.
  - Analysis of data and identification of tax payers/ jurisdictional office.
  - Dissemination of information to jurisdictional offices and review of action taken by jurisdictional offices on the information provided. The information pertaining to identified tax payers should be tagged to the PAN database leading to automatic computerized selection of the cases for scrutiny. In case of non-identification of tax payers, information should be automatically disseminated to various regulatory bodies. **Information which could not be analysed and taken to its logical conclusion is no information at all.**

- This would require adequate manpower and computerization of the CIB.
- v. Every new claim of exemption/deduction above a specified amount should be referred to the Directorate of Income Tax (Investigation) within three years for on the spot verification.
- vi. Scope of deducting taxes at source ('withholding tax') should be enlarged continuously.
- vii. Making penalty provisions simpler and effective to be of any use as deterrent to tax evasion.
- viii. Offences in cases where enough evidence is available of purposeful evasion of taxes should be made cognizable. Even minor punishments in such cases would act as a major deterrent.
- ix. The procedure for launching prosecution should be simplified.
- x. Felicitation of honest tax payers and immunity from scrutiny for three years.

### Systemic Reforms in Land Administration

**1. Introduction:** Land administration is perhaps one of the most important functions that the government performs. It basically deals with the maintenance of records about the ownership of land and immovable properties of citizens. The land administration systems that exist in India were designed primarily in the pre Independence period. At that time the main objective of the land administration system was collection of 'land revenue'. The system of land administration has been laid down in the Land Revenue Act, Code and the regulations made there under. The focus in the old system was on the rural lands. However, with increasing urbanization and spiraling land prices, land management systems in urban areas have assumed greater importance.

The land revenue laws and regulations laid down elaborate procedures for maintenance of land records in the rural areas. In fact, one of the primary duties of the Collector, was land management which he/she carried out through the 'Tahsildars', and 'Patwaris'. But, similar procedures do not exist in the urban areas where such records are maintained by the municipal bodies or development authorities or at times by the 'Tahsildars'.

It is felt that the state of record keeping for land records leaves much to be desired. In rural areas the problems are further compounded by the relatively low levels of awareness among people. An extensive survey of lands has not been carried out for decades, and updating of records has been lagging behind considerably. In urban areas the high price of lands coupled with improper record management systems provides a fertile breeding ground for corruption.

**2. Public Perception:** In a Transparency International – CMS Survey of Corruption in various Govt. Departments in 2005, nearly 4/5 of the respondents in the survey opined that the Land Administration Department was corrupt. There was no significant difference in perception among states with high level of or low level of computerization of land records.

#### 3. Statistics on Levels of Corruption:

- According to the same survey, value of corruption in the Land Administration Department in the country is estimated at Rs.3126/- crores per annum.
- 14.4% of households in the country claimed to have interacted with the department in the last one-year.
- 7.6% of all households in the country who had interacted with the department during the year, claimed to have paid bribes to the department. This figure is

higher in East (10%) and South (9%) in comparison with West (3%) and North India (5%).

- More than three-fourth (79%) of those interacting with the department had agreed that there is corruption in the department.
- Nearly two-third (61%) of those interacting with the department had used alternate route like using influence than paying bribes for completion of their work.
- Of those who paid bribes, more than one third (36%) had paid money to department officials, whereas 33% had paid money to middlemen like document writers, property dealers etc., to get their work done.

Respondents who had claimed to pay bribe in the department were asked about the nature of work/service for which they had to pay bribes. 39% of the respondents claimed to have paid bribes for property registration. One fourth had paid bribes for mutation.

#### *Work for which bribes are paid*

Multiple response	Figures in per cent
Work/Service	Total
Property registration	39
Mutation	25
Clearing land tax dues	12
Undervaluing land/property	12
Land Survey	12
Purchasing stamp paper	7
Obtaining land/property documents	4

**3. Causes of corruption:** In the Transparency International Survey, 2/5<sup>th</sup> of the respondents who had interacted with the Land Administration Department, took recourse to alternative methods like exerting influence or bribery to get their work done. The reasons cited by the respondents for using alternative processes were as under:

51% of the respondents said that it was to help save time, 46% said that they could not get the work done in the normal way and 3% attributed it to ignorance of rules and procedures of the transactions.

The underlying reasons are of course that land has traditionally been a key symbol of prosperity, power and prestige in India and in a fast growing economy; it is now a vital economic resource. Control of land has thus become one of the main sources of corruption in India as shown by recent policy controversies on the Government's SEZ policy and earlier controversies over allotments of public land at below market rates by government to private agencies, political parties, fraudulent charitable societies and the like.

#### 4. Reform measures needed and the road ahead:

##### Urban Areas:

- a. Eliminating controls, opening up the supply of land particularly in urban areas by steps such as the repeal of the Land Ceiling Act and higher composition fees on vacant land, shifting public land allotment policies from discretionary allotments to competitive auctions through the market, and giving farmers who lose land to either the public or the private sectors a chance to share in the fruits of development by giving them a portion of the developed land are some measures that can reduce the scope for corruption and also lead to more broad based development.
- b. While most states have some form of land records for rural/agricultural land; for urban properties, registered documents, wills etc are the only property documents available and these inevitably become complex as well as inchoate over time leading to property disputes and fuelling massive litigation. Therefore, proper record keeping systems should be introduced. All urban lands should be surveyed periodically using modern techniques. Elaborate rules should be laid down to spell out the procedures for obtaining title deeds and affecting mutations in cases of acquisition of rights by individuals. The rules should also lay down the mechanism for resolution of disputes in cases of entries in the records, as in the rural areas where such dispute resolution mechanism has been provided under the land revenue laws.

##### Rural Areas:

- a. A survey of all lands, which is long overdue, should be taken up immediately.
- b. There is a need to have an extensive capacity building programme for the field functionaries like the 'patwaris' to upgrade their knowledge about the various laws dealing with 'acquisition of rights'.
- c. The supervisory officers should ensure that most mutations are done suo motu, without the need of the villagers running from pillar to post. The details of such mutations like sale deeds, inheritances etc are already available with the land revenue machinery.
- d. Computerisation of land records should be taken up periodically. But it needs to be ensured that once these records are computerized they should be updated continuously.
- e. Absence of periodic updating of land records and inaccurate revision of such records (including village survey maps) is a major source of harassment of the land-holder. Even in states where computerization of records has taken place, no significant improvement in the 'satisfaction level' of users is discernible. A time has perhaps come when the State legislation governing the matter should have penal stringent provisions for inaccurate updating and delay in supplying copies.
- f. A time has also come when village land management details encompassing all the details of record of rights along with a cadastral survey map is published on the lines of 'electoral rolls'. With computerization of land records, this has become quite practicable and will considerably dilute the mystique of land records (This should be followed in urban areas also).

##### Computerisation of Land Records

In Karnataka, 20 million land records of 6.7 million landowners in 176 Talukas have been computerized in an online system that uses finger print biometric authentication to rule out fraud, provides for 'first in first out' mutation processes and regular updation of land records online all contributing to total transparency in land records management combined with security and reliability. Thus, farmers now get land records in 2 minutes, records are authentic, mutations can also be done quickly and access to farm credit becomes easy. There are concomitant benefits for the judicial administration and financial institutions in terms of clear land titles and for the administrators in the form of an accurate, easy to maintain database that is useful for many other developmental and regulatory activities.

- g. The Collectors and his/her field staff have not been giving the attention required for land management. It is necessary to provide adequate assistance to the Collector in the form of trained staff, in order to enable him/her to discharge this important function.

#### 5. Land Acquisition:

Concerted efforts are needed to introduce country planning on firm basis. To begin with, the formal responsibility of laying down policies for this purpose may be vested in the state governments under the overall guidance of Ministry of Rural Development (Department of Land Resources).

Inadequate land use statistics is also a major cause for irregularities in land acquisition. The Survey of India must be given the responsibility of compiling, maintaining and updating such data for every district. This should be done in conjunction with the land revenue departments of the states.

#### 6. Registration:

- a. There is need to rationalize high stamp duties that create an incentive for under-valuation and use of black money in property transactions combined with reforms and process improvements including the use of IT in the functioning of the Registration Departments in order to bring in automacity, reduce public-official interface, and eliminate corruption.
- b. As the stamp duties are based on the value of land, assessing the value of land every time leaves a lot of discretion in the hands of registering authorities. It may be desirable to fix the land values well in advance for different localities and different types of lands.

#### Reasons for Honesty Among Civil Servants in Central Government in Finland\*

There are some elements which explain why corruption so seldom occurs in Finland.

1. **Egalitarian society – no class distinction:** In 1906, Finland became the first country in the world to adopt universal suffrage that included the right of women not only to vote but to stand as candidates for election too. Public administration is open for everyone and a career as a civil servant has been open for everyone. The welfare services have expanded from the 1960s onward. The main elements of the welfare society are a basic old age pension for everyone over 65, free basic education, kindergarten places and higher education, and health care for everyone. The state takes care of the unemployed. All of the foregoing factors have reduced the urge to bribe civil servants and the temptation for civil servants to take bribes.
2. **Good status, adequate pay for civil servants:** The career of civil servant has always been highly regarded. Salaries have not been particularly high, but good enough. The population and administration in Finland have been so small that if you lose your good name in society you lose a lot. Thus the risk of being accused of wrongdoing and being excluded from normal social circles has been a powerful deterrent. That is why individual cases of corruption have always been rare.
3. **Public financing of parties:** All over the world, traditional ways of raising funds for political activities have included membership fees, canvassing, lotteries, donations, private support and small-scale commercial activities. Finland was one of the first countries to allocate state funds for political parties. The system has continued since 1967.
4. **The legal structure and culture of the administration:** A decree in 1817 reserved access to senior civil service posts in Finland for lawyers, or at least to university graduates with a degree in law. In spite of the modernization of the public sector, the core of governmental administration has maintained the legal tradition. An administration without clear political posts, with a low hierarchical structure, and, at the same time, with a high degree of individual and collective responsibility among civil servants at every level of administration, as well as exposure to public scrutiny, does not nurture corruption.

5. **The referendary or rapporteur system:** The referendary system is an old pillar of legalism in the Finnish administration. A referendary is a civil servant who researches a matter under advisement, suggests options and offers a final proposal. In this system the referendary, who is of lower rank than the decision-making politician or civil servant, can adhere to his or her opinion against the superior party. A Minister can make a political decision that differs from the proposal of the referendary. If the referendary does not sign it, it nevertheless becomes legally binding. A referendary is legally responsible for the decisions he or she makes. If a Minister or the government makes a decision different from that which the civil servant involved proposed in the matter, the civil servant can obviate legal responsibility by writing a response, but that is quite unusual. From the point of view of corruption, the Finnish system demands from the potential corrupter double work. He or she has to convince both the decision maker and the referendary of his or her interests.
6. **Non-political civil servants as heads of ministries - until 2005:** Finland has not had a system of political state secretaries. Non-political, professionally skilled, permanent civil servants have been regarded as the best types for promoting the interests of citizens. In 2005, the appointment of political state secretaries began in government ministries.
7. **Transparency and openness:** The main principle in Finland has always been that everything in the public administration really is public, open for criticism by other civil servants, citizens and the media. All the diaries and records kept in the public administration are open to everybody.
8. **The duty to provide public explanation of the reasons behind decisions and the duty to be proactive:** According to the Constitution, among the most important guarantees of good governance are the right to be heard, the right to receive a reasoned decision and the right of appeal. Another important principle is that it is not enough for a civil servant not to make mistakes. A civil servant must be proactive in carrying out duties in the best interests of the citizens.
9. **The strong positions of the Chancellor of Justice and Ombudsman:** The Chancellor of Justice works in the government - is a part of wider government- and the Ombudsman is part of parliament. The President nominates both, but they are wholly independent in their work. They have all the tools and rights

- they need to investigate and act. They are the highest and most highly regarded legal officers in Finland.
10. **Collective and collegiate decision structure:** Corruption is facilitated if a decision-making unit consists of only one person. The corrupter can focus all tactics and resources on that individual. As both parties usually benefit, there is little reason for either one to reveal their dealings and thus make themselves liable for possible punitive measures. If, however, decisions are made by a collegiate body, corruption becomes much more difficult and unsafe, but not impossible. More people have to be convinced of the advisability of deciding in favour of an interest group and there is always the possibility of one would-be corruptee blowing the whistle on any shady transaction. Collegiate decision making has been a tradition in Finland since the seventeenth century.
  11. **Low hierarchical structures plus personal independence and self-responsibility in administration:** The administration has always been modest; the civil servants well educated, and a democratic mind-set has been dominant. For these reasons, most civil servants deal with their tasks personally from the beginning until their decision is reached without the intervention of superiors. Civil servants are responsible for their action in the vertical and horizontal directions. They are obliged to inform others about their tasks and their actions.
  12. **Relatively closed civil service careers:** In Finland, it is very rare for someone from outside the administration to be appointed to the higher posts within it, even though there is not a closed career system. Finland does not have any elite educational establishment for the production of future high ranking civil servants along the lines of France's Ecole Nationale d' Administration, the ENA. Nor does Finland have very hierarchical administrative structures as in some southern European countries.

**Checking the limits of corruption in practice: "What is a bribe?":** While the Finnish governmental tradition has been very legalistic, but at the same time, practical and flexible, it has been important that the Supreme Court, which is the highest instance for clarifying and examining values in legal and administrative affairs, from time to time clarifies what are intended to be the norms. This mechanism controls the behaviour of the political elite and the top-level civil servants and because this is reflected in the lower levels of administration, everyone is reminded of the limits and correct interpretation of the norms.