LEGAL REGIME FOR COMBATING CORRUPTION: A COMPARATIVE STUDY OF U.K., U.S.A. & INDIA

Thesis

SUBMITTED TO THE
BABASAHEB BHIMRAO AMBEDKAR UNIVERSITY
LUCKNOW

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Prof. (Dr.) Sudarshan Verma

Head
Department of Law
School for Legal Studies

SUBMITTED BY

Brijandar Singh Panwar

Enrollment No. 366/10

DEPARTMENT OF LAW
SCHOOL FOR LEGAL STUDIES
BABASAHEB BHIMRAO AMBEDKAR UNIVERSITY
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LUCKNOW-226 025

2016

This Ph.D. Thesis is

Dedicated to

My Late Mother

Declaration

I, Brijandar Singh Panwar hereby declare that research work embodied in this Ph.D. thesis entitled "*LEGAL REGIME FOR COMBATING CORRUPTION: A COMPARATIVE STUDY OF U.K., U.S.A. AND INDIA*" has been carried out by me under the supervision of Professor (Dr.) Sudershan Verma, Head Department of Law, School for Legal Studies, Babasaheb Bhimrao Ambedkar University (A Central University) Lucknow. This Research work is an original work and it has not been previously submitted in part or full for any other degree or diploma in the University or any other University.

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This is to certify that this thesis entitled **"LEGAL REGIME FOR COMBATING CORRUPTION: A COMPARATIVE STUDY OF U.K., U.S.A. AND INDIA"** submitted by **Mr. Brijandar Singh Panwar** in the Department of Law, School for Legal Studies, Babasaheb Bhimrao Ambedkar University (A Central University) Lucknow in fulfillment for the award of the Degree of Doctor of Philosophy in Law. "The candidate has completed the research work for the full period prescribed and as per his declaration the thesis embodies the results of his investigation conducted during the period he worked as Ph. D. Research Scholar"

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This is to certify that as per the declaration of Mr. Brijandar Singh Panwar this thesis titled **"LEGAL REGIME FOR COMBATING CORRUPTION: A COMPARATIVE STUDY OF U.K., U.S.A. AND INDIA"** submitted by **Mr. Brijandar Singh Panwar** is an original research work and has not been previously submitted in part or full for the award of any other degree or diploma to this or any other University.

The thesis submitted to Babasaheb Bhimrao Ambedkar University Lucknow satisfies all the requirements as stipulated in the Doctor of Philosphy (PhD) regulations -1999 as amended in 2008 and it is fit for submission and evaluation for the award of the degree of Doctor of Philosophy in Law of the University.

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PREFACE

Over the past decade, corruption has been identified as a costly diversion of scare resources and an impediment to development effectiveness. Most observers note that corruption is a symptom of deeper problems in how a political leadership administers the key financial function of the state. Corruption is the greatest challenge before the humanity. It also lies at the root of several other problems facing the humanity. Corruption can perhaps be described as the biggest factor responsible for failure and near collapse of legal and moral fiber of the nations and societies the world over.

Corruption is a dangerous plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish. This evil phenomenon is found in all countries big and small, rich and poor, but it is in the developing world that its effects are most destructive.

Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a Government's ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment. Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development.

The adoption of the United Nations Convention against Corruption will send a clear message that the international community is determined to prevent and control corruption. It will warn the corrupt that betrayal of the public trust will no longer be tolerated. And it will reaffirm the

importance of core values such as honesty, respect for the rule of law, accountability and transparency in promoting development and making the world a better place for all.

The new Convention is a remarkable achievement, and it complements another landmark instrument, the United Nations Convention against Transnational Organized Crime. It is balanced, strong and pragmatic, and it offers a new framework for effective action and international cooperation.

The US Congress enacted the U.S. Foreign Corrupt Practices Act (FCPA or the Act) in 1977 in response to revelations of widespread bribery of foreign officials by U.S. companies. The Act was intended to halt those corrupt practices, create a level playing field for honest businesses, and restore public confidence in the integrity of the marketplace. The FCPA contains both anti-bribery and accounting provisions. The anti-bribery provisions prohibit U.S. persons and businesses (domestic concerns), U.S. and foreign public companies listed on stock exchanges in the United States or which are required to file periodic reports with the Securities and Exchange Commission (issuers), and certain foreign persons and businesses acting while in the territory of the United States (territorial jurisdiction) from making corrupt payments to foreign officials to obtain or retain business. The accounting provisions require issuers to make and keep accurate books and records and to devise and maintain an adequate system of internal accounting controls. The accounting provisions also prohibit individuals and businesses from knowingly falsifying books and records or knowingly circumventing or failing to implement a system of internal controls.

The United Kingdom ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention) on 14 December 1998. Since that time, the

U.K. has criminalised the bribery of foreign public officials principally by relying on the Prevention of Corruption Act 1906, the Public Bodies Corrupt Practices Act 1889 and the common law bribery offence. Until a 2001 amendment, none of these offences expressly referred to bribery of foreign public officials. Corporate liability for foreign bribery was available under the common law.

Efforts to reform the U.K.'s patchwork of bribery offences date back over many years. U.K. enacts effective and modern foreign bribery legislation in accordance with the Convention at the earliest possible date and as a matter of high priority. It also recommended that the U.K. adopt on a high priority basis appropriate legislation to achieve effective corporate liability for foreign bribery.

In April 2010, the U.K. enacted the Bribery Act 2010 which revamped its legislative scheme of bribery offences. The Act replaces the bribery offences described above with a specific offence of bribery of foreign public officials (Section 6) and general bribery offences that cover bribery of domestic and foreign public officials, and persons in the private sector (Sections 1 and 2). Corporate liability for these new offences would continue to be governed by the identification theory. In addition, the Act establishes a new offence of failure of commercial organisations to prevent bribery (Section 7). Finally, Section 14 establishes an offence against senior officers of a body corporate or partnership, where the body corporate or partnership commits a bribery offence under the Act with the consent or connivance of the senior officer. At the time of this report's adoption, the U.K. expected the Bribery Act to enter into force in April 2011.

In India the last three decades, reform has come to the India by way of two major law reforms, the Prevention of Corruption Act in 1988 (amending the 1947 law) and the Right to Information Act (RTI) in 2005.

The 1988 amendment to the Prevention of Corruption Act (PCA) affected corruption in the public sphere by attaching criminal liability under the Indian Penal Code to the acts of both public and private sector corruption and also defined the term "public servant," which had previously been left open to interpretation. The 2005 RTI Act aided the fight against corruption by granting private citizens the fundamental right to retrieve information from public authorities. The principal premise of the RTI is that through the promotion of transparency and accountability, corrupt practices will no longer be worth the risk of exposure.

The three main authorities involved in conducting inquiries and investigations into and prosecuting official corruption are the Central Vigilance Commission (CVC), the Central Bureau of Investigation (CBI), and the state Anti-Corruption Bureaus (ACB), while state Lokayuktas (Ombudsmen) advice state government departments on actions to be initiated against offending government officials. These latter state bodies are empowered to start investigative proceedings against any public functionary and recommend punishment. State Lokayukta statutes— anti-corruption laws passed by the individual Indian states—typically provide for the appointment of such an ombudsman and delineate that office's authority with regard to the investigation of administrative actions taken in certain cases or on behalf of that state's government. Cases related to money laundering are investigated and prosecuted by the Directorate of Enforcement and the Financial Intelligence Unit, both entities within the Indian Ministry of Finance.

Date- Brijandar Singh Panwar

Place-

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ABBRIVIATIONS

A.I.R	All India Reporter
ADB	Asian Development Bank
Art.	Article
BPI	Bribe Payers Index
CBI	Central Bureau of Investigation
CPI	Corruption Perceptions Index
CVC	Central Vigilance Commission
EU	European Union
FCPA	Foreign Corrupt Practices Act
FCRA	Foreign Contribution (Regulation) Act
GA	United Nations General Assembly
GAO	The Government Accountability Office
GCR	Global Corruption Report
GDP	Gross Domestic Product
GFC	Global Financial Crisis
GI	Government Inspectorate
HC	High Court
NGO	Non-Governmental Organisation
OAS	Organization of American States
OECD	Organisation for Economic Co-operation and Development
OECD	Organization for Economic Co-operation and Development
OGE	Office of Government Ethics
OIG	Offices of the Inspectors General
RTI	Right to Information
RICO	Racketeer Influenced and Corrupt Organizations Act
SC	Supreme Court
SFO	Serious Fraud Office

SOCA	Serious Organized Crime Agency
TI	Transparency International
UK	United Kingdom
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNCAC	United Nations Convention against Corruption
UNDP	United Nations Development Programme
UNODC	United Nations Office on Drugs and Crime
USA	United Nation of America
v.	Versus
Vol.	Volume

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- The Constitution of India, 1950
- The Foreign Contribution (Regulation) Act 2010 ("FCRA")
- The Prevention of Corruption Act 1906
- The Prevention of Corruption Act 1916
- The Prevention of Corruption Act, 1988
- The Prevention of Money Laundering Act, 2002
- The Public Bodies Corrupt Practice Act 1889
- UK Bribery Act 2010
- Whistle Blowers Protection Act, 2011

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- United States v. Sheker, 618 F.2d 607, 609 (9th Cir. 1980)
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CHAPTER-I

Introduction

CHAPTER I

INTRODUCTION

If a country is to be corruption free and become a nation of beautiful minds, I strongly feel there are three key societal members who can make a difference. They are the father, the mother and the teacher.[1]

Corruption is a disease, a cancer that eats into the cultural, political and economic fabric of society, and destroys the functioning of vital organs. In the words of Transparency International, "Corruption is one of the greatest challenges of the contemporary world. It undermines good government, fundamentally distorts public policy, leads to the misallocation of resources, harms the private sector and private sector development and particularly hurts the poor".[2]

Corruption is presently one of the major challenges facing the human race. The world over, corruption is increasingly being seen as a threat to human existence to the extent that some commentators have called for it to be recognised as a 'crime against humanity.' Indeed, corruption has been identified as the main obstacle to the realisation of good governance, sustainable development and Millennium Development Goals. It has monumental effects on the political, economic, social and cultural well-being of societies.[3]

[1] A.P.J. Abdul Kalam

[2] Transparency International, available at http://www.transparancy.de/mission.html last visited on 2 June 2013.

[3] Elizabeth Nduku & John Tenamwenye "*Corruption in Africa A Threat to Justice and Sustainable Peace"* http://www.globethics.net/publications last visited on 24 November 2015.

Corruption in a civilised society is a disease like a cancer, which if not detected in time is sure to maliganise the polity of country leading to disastrous consequences. It is termed as plague which is not only contagious but if not controlled spreads like a fire in a jungle. Its virus is compared with HIV leading to AIDS, being incurable. It has also been termed as Royal thievery. The socio-political system exposed to such a dreaded communicable disease is likely to crumble under its own weight. Corruption is opposed to democracy and social order, being not only anti people, but aimed and targeted against them. It affects the economy and destroys the cultural heritage. Unless nipped in the bud at the earliest, it is likely to cause turbulence shaking of the socio-economic-political system in an otherwise healthy, wealthy, effective and vibrating society.[4]

1.1 The Legal framework

The problem of corruption is not peculiar to our country alone. It is a world wide phenomenon and it existed in one form or the other in all forms of administration and in all periods of political development. History is replete with examples of wide spread corruption in the developing countries as well as the advanced countries like U.K., and USA have adopted many special laws to tackle this problem. The Council of Europe has adopted the Criminal law Convention on Corruption in 1998 and the Civil law Convention on Corruption in 1999. The European Union adopted a number of legal instruments from 1995 to the present, aiming to protect the European Communities financial interests by criminalizing fraudulent conduct. The Inter-American Convention against Corruption of the organization for American states entered into force in 1997. The organization for Economic Cooperation and Development adopted the Convention on Combating Bribery of foreign officials in International Business Transitions in 1997, and it went into force in 1999. The African union approved a regional anti-corruption convention in September 2002. United Nations also adopted Convention against corruption 2003. Properly

[4] *State of M.P. v. Ram Singh*, AIR 2000 SC 870 at p. 873.

implemented this legal instrument will greatly enhance the rule of law in fighting corruption in both the public and private sector.

British anti-bribery law was based on the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906, the Prevention of Corruption Act 1916, and Bribery Act, 2010[5]. In India the lawmakers have always been conscious of this problem. The Indian colonial government enacted the first codified law, The Indian Penal Code, 1860 which covers the crime of corruption. Later on after independence the Indian Parliament has enacted the Prevention of Corruption Act, 1988 is specifically deals with the problem of corruption in public life amendments were made from time to time to keep pace with the changing times. Prevention of Money Laundering Act 2002 (amended in 2005) was also enacted. At the local level, state government have state laws that address specific aspects of corruption. The Right to Information Act, 2005 aims at ensuring efficiency, transparency and accountability in public life.

1.2 The Institutional Framework

There are various bodies in place for implementing anti-corruption agencies are raising awareness on corruption issues. In UK, serious Fraud Office (SFO), in USA, The United States Office of Government Ethics (OGE), In India, the central Vigilance Commission (CVC), the Central Bureau of Investigation (CBI), the office of the Controller and Auditor General (CAG), and the chief Information Commission (CIC). Many Indian states have set up the office of Ombudsman known as Lokayuktas manly to prop complaints against ministers and public servants pertaining to corruption.

1.3. Statement of Problem

Corruption remains widespread in the country and there have been many instances of political and bureaucratic corruption, public funds embezzlement,

[5] Available at: http://www.legislation.gov.uk/ukpga/Vict/52-53/69/introduction last visited on 13 July 2012

fraudulent procurement practices, and judicial corruption high ranking officials have also been involved in major corruption scandals. The sectors most affected by corruption include public procurement tax and customs administration, infrastructure public utilities and the police

The Prevention of Corruption Act 1988 is the existing law in India dealing with offences relating to corruption. This law, however, was essentially enacted to take care of corruption cases in the public sector and by public servants, whereas in fact, there is widespread corruption in the private sector also which seriously hampers the overall growth and development of the country. The second problem is that the system is painfully slow and punishment is not swift. The corruption Act provides for trial of corruption cases exclusively by the special judges. The number of special judges is highly insufficient compared to the number of corruption cases field in their courts. There is no witness protection scheme nor there provisions for quick and effective action against witnesses who become hostile. Because prosecution has to depend heavily on the testimony of witnesses to prove its case beyond doubt regarding corruption other problem is that there are legal provisions for confiscation and recovery of property acquired as proceeds of crime, such recovery is not easy.

Corrupt public servants often acquire properties with the proceeds of crime in the names of their friends, relatives, family members and other acquaintances. Therefore it is not easy to prove in court that such properties are the proceeds of crime. Such properties are quite often held offshore under strict privacy laws and it is not easy to trace and recover them, especially in the absence of desired international co-operation. A whistleblower is a person who tells the public or someone in authority about alleged dishonest but in India there is no protection.

1.4. Objective of Research

The research work has following objectives:

1. To discuss the present situation of corruption in UK, USA and India.
2. To study the concept and historical background of corruption in UK, USA and India.
3. To study the role of international Conventions and other instruments to combat corruption.
4. To compare the anti-corruption laws and the various procedures and practices in pursuit of preventing corruption in UK, USA and India.
5. To evaluate and compare the performance of anti-corruption Agencies in UK, USA and India.
6. To study the various judgments of the courts to eradicate corruption.

1.5. Research Hypothesis

The researcher has formulated the following hypothesis:

1. Whether the international anti-corruption laws and convention are sufficient to combat corruption?
2. Whether the existing anti-corruption and bribery laws of UK and USA are complete for fighting corruption?
3. Whether the existing anti-corruption laws in India properly implement?
4. Whether the existing anti-corruption laws of UK, USA and India are effective in their countries.
5. Whether the anti-corruption institutions of UK, USA and India are to reduce the corruption?
6. Whether the courts of UK, USA and India able to curb corruption?

1.6. Research Methodology

The method in the present research study is comparative form of research. For this purpose the researcher has adopted primary and secondary sources. The primary data is collected from the Legislative enactments, Government Orders, national and international Committees. The secondary data is collected from books related to anti-corruption laws from various libraries, print material as well as online material available on internet and site

of them whenever necessary. For this purpose the cases are also referred not only from AIR, SCC but also foreign courts. In order to access them this study of foreign laws, interpretation of judiciary and foreign experiences are to be taken.

1.7. Literature Reviewed

During this research, number of books, magazines, articles, reports and materials available on websites are consulted. The relevant and material data and information has been incorporated at the appropriate place and level.

1.7.1 Prevention of Corruption Act[6]

In this book author has raised issues relating to the corruption. As the bribe-giver in a corruption case is often compared with an accomplice, the law relating to accomplices has also been discussed in appropriate detail. As many of the decided cases relate to the old provisions of laws relating to corruption which existed prior to the enactment of the present Prevention of Corruption Act, 1988. A comprehensive book containing detailed analysis of the provisions contained in the Prevention of Corruption Act, 1988, with the help of case law discussion of the Supreme Court and various High Courts. It also covers detailed discussion on the subject of the Prevention of Corruption Act, 1947; Delhi Special Police Establishment Act, 1946; Criminal Law Amendment Ordinance, 1944; Criminal Law Amendment Act, 1952; Anti-Corruption Laws (Amendment) Act, 1964; Anti-Corruption Laws (Amendment) Act, 1967; J&K Prevention of Corruption Act, 2006 (Smvt); Section 197 of CrPC (relating to Sanction for Prosecution); CBI and its Powers of Investigation; Law relating to Accomplices; Specimens of Pre-trap and Post-trap Panchnama/Memorandum; certain State Laws relating to Corruption and Allied Matters; relevant Central Civil Services Rules, and other useful material.

[6] Dhamija, Dr. Ashok, *Prevention of Corruption Act*, Lxis Nexis Butterworths Wadhwa Nagpur, Second Edition, 2009.

1.7.2 A Treatise on Anti-Corruption Laws in India (With Exhaustive Commentaries on the Prevention of Corruption Act, 1988)[7]

In this book author has described The Prevention of Corruption Act, 1988. With this object in view the term "Public Servant" has been defined to cover several categories of persons within its sweep. Sections 161 to 165-A of the Indian Penal Code have been repealed and incorporated in this Act with suitable amendments and providing enhanced penalties. The Criminal Law Amendment Act, 1952 has been repealed and the provisions of that Act have also been included in this Act with necessary amendments. Several other provisions provide for speedy trial of cases. The Part-I provides an exhaustive, analytical and critical exposition of the provisions of the Prevention of Corruption Act, 1988. Part-II contains Offences of Conspiracy, Attempt and Abetment punishable under the Indian Penal Code. Part-III contains Delhi Special Police Establishment Act, 1946 and Central Vigilance Commission Act, 2003. Part-IV Criminal Law Amendment Ordinance, 1944 and Part-V contains several useful Appendix. Copious case law added up to 2008. Pains have been taken to see that all important aspects are digested, analysed and presented to enable easy reference. In this treatise a comparative study of the provisions of the new Act with the provisions of the earlier corresponding laws, has been made highlighting the scope and significance of the various provisions of the new Act.

1.7.3 Corruption and Human Rights in India: Comparative Perspective on Transparency and Good Governance[8]

In this book author has described Corruption in India has become a growing and pervasive concern. It undermines not only the democratic

[7] Ramkrishna, P.V. *A Treatise on Anti-Corruption Laws in India (With Exhaustive Commentaries on the Prevention of Corruption Act, 1988)* S. Gogia & Company 14th Ed. 2012.

[8] Rajkumar, C, *Corruption and Human Rights in India: Comparative Perspective on Transparency and Good Governance*, Oxford University Press, 2012.

institutions, but also the social fabric, political and bureaucratic structure of the Indian society. This book examines corruption from a human rights perspective. It differentiates between two approaches to dealing with corruption, the criminal law enforcement approach to recognizing criminal culpability and the human rights approach to seeking accountability for corruption. Relying on the latter, it analyses corrupt practices that lead to violation of constitutional rights of individuals. In order to address the systemic inefficiencies in dealing with the problem, this work suggests key legislative and institutional reforms. It also critically examines the present anti-corruption framework, and legislative and institutional measures taken by various governments. Advocating accountability and transparency in governance, this book critically focuses on the right to information and the working of central and state information commissions. It compares India's experience with some other developing countries in South Asia.

1.7.4 Political Corruption[9]

In this book, an effort is made to enlighten the legal and constitutional issues raised before the Supreme Court on political corruption. The brief facts of each case and the issues raised before the Supreme Court have been mentioned in a concise and simple language, to create awareness about the seriousness of the problem.

1.7.5 The United Nations Convention Against Corruption: A Critical Overview[10]

In this article author has described the provisions of the United Nations Convention Against Corruption. Corruption is a global problem which poses serious threat to the development of a country and its people. States, developed or developing, are equal victims of this problem. Most importantly, corruption has the greatest impact on the most vulnerable part of a country's population,

[9] Ramkrishna, P.V. *Political Corruption*,S. Gogia & Company Hyderabad, Ed. 2009.
[10] R. Rajesh Babu, The United Nations Convention Against Corruption: A Critical Overview, available at http://ssrn.com/abstract=891898 last visited on 8 October 2012.

the poor. Further, corruption today has become one of the most salient manifestations of the organized crime syndicate of the globalized world, which has grave national and international ramifications. Establishing a legal framework to combat corruption at the national and international level is not an easy task. While many States have already embarked upon a national strategy to deal with corruption, and criminalized it when committed domestically, there is no uniformity in approach taken by these countries. Further, the issue of corruption as a transnational crime poses many challenges.

1.7.6 Combating Corruption under International Law[11]

This Article revisits the history of international law's anti-corruption efforts in order to generate questions about the current status and future direction of the fight against corruption under international law. By stepping back and reviewing how international law has struggled with an issue traditionally considered to fall within the exclusive domain of national law and politics, this Article argues that the lessons of these developments are helpful, not only in understanding the current status of anti-corruption initiatives, but also in generating the questions and propositions for the future development of this field of international law. This is necessary to contribute to the emerging efforts to combat corruption worldwide in a more balanced, creative, and effective way

1.7.7 The Anti-Corruption Movement in India and the Lokpal[12]

In this article, the India against corruption Jan Andolan (people's movement) is a collective organized synergistic people's movement formed to ensure a corruption free India. India against corruption's current objective, as stated on its website, is for direct participatory democracy of citizens (without caring about leaders or big names) to rid the greater Indian nation of corruption

[11] Posadas, Alejandro Combating Corruption under International Law, available on scholarship.law.edu/cgi/viewcontent.cgi?article=1220&context last visited on 10 May 2014.

[12] Megha Singh & Dr. R.K. Sohoni, The Anti-Corruption Movement in India and the Lokpal, Imperial Journal of Interdisciplinary Research (IJIR) Vol-2, Issue-4, 2016

wherever it is found by whatever means necessary. Accordingly, IAS offers and manages a series of platforms and tools to empower individuals who share a common dream that someday (soon) corruption will be eliminated in India. While India currently has a number of laws intended to stem corruption, supporters of the Jan Lokpal Bill have argued that the current laws are inadequate in light of the large number and size of scandals in India. To draw the attention of the government, a focused campaign "India against corruption" was started in 2011. Through these collaborative efforts till August 2011, IAC was able to upload the 23rd version of the Jan Lokpal Bill draft.

1.7.8 THE MOVEMENT FOR RIGHT TO INFORMATION IN INDIA People's Power for the Control of Corruption[13]

This article will attempt to outline firstly the significance of the right to information, particularly in empowering ordinary citizens to combat state corruption. It will describe in some detail the most important grassroots struggle for the right to information, which has succeeded in linking the entire movement in the country to the struggles for survival and justice of the most poor. It would then delineate the constitutional history of the right, and attempts through the courts to breach the culture of secrecy of the executive, and initiatives from persons within the government. It will in the end describe efforts at the national level to legislate this right.

1.7.9 COMBATING CORRUPTION IN INDIA The Role of Civil Society[14]

Fighting corruption has emerged as a key development issue in India in recent years. More and more policymakers, businesses, and civil society organizations, have begun to confront the issue openly. At the same time the general level of understanding about corruption has risen markedly. Until recently, it was not uncommon to hear someone discuss anti-corruption strictly in law enforcement terms. By contrast, most people working in the field today

[13] Harsh Mander & Abha Joshi, available on www.humanrightsinitiative.org last visited on 15 August 2012.
[14] Sunil Sondhi, Combating Corruption in India the Role of Civil Society, available on unpan1.un.org last visited on 15 August 2012.

acknowledge that public education and prevention are equally important. The field has also come to appreciate how critical the role of civil society is for effective and sustained reform. A number of factors explain this growing emphasis on fighting corruption. Expansion and consolidation of democracy at the grassroots level has enabled citizens to use the vote and new-found civil liberties to confront corruption, prompting leaders and opposition figures to show a stronger anti-corruption commitment. Internationally, since the end of the Cold War, donor governments have focused less on ideological grounds for foreign assistance and concentrated more on trade and development, both of which are undermined by corruption. Countries with high levels of corruption, like India, have found 3 themselves less able to attract investment and aid in a competitive global market. At the same time, business within the country has faced ever stiffer competition with the gobalization of trade and capital markets, and has become less willing to tolerate the expense and risk associated with corruption.

1.7.10 EFFECTIVE LEGAL AND PRACTICAL MEASURES FOR COMBATING CORRUPTION: A CRIMINAL JUSTICE RESPONSE, AN INDIAN PERSPECTIVE[15]

This article aims to give a brief overview of the Indian laws dealing with the problem of corruption. The main law, i.e. The Prevention of Corruption Act 1988, is discussed in brief. Provisions pertaining to confiscation of ill-gotten wealth and asset recovery have also been referred to. The established mechanisms for collecting information about corruption are also discussed. The problems and challenges faced by the country in the fight against corruption are also highlighted in brief.

[15] Dharam Chand Jain, EFFECTIVE LEGAL AND PRACTICAL MEASURES FOR COMBATING CORRUPTION: A CRIMINAL JUSTICE RESPONSE, AN INDIAN PERSPECTIVE, available at www.unafei.or.jp last visited on 24 June 2012.

1.8. Previous Work in this Field

This is the first research work in this field. No substantive work has been done on this particular topic in this department in the university.

1.9 Plan of Chapterization

The introduction deals with, what is the exact meaning of the term Corruption. The researcher discussed the forms of corruption and what is the impact on society of corruption.

In chapter second researcher discussed the historical context of corruption. It was present in ancient time as well as in Mugal and Maratha empires under the British Raj, also present there.

In chapter third researcher dealt with general introduction of international legal instruments on corruption. I discussed the provisions of UNCAC as well as Inter American and European Convention on corruption is discussed.

In chapter fourth researcher discussed the National legal instruments on corruption. Firstly the provisions of Prevention of corruption Act, 1988 discussed. Secondly the provisions of Penal code, Criminal law (Amendments) Act, 1944 discussed. The Central Vigilance Act, 2003, the commission of Inquiry Act, 1952, Extracts from constitution of India, 1950, the departmental Inquiry act, 1972.

Chapter fifth deals with Institutional framework on corruption. There are various bodies in place for implementing anti-corruption policies and rising awareness on corruption issue. At the federal level, key institutions include the Central Vigilance Commission (CVC), the Central Bureau of Investigation (CBI), the office of the Controller and Auditor General (C&G), the chief Information Commission (CIC) and state Lokayukt. At the state level, local anti-corruption bureau have been set up, such as the Anti-Corruption bureau of Maharashtra.

In chapter sixth judicial contributions for combating corruption are discussed by the researcher. Judiciary, the guardian of the rights of the people, adopted a cautious approach. The Supreme Court has taken a stronger stance against corruption in recent years, as confined by the Bertelsmann Foundation Report 2008, In December 2006, in a landmark ruling; the Supreme Court ruled that prosecutors do not need prior permission to being proceeding against politicians facing corruption charges. It has also started addressing corruption in the police by mandating the establishment of a police commission to take into their matter and has ruled that corrupt officers can be prosecuted without government consent.

The last chapter deals with lays down conclusion and suggestions.

CHAPTER-II

Nature, Scope and Historical Background Of Corruption

CHAPTER II

NATURE, SCOPE AND HISTORICAL BACKGROUND OF CORRUPTION

'Just as it is impossible not to taste the honey or the poison that finds itself at the tip of the tongue, so it is impossible for a government servant not to eat up, at least a bit of the king's revenue. Just as fish moving under water cannot possibly be found out either as drinking or not drinking water, so the government servant employed in the government work cannot be found out (while) taking money.' *Kautilya.*

Corruption is a global phenomenon and it has serious implications and consequences for the growth of democracy, promotion and protection of fundamental rights. There is a wide spread perception that the level and pervasiveness of corruption gains significance. Corruption in any form treated as an incurable disease is caused by many social and economic evils in the society. It damages the moral and ethical fibers of the civilization. Undisputedly, corruption breeds many evils in the society. Once the seed of corruption starts growing it takes roots slowly and gradually and cancerously. It passes through the whole Nation and becomes a perilous disease. Corruption has been considered one of greatest challenges impeding the growth of contemporary India. Though India's economy stands tall and firm, it has not realized its true potential as corruption has, in the present scenario, inhibits and undermines not only the economic growth, but also the effective functioning of democracy.[1]

[1] Srinivasa Rao Gochipata & Y. R. Haragoapal Reddy *"Institutional Arrangements to Combating Corruption: A Comparative Study India's (C.B.I) and Hong Kong's* Indipendent Commission against *Corruption (I.C.A.C)"*

Corruption, a social menace, has made our country susceptible to and defenseless against the oncoming forces of anti-social elements. Corruption in India is a consequence of the nexus between bureaucracy, politics and criminals. India is now no longer considered a soft State. It has now become consideration. Corruption has a corrosive impact on economy. It worsens our image in the international market and leads to loss of overseas opportunities.[2]

More importantly, corruption in India flows from the political class. It manifests latently in party activities and election funds. Further, political patronage gives an aura of invincibility and respectability to corruption and deprives it of all moral and legal fears. David Bayley observes that ―The presence of corruption is an important hindrance to economic growth and progressive social change.[3]

It is now commonly agreed that corruption has vitiated India‘s public life like a cancer spreading over a human body. All sectors, be they administrative or political or economic, have come under the ever increasing onslaught of corruption. There are many reasons as to why this has happened. Political actors of all shades including Ministers, Legislators, office-bearers of political parties, and other political officeholders are involved in corruption.[4]

The legal structure of society forms an important pillar in the fight against corruption. If corruption is to be cured, the need for a strong legal framework against the same is almost axiomatic. In India, the legal framework for curbing and controlling corruption is primarily based on statutory and common law. While existing legislations and executive orders have gone a long way towards reducing corruption levels in India, there still remain some areas that require change.[5]

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[2] Srinivasa Rao Gochipata & Y. R. Haragoapal Reddy *"Institutional Arrangements to Combating Corruption: A Comparative Study India's (C.B.I) and Hong Kong's Independent Commission against Corruption (I.C.A.C)"*

[3] *Ibid*.

[4] *Ibid.*

[5] available at http://ssrn.com/abstract=891898http://cvc.nic.in/NationalAntiCorruptionStrategydraft.pdf last visited on 13 may 2012

Since 1994, unprecedented efforts have been made to raise awareness about corruption, its insidious nature and the damaging effects it has on the welfare of entire nations and their peoples. Corruption not only distorts economic decision-making, it also deters investment, undermines competitiveness and, ultimately, weakens economic growth. Indeed, there is evidence that the social, legal, political and economic aspects of development are all linked, and that corruption in any one sector impedes development in them all. There is now increasing recognition throughout the public and private sector that corruption is a serious obstacle to effective government, economic growth and stability, and that anti-corruption policies and legislation are urgently required at the national and international level. Serious efforts to combat corruption are still believed to be in their infancy in most countries, and reliable information about the nature and extent of domestic and transnational corruption is difficult to obtain. The problems are compounded by the very broad nature of the phenomenon and a lack of consensus about legal or criminological definitions that could form the basis of international and comparative research.[6]

2.1 Definition of Corruption

The term "corruption" comes from Latin word *corruptio* which means "moral decay, wicked behavior, putridity or rottenness". The concept may have a physical reference, as in "the destruction or spoiling of anything, especially by disintegration or by decomposition with its attendant unwholesomeness and loathsomeness; putrefaction", or moral significance, as in "moral deterioration or decay… the perversion or destruction of integrity in the discharge of public duties by bribery or favour…"

One of the early attempts to define corruption, in 1931, was by J.J. Senturian who stated, "Corruption is the misuse of public power for private

[6]available at http://ssrn.com/abstract=891898https://www.unodc.org/pdf/crime/corruption/toolkit/corruption_un_anti_corruption_toolkit_sep04.pdf last visited on 13 may 2012

profit".[7] A similar definition was adopted by the World Bank, and describes it an "abuse of public power for private benefit".[8]

It is "the act of doing something with an intent to give some advantage inconsistent with official duty and the right of others, a fiduciary's or official use of station or office to produce some benefit either personally or for someone else, contrary to the rights of others."

The Oxford Unabridged Dictionary defines corruption as "perversion or destruction of integrity in the discharge of public duties by bribery or favor."[9]

The Merriam Webster's Collegiate Dictionary defines it as "inducement to wrong by improper or unlawful means (as bribery)."[10]

Transparency International defines corruption as "Corruption involves behaviour on the part of officials in the public sector, whether politicians or civil servants, in which they improperly and unlawfully enrich themselves, or those close to them, by the misuse of the public power entrusted to them."

The Asian Development Bank defines corruption as "Corruption involves behavior on the part of officials in the public and private sectors, in which they improperly and unlawfully enrich themselves and/or those close to them, or induce others to do so, by misusing the position in which they are placed."[11]

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[7] R. Rajesh Babu, *The United Nations Convention Against Corruption: A Critical Overview,* available at http://ssrn.com/abstract=891898 last visited on 12 July 2012

[8] Available at http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm last visited on 11 june 2012

[9] Available at http://www.oxforddictionaries.com/definition/english/corruption last visited on 9 may 2012

[10] Available at http://www.merriam-webster.com/dictionary/corruption last visited on 25 July 2013

[11] Available at http://www.adb.com last visited on 22 June 2013

In 1999 the Council of Europe agreed on a working definition of corruption, which states:[12]

'Corruption is bribery and any other behaviour in relation to persons-entrusted with responsibility in the private and public sector which violates their duties that follow from their status as public officials, private employee, independent agent or other relationship of that kind and is aimed at obtaining undue advantages of any kind for themselves or for others.'

The OECD, the council of Europe and UN Conventions do not define "corruption". Instead they established the offences for a range of corrupt behaviour. Hence, the OECD Convention establishes the offence of bribery of foreign public officials, while the Council of Europe Convention establishes offences such as trading in influence, and bribing domestic and foreign public officials, in addition to these types of conduct, the mandatory provisions of the UN Convention also include embezzlement, misappropriation or other diversion of property by a public official and obstruction of justice. The conventions therefore define international standards on the criminalization of corruption by prescribing specific offences, rather than through a generic definition or offence of corruption.[13]

Supreme Court of India has observed on *corruption* that, "*in the widest connotation includes improper or selfish exercise of power and influence attached to a public office*."[14]

Penal Law on corruption as enacted, in the Indian Penal Code is deficient in many respects. The definition of corruption as attempted in Section 161, I. P.C. is not exhaustive so as to cover various aspects of corruption. It only speaks of 'gratification' (other than legal remuneration) accepted or agreed

[12] Council of Europe Criminal Law Convention (COE Criminal Convention), done at Strasbourg, 27 January 1999, (entered into force 1 July 2002).
[13] OECD, 'About OECD', available at http://www.oecd.org/about/0,2337,en_2649_201185_1_1_1_1_1,00.html (last visited 3 November 2012)
[14] *High Court of Judicature at Bombay v. Shivkumar Rangrao Patil,* AIR 1997 SC 2631

to be accepted by a public servant, or a person expected to be a public servant for himself or for any other person for showing as a motive or reward for doing or for-bearing to show official favour, etc. An offence under Section 161 I. P. C. will be committed only when the public servant accepts some gratification as a motive or reward, otherwise no offence is committed. Thus, no offence can be made out if undue favour is shown to a contractor not with the immediate purpose of gaining any pecuniary advantage from him, but with a view to obtain some benefits in future when such an occasion would arise. Such covert activities are not the subjects of any penal law. It may be an official misdemeanor, if proved. But it is always difficult to be proved.[15]

The Prevention of Corruption Act, 1947 also attempts to cover certain aspects of corruption hitherto uncovered by the provisions of the Indian Penal Code. Besides habitual acceptance of 'gratification', it provides the following as ingredients of corruption i.e. criminal misconduct[16]

(a) acceptance of any valuable thing by a public servant without consideration, or for inadequate consideration from any person with whom he has official dealings or likely to have official dealings in future.

(b) dishonest or fraudulent misappropriation of any property entrusted to it public servant or held under his control as a public servant.

(c) obtaining a valuable thing or pecuniary advantage by illegal means or by abusing one's position as a public servant.

(d) possession of pecuniary resources or property disproportionate to the known source of the public servant's income.

2.2 Forms of Corruption

There are various forms of corruption. There is grand corruption, such as that indulged in by heads of state who amass fortunes through their corrupt practices. Then there is retail corruption which operates at the cutting edge of

[15] Section- 161 of Indian Penal Code, 1860
[16] Section- 5(1) of the Prevention of Corruption Act, 1947

administration; it is generally of the petty kind and affects the day-to-day life of ordinary people; this type of corruption can be a source of harassment because one encounters it so often. It between grand and retail corruption one can also categorize corruption involving substantial sums of money and indulged in by those vested with great authority. Transparency International also draws a distinction between 'for the rule' and 'against the rule' corruption; in 'for the rule form of corruption' money is taken for applying the norms in force, whereas in 'against the rule from of corruption', rules are bent or misinterpreted in order to take money.[17]

The main forms considered are bribery, embezzlement, fraud and extortion and even when these concepts are partly overlapping and at times interchangeable with other concepts, they may identify some basic varieties of corruption.[18]

2.2.1 Bribery[19]

Bribery is the payment (in money or kind) that is given or taken in a corrupt relationship. To pay or receive a bribe is corruption per se, and should be understood as the essence of corruption. A bribe is a fixed sum, a certain percentage of a contract, or any other favour in money of kind, usually paid to a state official who can make contracts on behalf of the state or otherwise distribute benefits to companies or individuals, businessmen and clients. There are many equivalent terms to bribery, like kickbacks, gratuities, "commercial arrangements", baksheesh, sweeteners, pay-offs, speed- and grease money, which are all notions of corruption in terms of the money or favours paid to employees in private enterprises, public officials, and politicians. These are payments or returns needed or demanded to make things pass swifter, smoother

[17] Jyoti Trehan, *Crime and Money Laundering The Indian Perspective*, New Delhi: Oxford University Press, 1st. Ed. 2008.

[18] Jyoti Trehan, *Crime and Money Laundering The Indian Perspective*, New Delhi: Oxford University Press, 1st. Ed. 2008.

[19] Ibid.

or more favourably through the state or government bureaucracies. By "greasing palms" corporations and business interests can for instance buy political favours and escape the full burden of taxation and environmental regulations, they can buy protected markets and monopolies, import/export licences and quotas, and get access to large state contracts on capital goods, on-going supplies, major civil engineering projects, construction works, and so on.

2.2.2 Embezzlement[20]

Embezzlement is theft of resources by people who are put to administer it; it is when disloyal employees steal from their employers. This is a serious offence when public officials are misappropriating public resources, when state official steals from the public institution in which he or she is employed and from resources he is supposed to administer on behalf of the public.[21]

Embezzlement is not considered as corruption from a strict legal point of view, but is included in the broader definitions. In legal terms, corruption is a transaction between two individuals, one state agent and one "civilian", where the state agent goes beyond the limits of the law and regulations in order to secure himself a personal benefit in the form of a bribe. Embezzlement is regarded as theft because it does not involve the "civilian" side directly. The general public is deprived when public funds are embezzled, but no individual property is stolen and individual citizens are bereft of legal rights to present themselves as forfeited. These points to one of the dangers of embezzlement. There will have to be a political will as well as an independent judiciary and a legal capacity to clamp down on embezzlement. Embezzlement is a form of corruption and power abuse that can develop in closed institutional and moral spheres, independently of the public moral and with few possibilities of public sanction. In many thoroughly corrupt countries, embezzlement is a

[20] Ibid.
[21] Jyoti Trehan, *Crime and Money Laundering The Indian Perspective*, New Delhi: Oxford University Press, 1st. Ed. 2008.

fundamental part of the resource extractive capacity of ruling elite, even more important than extraction through bribes.[22]

"Straddling", the process by which some power-holders systematically use their political office to enter into, secure and expand their private business interests, should be regarded as another form of embezzlement. In some countries the political elite has nationalised foreign businesses, property and monopoly rights, and redistributed these to the members of the ruling families.[23]

2.2.3 Fraud

Fraud is an economic crime that involves some kind of trickery, swindle or deceit. Fraud involves a manipulation or distortion of information, facts and expertise, by public officials positioned between politicians and citizens, who seeks to draw a private profit. Fraud is when a public official (agent), who is responsible for carrying out the orders or tasks assigned by his superiors (principal), manipulates the flow of information to his private profit; hence the widely used principal-agent or incentive theory employed by economists to study this phenomenon.[24]

Fraud is also a broader legal and popular term that covers more than bribery and embezzlement. It is fraud for instance when state agencies and state representatives are engaged in illegal trade networks, counterfeit and racketing, and when forgery, smuggling and other organised economic crime is propped up by "official" sanction and/or involvement. It is fraud when politicians and state agents take a share foreclosing their eyes on economic crimes, and it is serious fraud when they have an active role in it.[25]

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[22] Ibid.
[23] Ibid.
[24] Jyoti Trehan, *Crime and Money Laundering The Indian Perspective*, New Delhi: Oxford University Press, 1st. Ed. 2008.

[25] Ibid.

2.2.4 Extortion

Extortion is money and other resources extracted by the use of coercion, violence or the threats to use force. Blackmailing and extortion are corrupt transactions where money is violently extracted by those who have the power to do it, but where very little is returned to the "clients" (perhaps only some vague promises of exception from further harassment).[26]

"Protection" or "security" money can be extorted in the classical, well-known mafia style, where organised criminals use insecurity, harassment and intimidation to extort money from individual citizens, private businesses and public officials. Corruption in the form of extortion is usually understood as a form of extraction "from below", by mafias and criminals.

Corrupt practices of this kind can, however, also be "from above", when the state itself is the biggest mafia of them all. This is for instance when the state, and in particular its security services and paramilitary groups, extorts money from individuals, groups and businesses. With more or less concealed threats, taxes, fees and other resources are extracted from travellers, market vendors, transporters and other private sector businesses. Furthermore, various state officials may extract "under the table" fees and "gifts" from individual citizens as they approach the state as clients, customers, patients, school children etc. These practices may be interpreted as "informal" forms taxation.[27]

2.3 TYPES OF CORRUPTION

There are basically three types of corruption-bureaucratic corporate and political. Bureaucratic corruption generally flows from faulty structures, misuse of official position or abuse of power its incidence increases if the bureaucracy

[26] Ibid
[27] Jyoti Trehan, *Crime and Money Laundering The Indian Perspective*, New Delhi: Oxford University Press, 1st. Ed. 2008.

pays low salaries to its employees. Bureaucracy can also be a great facilitator for both corporate and political corruption.[28]

2.3.1 Bureaucratic

Bureaucracy can also be a great facilitator for both corporate and political corruption. Bureaucratic corruption generally involves just sitting on a decision, misrepresentation, bending of rules or even downright fraudulent behavior. In most of the developing countries bureaucracies are often corrupt. In fact a number of bureaucratic systems nowadays function on the basis of percentages; in any public work contract in India, 30-40 per cent of the sanctioned budget is expected to be siphoned off to the coffers of the corrupt. Thus an index on the level of corruption for bureaucratic departments can also be drawn up; in India it is the revenue-generating departments which are the most corrupt.[29]

2.3.2 Corporate

Corporate corruption is generally on a grand scale unlike bureaucratic corruption which can be both big and small. In countries where is a very large public sector as in the case of India, such a large public sector is considered to be a convenient and highly profitable milch cow for the corrupt. There are several ingenious ways in which corruption operates in the public sector. It can start from the fudging of misted rolls to awarding of contracts leading to substandard infrastructure, to retailing products in an unrenumerative manner in order to benefit the corrupt. Corruption in public-sector banks is sequential to non-performing assets; perhaps banking is one sector that would rank very high on the corruption index in most developing countries. In controlled or partially controlled economies the private sector by manipulation of controls extending over several spheres of economic activities indulges in large-scale

[28] Ibid.
[29] Jyoti Trehan, *Crime and Money Laundering The Indian Perspective*, New Delhi: Oxford University Press, 1st. Ed. 2008.

corruption. Any numbers of subsidies that are devised are also a very lucrative source of corruption for the corporate sector.[30]

The examples that have been given regarding types of corporate corruption are by no means exhaustive; perhaps a monumental work will have to be written to portray the full scope of corporate corruption.[31]

2.3.3 Political

Political corruption is another type of corruption that has been in the limelight following the process of decolonization, the political class in the newly independent countries realized that the profits were being taken mostly by the bureaucrats and the corporate world. Soon the political class wanted its share and it went about it with great gusto. Both democratic and totalitarian regimes fell prey to it. In dictatorial or totalitarian regimes since the political process was weak the proceeds of corruption could be easily collected; only its magnitude differed depending upon the rapaciousness of the corrupt leader. In democratic regimes politicians had to be more ingenious in order to make money by corrupt means.[32]

In order to money in a democracy the politician first of all has to ensure his continuation in politics as a leader and the role played by money t ensure the same has increased over a period of time. The way the politicians raise money for the electoral process is by way of donations from the corporate world or wealthy individuals also bribe the voters, hire musclemen to intimidate them, indulge in booth capturing (a very typical Indian phenomenon), generally in collusion with the local authorities buy adversaries so that they deliberately lose make false promises and indulge in propaganda instead of performance is also used by the politicians in an unabashed and shameless manner to ensure their vote bank' Moreover once in power the politicians by virtue of heading the executive, have perfected the art of making

[30] ibid

[31] Ibid.

[32] Jyoti Trehan, *Crime and Money Laundering The Indian Perspective*, New Delhi: Oxford University Press, 1st. Ed. 2008.

money. In a recent case of political corruption in India involving Shri Sukh Ram a Union Minister INR 25 million was seized during a search of his residential premises. In terms of sheer vulgarity it has been said that the corruption of Jayalalitha as Chief Minister of Tamil Nadu during her first term would put even lamella Marcos to shame. Corruption by politicians has also been described by Americans as machine polities in other words the commercialization of politics in order to maximize gains.[33]

2.4 Impact of Corruption

Globally, there is a general consensus amongst most academicians and policy makers that the debilitating effects of corruption permeate through all aspects of public life. Several studies have shown that corruption not only stifles growth, it also perpetuates inequalities, deepens poverty, causes human suffering, dilutes the fight against terrorism and organised crime, and tarnishes India's image globally. The impact of corruption is multi fold, encompassing: political costs, economic costs, social costs, environmental costs and issues of national security.[34]

(a) Political Costs:

The political costs of corruption are manifested in weakened public trust in political institutions, reduced political participation, perversion of the electoral process, restricted political choices available to citizens and loss of legitimacy of the democratic system.[35]

(b) Economic Costs: Corruption reduces economic efficiency by misallocation of resources in favour of rent seeking activities, increasing the cost of public transactions, acting as an additional tax on business thereby reducing investment, reducing genuine business competition.[36]

[33] Ibid.
[34] Available at http://cvc.nic.in/NationalAntiCorruptionStrategydraft.pdf last visited on 6January 2012
[35] http://cvc.nic.in/NationalAntiCorruptionStrategydraft.pdf last visited on 18 March 2012
[36] Ibid.

(c) Social Costs: The effect of corruption on the social fabric of society is perhaps the most alarming damage of all. It undermines people's trust in the political system, in its institutions and its leadership. Corruption distorts the value systems and wrongly attaches elevated status to occupations that have rent seeking opportunities. This results in a disillusioned public, a weak civil society, which attracts unscrupulous leaders to political life. Eventually, there is a risk that demanding and paying bribes could become the norm.[37]

(d) Environmental Costs: Environmental degradation is an indirect but serious consequence of corrupt systems. Environmentally devastating projects are given preference in funding, because they are easy targets for siphoning off public money into private pockets.[38]

(e) Issues of national security[39]:

Corruption within security agencies can lead to a threat to national security, including through distortion of procurement, recruitment of ineligible persons, providing an easy route for smuggling of weapons and terrorist elements into the country and money laundering.

2.5 Historical background of Corruption

2.5.1 History of Corruption in UK

British law on corruption rested on a combination of common law and statutes, known as the Prevention of Corruption Act 1889 to 1916. These were considered by the Law Commission in 1997 to have left the law on the subject in an unsatisfactory condition, being neither comprehensive nor consistent.[40] In 1974, the Salmon Commission had been established:

"to enquire into standards of conduct in central and local government and other public bodies in the United Kingdom in relation to the problem of

[37] Ibid.
[38] Ibid.
[39] Ibid.
[40] The Law Commission, 'Legislating the Criminal Code: Corruption', *Consultation Paper* 145 (London: The Stationery Office, 1997).

conflict of interest and the risk of corruption involving favourable treatment from a public body."

Its report, published in 1976, called for a review of the law in this area, but its findings were not discussed in the House of Commons and the government took no action in response to it.[41]

In January 1994 Parliament's Public Accounts Committee produced a report on "The Proper Conduct of Public Business" listing many failures which represented "a departure from the standards of public conduct which have mainly been established during the past 140 years", and giving a checklist of rules and procedures that ought to be kept in mind to reduce the risks of further failures.[42] Following the 'Cash for Questions' scandal, and despite the staunch opposition of some MPs who defended their right to self-regulation, the Prime Minister set up a Committee on Standards in Public Life, chaired by Lord Nolan. The Nolan Committee's first report in May 1995 proposed seven principles that encapsulated public expectations of the standards of behaviour of public office holders. These seven principles were:

1. Selflessness: motivations should be for the public interest rather than for gain for oneself, one's family or friends.
2. Integrity: no obligation to others should be accepted that might influence one's official duties
3. Objectivity: staff appointments and the placement of contracts should be based on merit
4. Accountability: public office holders should be accountable to the public and subject to scrutiny
5. Openness: public officer holders need to provide reasons for their decisions and restrict information only when it is in the wider public interest to do so

[41] Ibid, 1, 25, 27-28.
[42] United Nations Development Programme, 'Case Study UK-Britain'.

6. Honesty: private interests of public office holders should be declared, and any conflicts of interest be resolved in such a way that the public interest is protected.
7. Leadership: these principles should be promoted via leadership and example. The Committee recommended that the conduct of MPs should not be left to "self regulation" but should come within the law. MPs should report their assets and interests to an officer who would be effectively an "ethics commissioner". The Nolan Committee also recommended that the law on the area of corruption be reviewed.

U.K. anti-bribery law prior to the 2010 reform was its hodgepodge nature. Although the U.K. had two statutory offences and a common law offence that applied to foreign bribery, none of these offenses expressly referred to the bribery of foreign officials. One statutory offense, based on an agent/principal concept, was codified in the Prevention of Corruption Act 1906. Specifically, the Act made it an offense to give consideration to any agent as an inducement for doing any act to show favor or disfavor to any person, in relation to his or her principal's affairs or business. The other statutory offense was codified in the Public Bodies Corrupt Practices Act 1889. This provision made it a crime to corruptly give, promise, or offer any gift or advantage to officials of a public body.[43]

In addition to these two statutory offences, there was a common law offense. It prohibited the receipt or offer of an undue reward by or to any person in a public office to influence such a person's behavior in office and inclined him or her to act contrary to the known rules of honesty and integrity.[44]

In 2001, the U.K. government adopted Part 12 of the Anti-terrorism, Crime and Security Act, which expressly addressed the bribery of foreign

[43] Margaret Ryznar & Samer Korkor "*Anti-Bribery Legislation in the United States and United Kingdom: A Comparative Analysis of Scope and Sentencing"* Missouri Law Review, 2011, Vol. 76, p. 434-438

[44] Margaret Ryznar & Samer Korkor "*Anti-Bribery Legislation in the United States and United Kingdom: A Comparative Analysis of Scope and Sentencing"* Missouri Law Review, 2011, Vol. 76, p. 434-438

public officials. The 2001 Act amended the 1906 Act and expressly codified the common law offense to make it a triable offense for a U.K. national or company to make a corrupt payment or pay a bribe to a public officer abroad. The 1889 Act was also amended to extend the definition of public bodies to reach equivalent institutions outside the U.K. By these enactments, the U.K. codified its obligation under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997).[45]

As for the investigation and prosecution of bribery of foreign officials, section 1(3) and (5) of the Criminal Justice Act 1987 provided that the director of the Serious Fraud Office (SFO) "may investigate any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud" and "may . . . institute and have the conduct of any criminal proceedings which appear to him to relate to such fraud." "In performing these functions, the director is subject to the superintendence of the Attorney General." The courts have recognized the independence of the director, as well as the director's significant prosecutorial discretion under the statutory framework.[46]

The international community, however, strongly criticized this anti-bribery legal framework, drawn largely from statutes enacted in the late nineteenth and early twentieth century's, for its limited impact in policing bribery and corruption at British companies. As one commentator noted, this regime made "it very difficult for prosecutors to bring an effective case against a company for alleged bribery offences."[47]

2.5.1.1 The Ineffectiveness of the Historical Legal Framework

One of the results of the ineffective anti-bribery regime was the British government's ill-fated investigation into alleged bribery by the British company BAE Systems PLC, one of the largest defense contractors in the world. The end of the investigation, in many ways, marked the beginning of the reform of anti-bribery law. A whistleblower's 2004 claim that the company had a $120 million bribery fund to facilitate defense contracts triggered the U.K.

[45] Ibid.
[46] ibid
[47] Ibid.

Serious Fraud Office's investigation into BAE. Specifically, BAE was accused of paying $2 billion in bribes to Saudi royalty and officials to secure an $85 billion arms deal signed in 1985 – the Al Yamamah deal. Despite the severity of the bribery allegations, the Serious Fraud Office dropped its investigation in December 2006 due to a blatant threat from Saudi Arabia's representatives that important intelligence and diplomatic relationships between the countries would end if the investigation continued.[48]

The Serious Fraud Office's decision to end the investigation and the legality of the director's decision were ultimately challenged in court. The Divisional Court justified its intervention "in fulfilment of [its] responsibility to protect the independence of the Director and of [its] criminal justice system from threat." The court, in concluding that it "has a responsibility to secure the rule of law," ruled against the director who dropped the investigation on account of the Saudi threat. The court stated:

The Director was required to satisfy the court that all that could reasonably be done had been done to resist the threat. He has failed to do so. He submitted too readily because he, like the executive, concentrated on the effects which were feared should the threat be carried out and not on how the threat might be resisted. No-one, whether within this country or outside is entitled to interfere with the course of our justice. It is the failure of Government and the defendant to bear that essential principle in mind that justifies the intervention of this court.

Accordingly, the court quashed the director's decision to abandon the investigation and remitted it to him for reconsideration.[49]

The House of Lords, however, reversed the Divisional Court, finding that the director had adhered to Article 5 of the OECD Convention in believing that the Convention "permitted him to take account of threats to human life as a

[48] Margaret Ryznar & Samer Korkor "*Anti-Bribery Legislation in the United States and United Kingdom: A Comparative Analysis of Scope and Sentencing"* Missouri Law Review, 2011, Vol. 76, p. 434-438

[49] Margaret Ryznar & Samer Korkor "*Anti-Bribery Legislation in the United States and United Kingdom: A Comparative Analysis of Scope and Sentencing"* Missouri Law Review, 2011, Vol. 76, p. 434-438

public interest consideration." Additionally, Lord Bingham of Cornhill noted that courts should be reluctant to interfere in these matters because (1) the powers in question are entrusted only to the officers identified; (2) it is neither within the constitutional function nor the practical competence of the courts to assess the merits of policy and public interest considerations which are not susceptible of judicial review; and (3) "the powers are conferred in very broad and [non-]prescriptive terms." The House of Lords therefore upheld the director's decision to abandon the investigation.[50]

Nonetheless, the OECD Working Group condemned the U.K.'s handling of the BAE investigation. Thereafter, the United States Department of Justice took action, focusing on the Al Yamamah deal in a 2007 FCPA investigation. Jurisdiction was rooted in "the allegation that the illicit payments were funneled through U.S. banks."[51]

On March 1, 2010, BAE pleaded guilty in American federal district court "to conspiring to defraud the United States by impairing and impeding its lawful functions, to mak[ing] false statements about its [FCPA] compliance program, and to violat[ing] the Arms Export Control Act (AECA) and International Traffic in Arms Regulations (ITAR)."161 The court sentenced BAE to pay a $400 million criminal fine, among the most significant criminal fines in DOJ's history.162 Under the eventual deal reached with U.K. authorities, BAE also reportedly agreed to plead guilty to one charge of breach of duty in failing to keep accounting records in relation to payments made to a former marketing adviser in Tanzania. In connection with this plea, BAE paid a fine of 30 million pounds, following a U.K. court's approval of the plea agreement.[52]

The U.K.'s investigation of BAE damaged popular opinion of U.K. antibribery law arguably more than it damaged BAE, yielding significant

[50] Ibid.
[51] Ibid.
[52] Margaret Ryznar & Samer Korkor "*Anti-Bribery Legislation in the United States and United Kingdom: A Comparative Analysis of Scope and Sentencing"* Missouri Law Review, 2011, Vol. 76, p. 434-438.

criticism of the law and bringing attention to its inadequacies. The result was an overhaul of U.K. bribery law in 2010.[53]

2.5.2 History of Corruption in USA

Corruption is a pervasive concept in western political thought. Corruption played a central role in the political philosophies of Aristotle, Polybius, Machaivelli and the 16th century Italians, and Harrington and the 17th and 18th century English writers who became known as Whigs or Commonwealth men. The Whig indictment of corruption in British government shaped American colonial political thought and prepared the colonists to interpret the actions of Crown and Parliament after 1763 as unconstitutional threats to their fundamental liberties as British citizens. Once independent, Americans worried continuously about their governments and how to design their political institutions to limit corruption. The reawakening of interest among economists in the role played by political institutions as a determinant of economic performance has stimulated a renewed interest in the quality of governance: of corruption. While corruption did not disappear from 20th century American politics, it has ceased to be major concern. The self-conscious, centuries long debate over corruption in western political thought in general, and in American politics in particular, suggests that a longer view of American history might offer insights into how economic and political institutions can curb corruption.[54]

After the American Civil War (1861-65), a system of political practices that sustained American national politics and government was attacked as corrupt. An ensuing fifty-year battle over corruption changed the nature of American government and reshaped the role of political parties in American

[53] Ibid.
[54] John Joseph Wallis, *"The Concept of Systematic Corruption in American Political and Economic History"* Working Paper 10952, National Bureau of Economic Research, Cambridge, December 2004

politics. From the Civil War's end to early in the 20th century, the practices attacked by critics as "corrupt" were not simply manipulations of the public trust for private gain, although there was abundant private gain. They were, rather, a system of practices that used government to supply the sustenance for mass-based political parties. In that roughly fifty year period, the attack on corruption was an attack not on individual dishonesty but an attack on the mainsprings of the American national political system of that era. Thus, the successful battle against corruption in government not only ended widespread corrupt practices in government but also transformed politics and government in unexpected ways.[55]

This problem of transnational corruption was first recognized as a matter for international concern in the United States during the Cold War. American firms had long been free to bribe foreign officials in violation of the foreign country's laws to induce those officials to invest public funds in American goods or services or to supply access to local resources. It was fair to assume that such payments were sometimes indispensable conditions of foreign trade by the American firms because contracts were often given to the highest bidder, i.e. the firm offering the biggest bribe. In the United States, bribes paid to foreign officials were long regarded as expenses deductible against income for income tax purposes, regardless of their illegality under foreign law, and thus were in a special sense subsidized by the government. The Watergate scandal and the misuse of corporate money to fund President Nixon's 1972 presidential campaign led to an investigation by the Securities and Exchange Commission (SEC) of reported expenses that might have been payments made to gain an illicit advantage with foreign government officials. The investigation coincidentally revealed widespread use of false accounting methods to conceal bribes paid to foreign officials. The SEC initiated the practice of investigating such reporting and seeking injunctions to compel companies to make full disclosures in the financial statements they distributed to investors. The SEC

[55] Peri E. Arnold, "*Democracy and Corruption in the 19th Century United States: Parties, "Spoils" and Political Participation*

also initiated a voluntary disclosure program that led to the revelation that more than 450 companies had concealed at least $400 million (at least $4 billion in 2010 dollars) in bribes paid to foreign officials in one year. Among the scandals revealed was the payment of $1 million (at least $10 million by 2010 standards) by the Lockheed Aircraft Corporation to Prince Bernhard of the Netherlands to secure the sale of a military aircraft.[56]

The Foreign Corrupt Practices Act ("FCPA" or "Act") is a groundbreaking law that targets public corruption and fraud in the international marketplace. The Act, which imposes both civil and criminal penalties, makes it a federal criminal offense for any U.S. person or entity or any issuer of U.S. securities, acting anywhere in the world, or any foreign persons that cause an act in the United States, to make a corrupt payment to any foreign government official, directly or indirectly, to obtain or retain business. It also contains provisions requiring companies with securities registered on U.S. stock exchanges to maintain accurate records and implement adequate internal controls. Although it predated the U.S. Sentencing Guidelines for Organizations by 14 years and the Sarbanes-Oxley Act by 25 years, the FCPA applied many principles later incorporated in those laws. Today, it has an ever-increasing impact on the ways in which companies conduct business around the globe.[57]

Congress enacted the FCPA in 1977 in response to a report by the Watergate Special Prosecutor indicating that major American corporations were engaging in systematic bribery of foreign government officials. Until its passage, the U.S. criminal laws did not expressly prohibit the bribery of foreign officials. The FCPA was the first legislation of its kind, and most other countries did not enact similar anti-corruption regulations until almost 20 years later. As a result, in the years following the FCPA's initial enactment,

[56] Paul D. Carrington, *"Enforcing International Corrupt Practices Law"* Michigan Journal of International Law, 2010, Vol. 32, p. 131,132.
[57] James Ukropina, "*Foreign Corrupt Practice Act"*, An O'Melveny Handbook, Washington, D.C., 2009.

American businesses with operations overseas complained that they faced a competitive disadvantage and sought to have the legislation relaxed or repealed. Although repeal efforts were unsuccessful, Congress amended the FCPA in 1988 to modify the state of mind required for a violation of the Act when paying an intermediary and by adding one exception and two affirmative defenses. At the same time, Congress urged the executive branch to encourage the United States' trading partners to adopt similar anti-corruption legislation.[58]

2.5.3 Historical Perspective of Corruption in India

2.5.3.1 Ancient period

The History of corruption is as old as civilization. It always, existed in one form or another. Some societies considered it as an offence, and some societies not. In the Code of Babylonian King Hammurabi (22nd Century B.C.) there is, mention of punishment for giving false evidence on receipt of grain or money as bribe. In the Edict of Harmhab, King of Egypt (14th Century B.C.) capital punishment is found to have been provided for accepting bribe in the discharge of judicial duties.[59]

In the Code of Manu (800-900 BC), there is no mention of corruption, and since Manu, the Law-giver, has not mentioned this vice in XVIII Tables, it is quite natural to think that there was no vice of bribery or corruption in the early society when Manu lived. Life was elemental and simple, and there was no scope for bribery or corruption. But gradually with the growth of civilization many vices came into existence including bribery or corruption. Kautilya (321-300 B.C.) in his Arthashatra refers to the various forms of corruption prevalent in his time. Kautilya has stated in Arthashastra:[60]

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[58] James Ukropina, "*Foreign Corrupt Practice Act"*, An O'Melveny Handbook, Washington, D.C., 2009.

[59] K.P. Chakravarti, '*Privention of Corruption in public Services (Law and procedure)'* Vora Prakasnan, Ahamdabad, 1981, pp. 7.

[60] K.P. Chakravarti, '*Privention of Corruption in public Services (Law and procedure)'* Vora Prakasnan, Ahamdabad, 1981, pp. 7.

'Just as it is impossible not to taste the honey or the poison that finds itself at the tip of the tongue, so it is impossible for a government servant not to eat up, at least a bit of the king's revenue. Just as fish moving under water cannot possibly be found out either as drinking or not drinking water, so the government servant employed in the government work cannot be found out (while) taking money.'

In the chapter "Ascertaining Temptations, Purity or impurity in the Character of a Minister," of his Arthasastra, Kautilya says:

"Assisted by his prim e minister and his high priest, the king shall, by offering temptations, examine the character of ministers appointed in government of ordinary nature."

The various degrees of temptations to which a Minister is lured are explained by Kautilya. He concludes:

"Teachers have decided that in accordance with ascertained purity, the king shall employ in corresponding works those ministers whose character has been tested under the three pursuits of life, religion, wealth and love and under fear."

Kautilya is more specific in another chapter entitled *"Detection of what is embezzled by Government servants out of state revenue"* "which reads like a modern official report on modes of corruption and corresponding punishments."

Ashoka's dharmic state, following closely on the heels of Kautilya's times must have had the minimum of corruption, for the Emperor declared in one of his edicts that "for the welfare of all folk is what I must work and the root of that, again, is in effort and dispatch of business." For ensuring speedy dispatch of business, he commanded his officials to report to him at all times and hours "whether I am dining, or in the ladies apartments, in my bedroom, or

in my closet, in my carriage, or in the palace gardens. Briefly corruption and bribery during Ashoka's rule must have been the minimum.[61]

2.5.3.2 Medieval period

In many medieval societies conception of bribery or corruption was not developed. No line between the sin and crime was demarcated, since there was no enacted law to regulate human conduct. What was, therefore, .tabooed by religion was considered unlawful, and in the religious code or scripture there was no mention of bribery or corruption. In ancient or medieval societies it was no crime to purchase favours. The payment of the judges by the parties was a usual affair, and the question of immorality was not attached to such an act even if it Jed to the sale of justice to the highest bidder.[62]

This practice continued for a long time till the State took upon it the responsibility to pay the judicial officers with the object that justice must be dispensed according to law, and not according to the quantum of reward received by the judges from the parities. Still many societies kept the hereditary offices of the judges. The office of the Kazis in Muslim societies remained to be a hereditary one. In the Roman countries the office of the Praetors was an elective one.[63]

It is but natural that if the judges were allowed to levy their own fees, there was a scope for bias and abuse of power. Justice would lose its fair name, and the party paying less fees would have hardly any chance of fair justice meted out to it. So the affluent sections of the community would always have the advantage over the weaker sections.[64]

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[61] K.P. Chakravarti, '*Privention of Corruption in public Services (Law and procedure)'* Vora Prakasnan, Ahamdabad, 1981, pp. 7.
[62] Ibid.
[63] Ibid.
[64] K.P. Chakravarti, '*Privention of Corruption in public Services (Law and procedure)'* Vora Prakasnan, Ahamdabad, 1981, pp. 7.

In primitive and medieval societies the scope of' public authority was minimum. Many of the matters that were looked after by the community have now become a function of the State. The few authorities which existed for the collection of taxes, administration of justice or other purposes did not act according to any definite written laws or rules, but largely at their discretion subject to good conscience and equity and directives of the higher authorities. So long as the officials were loyal to the existing regime and did not resort to oppression and forcible expropriation, they were free to do as they liked. If through tactful methods, they amassed wealth for themselves or advanced their other material interests they were praised rather than censured. Often offices were hereditary and perquisites which would to-day amount to bribery were co growth of the currently accepted standards of integrity." Emergence of bribery as an indictable offence is the pro-duct of refined jurisprudence. No doubt it is a question of social refinement because of the emphasis gradually being put on the maintenance of integrity in the social order so that justice may be evenly dealt strictly according to law and moral conscience or equity, and not according to the mere fancy or whim of the officer discharging such functions.[65]

Mr. D.R.B. Jeejeebhoy gives a vivid account of corruption under various rulers in the centuries that followed the downfall of the Marian Empire in his book, Bribery and corruption in Bombay (1952). Says Alexander Hamilton in his new account of the East Indies (1774)[66]:

"The Mohammadans have the law in their hands and distribute justice best to those who pay best for it. The judge's fees are twenty-five per cent on all sums that he pronounces due to the party whose plea is best supported by bribes or interest for the justice of the cause seldom prevails."[67]

[65] ibid
[66] Ibid.
[67] K.P. Chakravarti, '*Privention of Corruption in public Services (Law and procedure)'* Vora Prakasnan, Ahamdabad, 1981, pp. 7.

Corruption was rampant in the Mughal Empire even in the heyday of its glory. Of conditions towards the end of the sixteenth century sir Thomas Roe wrote: the people of India live as fishes do in the great ones eat up the little, for first the farmer robs the peasant, the gentleman robs the farmer the greater robs the lesser and the king robs all" Francisco Peisart, chief of the Dutch factory at Agra, wrote in 1626 as follows[68]:

"The second scourge is the oppression of the Governor nobles, Diwan, Kotwal, Bakshi, and other imperial officers. If one of these wants a workman the man is not asked if he is willing to come but is seized in his house or in the street, well beaten if he should dare to raise any objection and in the evening paid half his wages, or perhaps nothing at all"

This was for worse than corruption, for the victim sacrificed money and got nothing in return except that he was thoroughly thrashed. About corruption during the days of the Portuguese, an official report of 1542 said[69]:

"Justice was sold at the tribunals and the most infamous crimes escaped punishment when the criminals were affluent enough to corrupt the judges. All methods of accumulating wealth were considered lawful, and extortion was openly advocated"

It was gradually realised that for the sake of social solidarity, the public officials must be fair and impartial and should, therefore, be incorruptible. Last but not the least, the judges must be above suspicion like Ceaser's wife. Honesty, integrity and fair play which have now become catchwords are the products of our social awareness and refined thinking. After the public offices had ceased to be hereditary and became more and more organised and the breach of rules and regulations by the public servants became punishable, the present notion of 'integrity' in public service grew up. As observed by the Santhanam Committee, the modern conception of integrity of public servants in the sense that they should not use their official position to obtain any kind of

[68] ibid
[69] Ibid.

financial or other advantage for themselves, their families or friends is due to the development of the rule of law and the evolution of a large, permanent public service.[70]

2.5.3.3 Pre-Independence Period- During the British Rule

The problem of corruption in India is rooted in India's colonial past. The "British Raj" period of British Colonial rule began in 1858 when, through an Act of the British Parliament, the ownership of the successful British East India Trading Company was transferred to the Crown under Queen Victoria. The position of governor-general was established as the head of the Government of India, and the country was divided into districts, creating provincial governments controlled by a commissioner and small executive and legislative factions. The importation of governing power was only possible through the practice of exclusion of the native Indian citizens.[71]

The officials of the East India Company who ruled the country were mostly corrupt. Many of them while on the roll of the Company made fabulous wealth through clandestine transactions. Not to speak of smaller officials, the instances of Robert Clive and Warren Hastings may he cited. Both during their tenures in Bengal,-Clive as Governor and Hastings as Governor-General-amassed great fortunes through corrupt means, and both, on their return to England, Lad to face impeachment for corruption and mal-administration. Though the East India Company Act, 1973 made prohibitions against making for tunes through underhand means, nobody cared, because the-public morality was low, and corruption was not looked down upon with contempt as at present. During the entire British rule in India, no law except that embodied in Chapter IX of the Indian Penal Code was enacted, and the existing law was considered enough for the purpose, though in fact it was not enough to cover all varieties of cases.

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[70] K.P. Chakravarti, '*Privention of Corruption in public Services (Law and procedure)'* Vora Prakasnan, Ahamdabad, 1981, pp. 7.

[71] Christina E. Humphreys, "*The Current State of India's Anti-Corruption Reform: The RTI and PCA"*, UICIFD Briefing Paper No. 7, January 19, 2010, p. 2

During the War years (World War II), corruption had its hey-day, and spread out its tentacles in various directions, e.g. hoarding, profiteering and black-marketing, etc. It was not confined to the rank and file of public servants in the public services of the State, but spread among the higher echelons. Proverbially it was prevalent in the Police, P.W.D. and Railway Departments, but it also made inroads in the other fields where "substantive decisions had to be taken in matters like assessment and collection of taxes, determination of eligibility for obtaining licences, grant of licences; ensuring fair utilisation of licences, approval of works and acceptance of supplies," etc.[72]

2.5.3.4 Post-Independence Period—Extent of Corruption.

It is true, as observed by the Santhanan Committee, high water-mark of Corruption was reached in War time, but it is not true that the tide of corruption that swept the national life during the war automatically ebbed away on the cessation of hostilities. Everywhere in the world there was a steady fall in the moral standard, and this made a vacuum in the administration and more so in India because of the sea-change that came over it as a result of the partition of the country. With the huge task or reconstruction on the one hand i.e. implementation of plan schemes on a vast national scale requiring spending of crores of rupees, and resettlement of millions of refugees draining out the vast national resources on the other, the popular Government had to face tremendous problems. The administration of the country was on the breaking point not because it lacked men, but it lacked men of unassailable integrity at the vulnerable spots of administration. Suddenly many public servants of doubtful integrity and inferior caliber found themselves at_ the top of the administration.[73] Overnight promotions had to be made to fill up the vacuum created by the departure of the seasoned and efficient officers (mostly Members of the I.C.S.) on partition, and also a legion of lower grade staff of unproven integrity had to be recruited to man the various places of

[72] K.P. Chakravarti, '*Privention of Corruption in public Services (Law and procedure)'* Vora Prakasnan, Ahamdabad, 1981, pp. 7.
[73] Ibid.

administration. This is obviously one of the reasons of high tide of corruption that swept the post-independence-period.[74]

Moreover, the sudden extension of economic activities of the Government with a large armory of regulations, control, licenses and permits provided new and large opportunities for corruption. In reality these were the vulnerable spots where• corrupt practices had their full sway. From the case-study, the Santhanam Committee arrived at the conclusion that the anxiety to avoid delay has encouraged the growth of dishonest. practices like the system of 'speed-money'. Speed-money is reported to have become a fairly common type of corrupt: practice particularly in matters relating to the giant of licences permits, etc. In many departments, it has become customary with certain sections of the staff to delay the issue of permits, or licences till the 'speed-money' is paid.[75]

With the degeneration of the moral climate following: the War years, profiteers and black- marketers had their hey-day, more because the Government had little time in the face of tremendous problems of reconstruction to tackle these particular problems. These unscrupulous elements of the society found a golden opportunity to thrive on the unprecedented situation created by the War and its aftermath. As observed by the Santhanam Committee, the ranks of these classes have been swelled by the speculators and adventurers of the War period. To these, corruption is not only an early-method to secure large unearned profits but also the necessary, means to enable them to be in a position to pursue their vocations or retain their position among their own competitors.[76] It is these persons who indulge in evasion and .avoidance, of taxes, accumulate large amounts of unaccounted money by various methods such as obtaining licenses in the names of bogus firms and individuals, trafficking in licenses, suppressing profits by

[74] K.P. Chakravarti, '*Privention of Corruption in public Services (Law and procedure)'* Vora Prakasnan, Ahamdabad, 1981, pp. 7.
[75] Ibid.
[76] Ibid.

manipulation of accounts to avoid taxes and other legitimate claims on profits, accepting money for transactions put through without accounting for it in bills and accounts (on money) and undervaluation of transactions in immovable property. It is they who have control over large funds and are in a position to spend considerable sums of money in entertainments. It is next to impossible to make a precise estimate of -the extent of corruption prevailing in the various departments of the Government, nor is it possible to make a rough estimate of the number of public servants involved in corrupt practices. There is no machinery by which a correct assessment could be made. From the data collected from the .export/import cases alone, it is seen that 660 cases of mal-practices during the period 1958-1962 involving Rs. 2,38,24,142 were registered….. Thus, a huge unearned profit varying between two to ten crores should have been made in these transactions, and it is imaginable what a large share would have gong into the pockets of the public servants.[77]

The Santhanam Committee includes in its report, certain statistical data for the years 1956 to 1962, on the basis of the vigilance cases registered in each department. These figures do not represent the corruption cases alone and from the figures it is difficult to estimate what percentage actually comprises the corruption cases. However, these figures give a rough idea of the extent of such cases dealt with by the-Special Police Establishments. Statistics is by no means a sure way of finding out the depth of corruption. There may be-cases of minor technical lapses, or departure from the established procedure or irregularity in the performance.[78] It is very. difficult to establish a charge of corruption, unless it is proved beyond doubt that the practices in which the public servant indulged are, in fact, corrupt,—corrupt because the acts were motivated by personal gain, monetary or otherwise.[79]

[77] K.P. Chakravarti, '*Privention of Corruption in public Services (Law and procedure)'* Vora Prakasnan, Ahamdabad, 1981, pp. 7.
[78] Ibid.
[79] K.P. Chakravarti, '*Privention of Corruption in public Services (Law and procedure)'* Vora Prakasnan, Ahamdabad, 1981, pp. 7.

Table 1: Scams in India from 1976 Onward

Year	Scam	Amount
1976	Kuo Oil Deal Scam	2.2
1981	Auntuly Trust (Pay)	30
1987	HDW Commission	20
1987	Bofors Scame	64
1991	Telgi Scam	43,000
1991	JMM Bribes (to JMM MPs)	0.3
1992	Sucurity Scam (Harshad Mehta)	4000
1992	Indian Bank Rip-off	1300
1994	Sugar Import	650
1995	Bhansali Scam	1200
1996	Lakhubhai Pathak Scam (money paid to get a paper pulp contract)	0.1
1996	Fodder Scam	950
1996	Hawala Scandal	810
1996	Telecom Scam	1.6
1996	Urea Deal	233
2000	Match Fixing Scam	N.A.
2000	UTI Scam	32
2001	Mutual Fund Scams	1350
2002	Home Trade Scam	600
2005	Oil for Food Scandal	N.A.
2006	IPO Scam	61
2009	Madhu Koda Scam	4000
2009	Satyam Scam	24,000
2010	The 2G Scam	1,76,000
	Cole Scam	
	Vyapam Scam	

Table 2 : Corruption Perceptions Index of UK, USA and India.

Sources: Transparency International

2005		
Country	**Rank**	**CPI Score**
United Kingdom	11	8.6
USA	17	7.6
India	88	2.9

2006		
Country	**Rank**	**CPI Score**
United Kingdom	11	8.6
USA	20	7.3
India	70	3.3

2007		
Country	**Rank**	**CPI Score**
United Kingdom	12	8.4
USA	20	7.2
India	72	3.5

2008		
Country	**Rank**	**CPI Score**
United Kingdom	16	7.7
USA	18	7.3
India	85	3.4

2009		
Country	**Rank**	**CPI Score**
United Kingdom	17	7.7
USA	19	7.5
India	84	3.4

2010		
Country	**Rank**	**CPI Score**
United Kingdom	20	7.6
USA	22	7.1
India	87	3.3

2011		
Country	**Rank**	**CPI Score**
United Kingdom	16	7.8
USA	19	7.1
India	95	3.1

2012		
Country	**Rank**	**CPI Score**
United Kingdom	17	74
USA	19	73
India	94	36

2013		
Country	**Rank**	**CPI Score**
United Kingdom	14	76
USA	19	73
India	94	36

2014		
Country	**Rank**	**CPI Score**
United Kingdom	14	78
USA	17	74
India	85	38

There is a much better grasp today of the extent to which corruption is a symptom of fundamental institutional weaknesses. Instead of tackling such a symptom with narrow intervention designed to "eliminate" it, it is increasingly understood that the approach ought to address a broad set of fundamental institutional determinants. However, the challenge of integrating this understanding with participatory process has barely begun.[80]

The implementation of institutional reforms can benefit significantly from the participatory process that is being developed for anti-corruption activities. Equally important, any participatory process, however sophisticated, ought to lead to concrete results beyond enhanced participation and heightened awareness. Thus, identifying key institutional reforms in India, and mobilising support for such reforms, needs to be fully integrated into the participatory process from very early on. Such early convergence is likely to promote a better balance between prevention and enforcement measures in addressing corruption. Until recently, the pendulum was firmly in the "enforcement" corner. The gradual swing towards the middle ground has taken place due to recognition of the limitations to expose legalistic enforcement measures, since the law institutions themselves are currently part of the corruption problem in India.[81]

Therefore, corruption is an intractable problem; it is like diabetes, which can only be controlled, but not totally eliminated. It may not be possible to root out corruption completely at all levels but it is possible to contain it within

[80] A. Abdulraheem Corruption in India: An Overview (Causes, Consequences and Remedial Measures) SOCIAL ACTION VOL. 59 OCTOBER – DECEMBER 2009, p. 360
[81] Ibid.

tolerable limits. Honest and dedicated persons in public life, control over electoral expenses, could be some of the important prescriptions to combat corruption. Corruption has a corrosive impact on our economy and leads to loss of overseas opportunities. Corruption is a global problem that all countries of the world have to confront: solutions, however, can only be home-grown.[82]

[82] Ibid.

CHAPTER-III

International Legal Framework to Combat Corruption

CHAPTER III

INTERNATIONAL LEGAL FRAMEWORK TO COMBAT CORRUPTION

"The adoption of the United Nation Convention against Corruption will send a clear message that the international community is determine to prevent and control corruption. It will warn the corrupt that betrayal of the public trust will no longer be tolerated. The adoption of the new Convention will be a remarkable achievement. But let us be clear: it is only a beginning."[1]

Corruption is a global problem which poses serious threat to the development of a country and its people. States, developed or developing, are equal victims of this problem. Corruption, apart from affecting the public at large, also causes reduced investment, lack of respect for the rule of law and human rights, undemocratic practices and diversion of Corruption, apart from affecting the public at large, also causes reduced investment, lack of respect for the rule of law and human rights, undemocratic practices and diversion of funds intended for development and essential services, affects government's ability to provide basic services to its citizens. Most importantly, corruption has the greatest impact on the most vulnerable part of a country's population, the

[1] Foreword by the then UN Secretary- General, Kofi Anan, to the United Convention against Corruption, available at: http://www.undoc.org/documents/treaties/UNCAC/Publication/Convention/08-50026_E.pdf. last visited on 12 may 2012.

poor. Further, corruption today has become one of the most salient manifestations of the organized crime syndicate of the globalized world which has grave national and international ramifications.[2] Since the end of Cold War, corruption has become an item on the international agenda. This is to partly due to the removal of the compelling need to support corrupt regimes for national security reasons, the visible corruption and organized crime in the former Eastern bloc and other parts of the world, and the new corrupt opportunities created by moves towards privatization and deregulation.[3]

3.1 International Legal Framework

Corruption has existed from the beginning of time. Globalization, however, seems to have increased the magnitude and impact of such corruption. The end of the Cold War in the early 1990s removed certain incentives for unqualified support of corrupt regimes by the West. It is also resulted in universal application of free market reform by donor governments and International Financial Institutions (IFIs). These reforms have, in turn, increased opportunities for corruption.[4]

The success of anti-corruption efforts is largely attributable to the repackaging of the problem of corruption as an economic rather than a political or moral problem. Anti-corruption advocates have convincingly argued that corruption impedes economic development by distorting public sector choice towards "wrong" public projects that benefit corrupt government officials while producing inefficient and inequitable spending. This argument has allowed anti-corruption advocates to overcome the East-West and North-South division that dominated the U.N. initiative against corruption and bribery in the late 1970s[5]

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[2] R. Rajesh Babu, The United Nations Convention Against Corruption: A Critical Overview, available at http://ssrn.com/abstract=891898 last visited on 8 October 2012.
[3] Susan Rose-Ackerman, Corruption and Government: Causes, Consequences and Reform, Cambridge: Cambridge University Press, 1999, p. 177
[4] Padideh Ala'I, "Controlling Corruption in International Business: The International Legal Framework," International Sustainable Development Law, Vol. II. available at http://www.eolss.net/Eolss-sampleALLChapter.aspx last visited on 23 may 2013.
[5] Ibid.

Corruption in its different manifestation was condoned in all societies since antiquity; however, in the recent years this phenomenon has received greater deal of attention from the international community than before. In fact, the degree of attention attributed to combat corruption has been unprecedented that the effort made at the international level has paved the way for the negotiation and adoption of five legally binding international anti-corruption instruments within a short span of time. These international and regional agreements have attempted to establish a legal framework and harmonize international rules to combat corruption.[6]

Establishing a legal framework to combat corruption at the national and international levels is not easy task. While many States have already embarked upon a national strategy to deal with corruption, and criminalized it when committed domestically, there is no uniformity in approach taken by these countries. Further, the issue of corruption as a transnational crime poses many challenges. The different legal systems do not have the same notion about establishing "criminality" regarding corruption as a crime. The lack of effective cooperation in sharing of information and investigation, the complications in judicial assistance, bank secrecy regulations etc., are just few examples which pose problems of great magnitude.[7]

Corruption is a worldwide problem and has transnational implications, global action is imperative and it was recognized that an international anti-corruption instrument in the form of a convention or treaty is imperative not only to bridge the gaps in national legal systems but also to forge close cooperation among States. As causes of corruption differ from one country to another, and preventive, enforcement and prosecutorial measures that work in some countries may not work in others, the United Nations, an organization with universal membership and a global mandate, is ideally positioned to deal with global challenges. It was in this context that the UN office for Drugs and

[6] R. Rajesh Babu, The United Nations Convention Against Corruption: A Critical Overview, available at http://ssrn.com/abstract=891898 last visited on 8 October 2012.
[7] Ibid.

Crime (ODC) through the UN General Assembly to establish an Ad Hoc Committee to negotiate a comprehensive United Nations Convention against Corruption (UNCAC), which entered into force in December 2005.[8]

3.2. The United Nations Convention against Corruption[9] (UNCAC)

The United Nations Convention against Corruption (UNCAC), represents a major step forward in the global fight against corruption, and constitutes the culmination of efforts of the international community to put in place a normative instrument against corruption of a global range.[10] It was adopted by the UN General Assembly on 31 October 2003 and was opened for signature in Merida, Mexico on 9-11 December 2003. The UNCAC entered into force two years later, on 14 December 2005. The high number of signatories and ratifications reflects the broad international consensus on the Convention.[11]

The UNCAC is the first global agreement comprehensively addressing corruption. The objective of the UNCAC, as the Preamble and the Statement of purpose declares, is to promote and strengthen measures to combat corruption, both domestic and international. The Convention rests on four pillars: Prevention, Criminalization, International Co-operation and Asset Recovery. The Convention aims to promote and strengthen the development of anticorruption mechanisms; to promote, facilitate and regulate co-operation among State Parties; and to develop and harmonize policies and domestic legislation of State Parties, relating to the prevention, detection, punishment and eradication of corruption. The Convention covers corruption in both private and public sector, including private-to-private corruption, and

[8] R. Rajesh Babu, The United Nations Convention Against Corruption: A Critical Overview, available at: http://ssrn.com/abstract=891898 last visited 8on October 2012.
[9] Afterword reffered as UNCAC
[10] Demostenes Chryssikos, "The United Nations Convention against Corruption: An Overview with special focus on the provisions relevant to Criminal Justice Authorities" THE 13TH INTERNATIONAL TRAINING COURSE ON THE CRIMINAL JUSTICE RESPONSE TO CORRUPTION VISITING EXPERTS' PAPERS RESOURCE MATERIAL SERIES No.83 p.139
[11] Jan Wouters, Cedric Ryngaert & Ann Sofie Cloots, "THE FIGHT AGAINST CORRUPTION IN INTERNATIONAL LAW" Working Paper No. 94 – July 2012, available at: http://www.globalgovernancestudies.eu last visited on 2 November 2012.

criminalizes bribery, foreign and domestic; embezzlement; trading in influence and money laundering. It provides for effective international framework for extradition and investigations.[12]

The UNCAC requires establishment of a number of offences as crime in their domestic law, either by enacting new laws and amend the existing laws, if these are not already crimes under domestic law. The unique feature of the Convention is that it goes beyond previous instruments of this kind, criminalizing not only basic forms of corruption such as bribery and the embezzlement of public funds, but also trading in influence and the concealment and "laundering" of proceeds of corruption. Offences committed in support of corruption, including money-laundering and obstructing justice, are also dealt with. The Convention offence also deals with the problematic areas of private-sector corruption.[13]

3.2.1 Active and Passive Corruption by a Public Official

Article 15 of the Convention prohibits passive and active corruption and mandates the States to take measures to establish as criminal offences:

- Active bribery, defined as the promise, offering or giving to a public official of an undue advantage, in order to act or refrain from acting in matters relevant to official duties.[14]
- Passive bribery, defined as the solicitation or acceptance by a public official of an undue advantage, in order to act or refrain from acting in matters relevant to public official duties.[15]

[12] R.Rajesh Babu, The United Nations Convention Against Corruption: A Critical Overview, available at: http://ssrn.com/abstract=891898. Last Visited 8 on October 2012.
[13] Ibid.
[14] Article 15 (b) of the UNCAC.
[15] Article 15 (a) of the UNCAC.

3.2.2 Corruption by a foreign public official and official of a public international organization

The convention under Article 16 covers both passive and active corruption by a 'foreign public official' and official of a public international organization. Article 16(1) deal with active corruption and Article 16 (2) deals with passive corruption. The elements of both these offences are similar to those listed in the case of active and passive bribery of national public officials. The only difference is that Article 16(1) and (2) applies only to foreign public official or official of an international organization, instead of national public officials, and the offence is linked to the conduct of international business, including international aid.[16] The Convention provides under Article 17 Embezzlement, misappropriation or diversion of property by a public official.[17]

3.2.3 Laundering of Proceeds of Crime (Money laundering)[18]

[16] Article 16 of the UNCAC stated about the, Bribery of foreign public officials and officials of public international organizations and provides 1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business. 2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

[17] Article 17 of the UNCAC provides that, "each State Party shall adopt such measures as may be necessary to establish as criminal offences the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position."

[18] Article 23 of the UNCAC, stated about the Laundering of proceeds of crime and provides,

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action; (ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;

(b) Subject to the basic concepts of its legal system:

(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime; (ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

Article 23 of the UN Convention deals with the "laundering of proceeds of crime" and Article 24 deals with the "concealment or continued retention" of property derived from corrupt activities. According to Article 23 State parties must establish the following four offences as crime:

- Convention or transfer of proceeds of crime;[19]
- Concealment or disguise of the nature, source, location, disposition, movement or ownership of proceeds of crime;[20]
- acquisition, possession or use of proceeds of crime;[21]
- participation in, association with or conspiracy to commit, attempts to commit, and aiding, abetting, facilitating and counseling the commission of any of the offences mandated by article 23.[22]

In the case of first two offences, the State Parties must establish those offences as crime within their domestic law. In the case of letter two offences, the establishment of these offences within the domestic law is subject to the basic concepts of their legal systems.

Article 27 of the UNCAC criminalizes participation as accomplice, assistant or instigator and attempt to commit an offence. According to this article, the State parties shall establish the following three criminal offences:[23]

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2. For purposes of implementing or applying paragraph 1 of this article:
(a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences; (b) Each State Party shall include as predicate offences at a minimum a comprehensive range of criminal offences established in accordance with this
Convention;
(c) For the purposes of subparagraph (b) above, predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there;
(d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;
(e) If required by fundamental principles of the domestic law of a State
Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence.

[19] Article 23, para. 1 (a) (i), of the UNCAC.
[20] Article 23, para. 1 (a) (ii), of the UNCAC.
[21] Article 23, para. 1 (b) (i), of the UNCAC.
[22] Article 23, para. 1 (b) (ii), of the UNCAC.

- Participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with this Convention.
- any attempt to commit an offence established in accordance with Convention.
- the preparation for an offence established in accordance with Convention.

3.2.4 Preventive Measures

Preventive Measures is one of the most pillars on which the UNCAC rests upon. The Convention dedicates an entire chapter of the Convention for prevention, with measures directed at both the public and private sector.[24] This chapter requires each State party to develop and maintain preventive 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[25], and preventive anti-corruption body or bodies with necessary independence.[26]

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[23] Article 27, of the UNCAC.
[24] Chapter II, of the UNCAC.
[25] Article 5 of the UNCAC, said about Preventive anti-corruption policies and practices and provides
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.
4. 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.
[26] Article 6 of the UNCAC, Preventive anti-corruption body or bodies
1. Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate that prevent corruption by such means as:
(a) Implementing the policies referred to in article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of those policies;
(b) Increasing and disseminating knowledge about the prevention of corruption.
2. Each State Party shall grant the body or bodies referred to in paragraph 1 of this article the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions, should be provided.

3.2.5 Corruption in Private Sector[27]

Corruption in private sectors should be subject to preventive measures and should be civilized just like corruption in the public sector. This is because private sector is becoming larger than public sector, and the line between the two sectors is blurred by privatization, outsourcing and other developments.[28] Article 12 of the UNCAC is a unique feature of this Convention. It requires State Parties to take three types of preventive measures in accordance with the

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3. Each State Party shall inform the Secretary-General of the United Nations of the name and address of the authority or authorities that may assist other States Parties in developing and implementing specific measures for the prevention of corruption.

[27] Article 12 of the UNCAC, 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 licences 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;

(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.

[28] Phillippa Webb, "The United Nations Against Corruption", Journal of International Economic Law, vol. 8, no. 1, 2005, p.213.

fundamental principles of their law. The first is general obligation to take measures aimed to prevent corruption in private sector. The second obligation is to enhance accountability and auditing standards in the Private sector. This is to enhance transparency and detect malpractices in the private sector. The third requirement is to undertake effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with the accountability and auditing standards.

3.3. European Instruments to Avert Corruption

3.3.1. Council of Europe Convention on Corruption

The Council of Europe Convention on Corruption ("COE Convention") was adopted in response to heightening global pressure to act in the face of the growing threat of foreign corruption and the perception that the EU Convention was not strong enough to effectively combat corruption because it lacked a monitoring or enforcement mechanism that would render it powerful enough to compel compliance. The COE Convention includes both the Criminal and Civil Law Conventions.

The Criminal Law Convention was adopted in January 1999. It is like other international conventions in that it requires the criminalization of both active[29] and passive domestic[30] and foreign bribery[31], and also makes illegal

[29] Article 2, Criminal Law Convention On Corruption. Active bribery of domestic public officials
Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the promising, offering or giving by any person, directly or indirectly, of any undue advantage to any of its public officials, for himself or herself or for anyone else, for him or her to act or refrain from acting in the exercise of his or her functions.

[30] Article 3 of the Criminal Law Convention On Corruption, Passive bribery of domestic public officials said that Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the request or receipt by any of its public officials, directly or indirectly, of any undue advantage, for himself or herself or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in the exercise of his or her functions.
Article 4, Criminal Law Convention On Corruption., Bribery of members of domestic public assemblies stated that Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to in Articles 2 and 3, when involving any person who is a member of any domestic public assembly exercising legislative or administrative powers.

[31] Article 5 of the Criminal Law Convention On Corruption, Bribery of foreign public officials
Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to in Articles 2 and 3, when involving a public official of any other State.

"trading in influence"[32] and money laundering.[33] However, it is more stringent than other conventions in that it makes bribery in the private sector illegal as well.[34] Recordkeeping issues are addressed using criminal law provisions, which is also a unique approach among international conventions.[35] The Criminal Law Convention also has explicit provisions holding corporations responsible for offenses committed for their benefit by a natural person with a

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Article 6 of the Criminal Law Convention On Corruption, Bribery of members of foreign public assemblies stated that Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to in Articles 2 and 3, when involving any person who is a member of any public assembly exercising legislative or administrative powers in any other State.

[32] Article 12 of the Criminal Law Convention On Corruption, Trading in influence said, Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the promising, giving or offering, directly or indirectly, of any undue advantage to anyone who asserts or confirms that he or she is able to exert an improper influence over the decision-making of any person referred to in Articles 2, 4 to 6 and 9 to 11 in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result.

[33] Article 13 of the Criminal Law Convention On Corruption, Money laundering of proceeds from corruption offences provides that Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to in the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Products from Crime (ETS No. 141), Article 6, paragraphs 1 and 2, under the conditions referred to therein, when the predicate offence consists of any of the criminal offences established in accordance with Articles 2 to 12 of this Convention, to the extent that the Party has not made a reservation or a declaration with respect to these offences or does not consider such offences as serious ones for the purpose of their money laundering legislation.

[34] Article 7 of the Criminal Law Convention On Corruption, Active bribery in the private sector

"Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally in the course of business activity, the promising, offering or giving, directly or indirectly, of any undue advantage to any persons who direct or work for, in any capacity, private sector entities, for themselves or for anyone else, for them to act, or refrain from acting, in breach of their duties."

Article 8 of the Criminal Law Convention On Corruption, Passive bribery in the private sector

"Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, in the course of business activity, the request or receipt, directly or indirectly, by any persons who direct or work for, in any capacity, private sector entities, of any undue advantage or the promise thereof for themselves or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in breach of their duties."

[35] Article 14 of the Criminal Law Convention On Corruption, Account offences

Each Party shall adopt such legislative and other measures as may be necessary to establish as offences liable to criminal or other sanctions under its domestic law the following acts or omissions, when committed intentionally, in order to commit, conceal or disguise the offences referred to in Articles 2 to 12, to the extent the Party has not made a reservation or a declaration:

a. creating or using an invoice or any other accounting document or record containing false or incomplete information;

b. unlawfully omitting to make a record of a payment.

leading position within the company.[36] To facilitate enforcement of anti-corruption laws, the Criminal Law Convention requires cooperation among the national authorities of different states.[37]

The Civil Law Convention was passed later, in November 1999, and offers redress to those injured as a result of "acts of corruption, to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage."[38] The Explanatory Report notes that this Convention was passed because combating corruption cannot rely exclusively on criminal law.[39] The Civil Law Convention requires nations to take "any necessary measures" to ensure corporate accounting presents a "true and fair view of the company's financial position" and that auditors be required to confirm this.[40] The Civil Law Convention addresses the accessibility and

[36] Article 18 (1) of the Criminal Law Convention On Corruption, Corporate liability provides that, Each Party shall adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for the criminal offences of active bribery, trading in influence and money laundering established in accordance with this Convention, committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:
– a power of representation of the legal person; or
– an authority to take decisions on behalf of the legal person; or
– an authority to exercise control within the legal person;
as well as for involvement of such a natural person as accessory or instigator in the above-mentioned offences.
2. Apart from the cases already provided for in paragraph 1, each
Party shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of the criminal offences mentioned in paragraph 1 for the benefit of that legal person by a natural person under its authority.
3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators of, or accessories to, the criminal offences mentioned in paragraph 1.

[37] Article 21 of the Criminal Law Convention On Corruption, Co-operation with and between national authorities
Each Party shall adopt such measures as may be necessary to ensure that public authorities, as well as any public official, co-operate, in accordance with national law, with those of its authorities responsible for investigating and prosecuting criminal offences:
a. by informing the latter authorities, on their own initiative, where there are reasonable grounds to believe that any of the criminal offences established in accordance with Articles 2 to 14 has been committed, or
b. by providing, upon request, to the latter authorities all necessary information.

[38] Article 1 of the Civil Law Convention on Corruption, Purpose
"Each Party shall provide in its internal law for effective remedies for persons who have suffered damage as a result of acts of corruption, to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage."

[39] Available at: http://conventions.coe.int/Treaty/EN/Report/Html/174.htm visited on 12 November 2012.

[40] Article 10 of the Civil Law Convention, Accounts and audits

effectiveness of civil law remedies,[41] the validity of contracts,[42] and the role of auditors, "whistleblower" protection of employees,[43] and litigation costs and international cooperation.[44]

3.4. Other Regional[45] Instruments

3.4.1. OECD

The Organization for Economic and Cooperative Development (OECD) Convention was signed on December 17, 1997. This treaty requires all signatories to take steps to criminalize the payment of bribes to foreign public officials and to establish appropriate sanctions on firms and individuals guilty of violating these provisions. The Convention does not eliminate the tax deductibility of bribes permitted by some countries and does not generally apply to bribes made to political parties. The U.S. State Department has called the OECD Convention "a major milestone in U.S. efforts over more than two

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1. Each Party shall, in its internal law, take any necessary measures for the annual accounts of companies to be drawn up clearly and give a true and fair view of the company's financial position.
2. With a view to preventing acts of corruption, each Party shall provide in its internal law for auditors to confirm that the annual accounts present a true and fair view of the company's financial position.

[41] Article 3 of the Civil Law Convention, Compensation for damage

1. Each Party shall provide in its internal law for persons who have suffered damage as a result of corruption to have the right to initiate an action in order to obtain full compensation for such damage.
2. Such compensation may cover material damage, loss of profits and non-pecuniary loss.

Article 4 Civil Law Convention, Liability

1. Each Party shall provide in its internal law for the following conditions to be fulfilled in order for the damage to be compensated:
i. the defendant has committed or authorised the act of corruption, or failed to take reasonable steps to prevent the act of corruption;
ii. the plaintiff has suffered damage; and
iii. there is a causal link between the act of corruption and the damage.
2. Each Party shall provide in its internal law that, if several defendants are liable for damage for the same corrupt activity, they shall be jointly and severally liable.

[42] Article 8 of the Civil Law Convention Validity of contracts

1. Each Party shall provide in its internal law for any contract or clause of a contract providing for corruption to be null and void.
2. Each Party shall provide in its internal law for the possibility for all parties to a contract whose consent has been undermined by an act of corruption to be able to apply to the court for the contract to be declared void, notwithstanding their right to claim for damages.

[43] Article 9 of the Civil Law Convention, Protection of employees

Each Party shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities.

[44] Article, 13 of the Civil Law Convention, International co-operation

The Parties shall co-operate effectively in matters relating to civil proceedings in cases of corruption, especially concerning the service of documents, obtaining evidence abroad, jurisdiction, recognition and enforcement of foreign judgements and litigation costs, in accordance with the provisions of relevant international instruments on international co-operation in civil and commercial matters to which they are Party, as well as with their internal law.

[45]

decades to have other major trading nations join us in criminalizing the bribery of foreign public officials in international business transactions."

In general, the OECD Convention requires signatory nations to adopt "effective, proportionate, and dissuasive criminal sanctions" to those persons who bribe foreign public officials.[46] It calls for each nation to exercise its full jurisdictional powers to punish foreign bribery where the offense is committed in whole, or in part, on its soil, or is committed by its nationals abroad.[47] Like the FCPA, it contains both anti-bribery and recordkeeping provisions. Other significant points of the OECD Convention include:

I. **Active Bribery Only**. The Convention only criminalizes "active bribery" which involves offering or giving a bribe. "Passive bribery," or the act of soliciting a bribe, is not addressed on the basis that this is presumably already a criminal offense in most countries.

II. **Definition of Bribery**. Active bribery is defined as a bribe offered or given "in order to obtain or retain business or other improper advantage in the conduct of international business." The Convention also requires

[46] Article 3 of the OECD Convention, Sanctions
1. The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.
2. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive noncriminal sanctions, including monetary sanctions, for bribery of foreign public officials.
3. Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.
4. Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.

[47] Article 4 of the OECD Convention, Jurisdiction
1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.
2. Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.
3. When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.
4. Each Party shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps.

signatories to prohibit the use of off-the-book accounts and other practices used to conceal bribes made to public officials.

III. **Public Officials**. The Convention defines "public officials" as follows: "any person is holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function or involved in a public agency or public enterprise; and any official or agent of a public international organization."

IV. **Civil liability if Not Criminal**. The Convention recognizes that in countries like Japan and Germany, legal entities (e.g., corporations) generally cannot be criminally responsible under domestic law. However, Article 2 of the Convention requires all signatories to hold legal entities liable for the bribery of foreign public officials without specifying whether such liability is to be criminal or civil. Article 3.2 further requires that in countries which do not impose criminal liability on legal persons, "effective, proportionate, and dissuasive non-criminal sanctions, including monetary sanctions" should be imposed.

V. **Reliance on Domestic Laws**. The Convention seeks to impose general standards rather than detailed prohibitions. Though it provides a definition of the offense criminalized, the Convention also relies on the fact that its signatories' domestic laws regarding the issue of internal bribery or their rules pertaining to criminal law will be extended so as to address the bribery of foreign public officials.

3.4.2. Inter-American Convention against Corruption

The Organization of American States Inter-American Convention against Corruption (OAS Convention) was the first binding multilateral agreement on corruption. It was signed by 22 states, including the US, in 1996 and entered into force in 19978.[48] It currently has 33 ratifications and countries that are not OAS members may also accede to it.[49] The initiative for the OAS

[48] Inter-American Convention Against Corruption (OAS Convntion), done at Caracas, 29 March 1996, 35 I.L.M. 724 (entered into force 6 March 1997), available at http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/documents/eng/aboutoas.asp. visited on 2 November 2013.

[49] OAS, 'Inter-American Convention Against Corruption', http://www.oas.org/juridico/english/sigs/b-

Convention came from a group of Latin American governments led by Venezuela, and was strongly supported by the US.[50] The Convention is distinctive in including developed countries, some in the middle range, and some poor countries.[51] The OAS Convention is a manifestation of the spread of democratic government in Latin America which has publicly led to less patience for, and even rejection of, corruption.[52] Consequently, the Convention emphasizes the need to protect democratic institutions because 'representative democracy, an essential condition for stability, peace and development of the region, requires, by its nature, the combating of every form of corruption in the performance of public functions.[53]

The OAS Convention has a broader scope than the OECD and European instruments. It applies to active bribery (the offence committed by the person who promises or gives the bribe) and passive bribery (the offence committed by the person who receives the bribe).[54] It seeks not only to make bribery of foreign officials a crime, but also encourages governments to deal with domestic corruption. It requires states parties to criminalize: the solicitation, acceptance or offer of illicit payments; acts or omissions of government officials for the purpose of obtaining a bribe; fraudulent use of property derived

58.html visited 1 November 2004; Article XXIII of OAS Convention. Visited on 2 November 2013.

[50] David A. Gantz, 'Globlizing Sanctions Against Foreign Bribery: The Emergence of a New International Legal Consensus', 18 NW. Int'I L. & Bus. (1998) 457, at 477.

[51] Susan Rose-Ackerman, 'Corruption and the Global Corporation: ethical obligations and workable stategies', in Michael Likosky (ed), Transnational Legal Process (London: Butterworths, 2002) 148-71, at 150.

[52] Article II of the Oas, Article II Purposes
The purposes of this Convention are:
1. To promote and strengthen the development by each of the States
Parties of the mechanisms needed to prevent, detect, punish and eradicate corruption; and
2. To promote, facilitate and regulate cooperation among the States
Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption in the performance of public functions and acts of corruption specifically related to such performance.

[53] Preamble, para 2 of the OAS Convention, available at http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/documents/eng/aboutoas.asp. last visited 2on November 2013.

[54] Peter J. Henning, 'Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law', 18 Ariz. J. Int'I & Comp. Law (2001) 793, at 807.

from such activities; and participation as a principal, accomplice or accessory after the fact.[55]

Its provision on transnational bribery is broader than the equivalent provisions of the OECD Convention because it covers not only bribery where the purpose relates to a contract or business transaction, but also any other case where the bribe relates to 'any act or omission in the performance of that official's public function'.[56] States parties are also asked to consider criminalizing a series of further offences on improper use of confidential information or government property by an official, seeking a decision from a public authority for illicit gain, and improper diversion of state property, monies or securities.[57] Interestingly, if adopted, these become 'acts of

[55] Articles VI of the OAS Convention, Acts of Corruption
1. This Convention is applicable to the following acts of corruption:
a. The solicitation or acceptance, directly or indirectly, by a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions;
b. The offering or granting, directly or indirectly, to a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions;
c. Any act or omission in the discharge of his duties by a government official or a person who performs public functions for the purpose of illicitly obtaining benefits for himself or for a third party;
d. The fraudulent use or concealment of property derived from any of the acts referred to in this article; and
e. Participation as a principal, coprincipal, instigator, accomplice or accessory after the fact, or in any other manner, in the commission or attempted commission of, or in any collaboration or conspiracy to commit, any of the acts referred to in this article.
2. This Convention shall also be applicable by mutual agreement between or among two or more States Parties with respect to any other act of corruption not described herein.
Article VII of the OAS Convention, Domestic Law
The States Parties that have not yet done so shall adopt the necessary legislative or other measures to establish as criminal offences under their domestic law the acts of corruption described in Article VI(1) and to facilitate cooperation among themselves pursuant to this Convention.
[56] Article VIII of the OAS Convention, Transnational Bribery
Subject to its Constitution and the fundamental principles of its legal system, each State Party shall prohibit and punish the offering or granting, directly or indirectly, by its nationals, persons having their habitual residence in its territory, and businesses domiciled there, to a government official of another State, of any article of monetary value, or other benefit, such as a gift, favour, promise or advantage, in connection with any economic or commercial transaction in exchange for any act or omission in the performance of that official's public functions.
Among those States Parties that have established transnational bribery as an offence, such offence shall be considered an act of corruption for the purposes of this Convention.
Any State Party that has not established transnational bribery as an offence shall, insofar as its laws permit, provide assistance and cooperation with respect to this offence as provided in this Convention.
[57] Article XI of the OAS Convention, Progressive Development

corruption' under the Convention and trigger cooperation requirements even among states which have not criminalized the offences.[58]

3.4.3. African Instruments

The most recent regional initiative is the African Union Convention on Preventing and Combating Corruption (African Union Convention) which was adopted in Mozambique in 2003.[59] The African Union was established in 2000 as the successor to the Organization of African Unity (OAU). It represents the change in priorities for Africa: whereas the OAU focused on removing the vestiges of colonization and apartheid, the African Union aims to expedite the process of economic and political integration in the continent.[60]

The Convention's objectives reflect the African Union's focus on economic and political development. It aims to promote mechanisms to fight corruption in the public and private sectors, to facilitate cooperation among states parties, and to coordinate the policies and legislation relevant to corruption.[61]

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1. In order to foster the development and harmonization of their domestic legislation and the attainment of the purposes of this Convention, the States Parties view as desirable, and undertake to consider, establishing as offences under their laws the following acts:
a. The improper use by a government official or a person who performs public functions, for his own benefit or that of a third party, of any kind of classified or confidential information which that official or person who performs public functions has obtained because of, or in the performance of, his functions;
b. The improper use by a government official or a person who performs public functions, for his own benefit or that of a third party, of any kind of property belonging to the State or to any firm or institution in which the State has a proprietary interest, to which that official or person who performs public functions has access because of, or in the performance of, his functions;
c. Any act or omission by any person who, personally or through a third party, or acting as an intermediary, seeks to obtain a decision from a public authority whereby he illicitly obtains for himself or for another person any benefit or gain, whether or not such act or omission harms State property; and
d. The diversion by a government official, for purposes unrelated to those for which they were intended, for his own benefit or that of a third party, of any movable or immovable property, monies or securities belonging to the State, to an independent agency, or to an individual, that such official has received by virtue of his position for purposes of administration, custody or for other reasons.
2. Among those States Parties that have established these offences, such offences shall be considered acts of corruption for the purposes of this Convention.
3. Any State Party that has not established these offences shall, insofar as its laws permit, provide assistance and cooperation with respect to these offences as provided in this Convention.

[58] Philippa Webb, The United Nations Convention Against Corruption Global Achivement or Missed Opportunity? Journal of Inernational Economic Law 8(1), 191-229.
[59] Available at: http://www.african-union.org/home/Welcome.htm. visited 12on November 2013.
[60] Available at: http://www.african-union.org/home/Welcome.htm. visited 12 on November 2013.
[61] Article 2 of the African Convention, Objectives

The Convention's scope is broad and covers active and passive bribery, influence peddling, illicit enrichment, concealment of proceeds derived from corrupt acts.[62] Its requirements are extensive and appear to be binding. States parties 'undertake to' adopt legislative and other measures to establish the Convention's offences, strengthen national control measures to ensure the setting up and operations of foreign companies in their territory are subject to the national legislation, establish independent national anticorruption authorities, pass laws to protect informants and witnesses, and punish those who make false and malicious corruption reports.[63] States parties must adopt legislation to give effect to the right of access to any information that is required to assist in the fight against corruption.[64]

The objectives of this Convention are to:
1. Promote and strengthen the development in Africa by each State Party, of mechanisms required to prevent, detect, punish and eradicate corruption and related offences in the public and private sectors.
2. Promote, facilitate and regulate cooperation among the State Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption and related offences in Africa.
3. Coordinate and harmonize the policies and legislation between State Parties for the purposes of prevention, detection, punishment and eradication of corruption on the continent.
4. Promote socio-economic development by removing obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights.
5. Establish the necessary conditions to foster transparency and accountability in the management of public affairs.

[62] Article 4 of the African Convention.

[63] Article 5 of the African Convention, Legislative and other Measures
For the purposes set-forth in Article 2 of this Convention, State Parties undertake to:
1. Adopt legislative and other measures that are required to establish as offences, the acts mentioned in Article 4 paragraph 1 of the present Convention.
2. Strengthen national control measures to ensure that the setting up and operations of foreign companies in the territory of a State Party shall be subject to the respect of the national legislation in force.
3. Establish, maintain and strengthen independent national anticorruption authorities or agencies.
4. Adopt legislative and other measures to create, maintain and strengthen internal accounting, auditing and follow-up systems, in particular, in the public income, custom and tax receipts, expenditures and procedures for hiring, procurement and management of public goods and services.
5. Adopt legislative and other measures to protect informants and witnesses in corruption and related offences, including protection of their identities.
6. Adopt measures that ensure citizens report instances of corruption without fear of consequent reprisals.
7. Adopt national legislative measures in order to punish those who make false and malicious reports against innocent persons in corruption and related offences.
8. Adopt and strengthen mechanisms for promoting the education of populations to respect the public good and public interest, and awareness in the fight against corruption and related offences, including school educational programmes and sensitization of the media, and the promotion of an enabling environment for the respect of ethics.

[64] Article 9 of the African Convention, "Each State Party shall adopt such legislative and other measures to give effect to the right of access to any information that is required to assist in the fight against corruption and related offences"

The African Union Convention will be monitored by an Advisory Board on Corruption made up of 11 members elected by the Executive Counci1.[65] States Parties have to report on their implementation progression to the Board on an annual basis and the Board will then report to the Executive Council. The Board will adopt its own rules of procedure, but as of yet it is not obliged to verify the country reports in any way.

3.5. Anti-Corruption Initiatives in International Financial Institution

In recent years, international institutions and organizations have increased their focus on corruption. Institutions engaging in recent anti-corruption efforts include The World Bank and the International Monetary Fund.

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[65] Article 22 of the African Convention, Follow up Mechanism
1. There shall be an Advisory Board on Corruption within the African Union.
2. The Board shall comprise 11 members elected by the Executive Council from among a list of experts of the highest integrity, impartiality, and recognized competence in matters relating to preventing and combating corruption and related offences, proposed by the State Parties. In the election of the members of the board, the Executive Council shall ensure adequate gender representation, and equitable geographical representation.
3. The members of the Board shall serve in their personal capacity.
4. Members of the Board shall be appointed for a period of two years, renewable once.
5. The functions of the Board shall be to:
(a) promote and encourage adoption and application of anti-corruption measures on the continent;
(b) collect and document information on the nature and scope of corruption and related offences in Africa;
(c) develop methodologies for analyzing the nature and extent of corruption in Africa, and disseminate information and sensitize the public on the negative effects of corruption and related offences;
(d) advise governments on how to deal with the scourge of corruption and related offences in their domestic jurisdictions;
(e) collect information and analyze the conduct and behaviour of multinational corporations operating in Africa and disseminate such information to national authorities designated under Article 18 (1) hereof;
(f) develop and promote the adoption of harmonized codes of conduct of public officials;
(g) build partnerships with the African Commission on Human and Peoples' Rights, African civil society, governmental. Intergovernmental and non-governmental organizations to facilitate dialogue in the fight against corruption and related offences;
(h) submit a report to the Executive Council on a regular basis on the progress made by each State Party in complying with the provisions of this
Convention;
(i) perform any other task relating to corruption and related offences that may be assigned to it by the policy organs of the African Union.
6. The Board shall adopt its own rules of procedure.
7. States Parties shall communicate to the Board within a year after the coming into force of the instrument, on the progress made in the implementation of this Convention. Thereafter, each State Party, through their relevant procedures, shall ensure that the national anti-corruption authorities or agencies report to the Board at least once a year before the ordinary sessions of the policy organs of the AU.

3.5.1. World Bank Initiatives:

The World Bank acknowledges that corruption is one of "the greatest obstacles to economic and social development. Former Bank President James Wolfensohn first singled out corruption as a problem in 1996. During his tenure, the Bank has an internal department to investigate corruption and fraud in Bank-funded projects, and developed diagnostic measurements and corruption indices that are now widely used by external actors, including the U.S. government. Since 1996, the Bank has provided support for some 600 anti-corruption programs and governance initiatives in its member countries, and now governance assessments are part of every Country Assistance Strategy.[66]

The Integrity Vice Presidency (IVP) investigates allegations of corruption by Bank employees (internal corruption) and in the execution of Bank-funded projects (external corruption). Bank employees have access to an internal ethics line, in case they have any corruption-related questions. The Bank operates a multilingual, anonymous 24h AlertLine, which whistle-blowers can call for corruption complaints.[67]

Realizing the need for a comprehensive governance and anti-corruption strategy, the Bank embarked on a number of global consultations between 2006 and January 2007 with more than 3200 representatives of governments, parliaments, donors, civil society, private sector, academia, and other stakeholders. In March 2007, the World Bank Board of Directors unanimously endorsed new governance and anti-corruption strategy paper entitled *Strengthening Bank Group Engagement on Governance and Anticorruption*. The three main pillars of this strategy are:[68]

i. enhancing country efforts to eliminate corruption,

[66] James Ukropina, "Foreign Corrupt Practice Act", An O'Melveny Handbook, Washington, D.C., 2009, p. 107.
[67] Jan Wouters, Cedric Ryngaert & Ann Sofie Cloots, "The Fight Against Corruption in International Law" Working Paper No. 94 – July 2012, available at: http://www.globalgovernancestudies.eu last visited on 2 November 2012.
[68] James Ukropina, "Foreign Corrupt Practice Act", An O'Melveny Handbook, Washington, D.C., 2009, p. 107.

ii. minimizing risk of corruption in Bank-funded projects, and

iii. expanding partnerships with other development institutions, the private sector, civil society, and other groups to combat corruption. The Bank recently released for comment an implementation plan for this strategy paper.

3.5.2 International Monetary Fund Schemes

The International Monetary Fund (IMF) began addressing corruption in 1996, when IMF's Board of Governors urged the Fund to "promote good governance in all its aspects, including by insuring the rule of law, improving the efficiency and accountability of the public sector, and tackling corruption, as essential elements of a framework within which economies can prosper".[69]

The IMF has since expanded its promotion of good governance, but continues to limit its activities to those economic aspects of governance that have the potential for significant macroeconomic impact. The IMF publishes a number of working papers on corruption, monitors for abuse of IMF funds, makes corruption a part of its country evaluation process, and promotes policies supporting fiscal and monetary transparency. Like the World Bank, the IMF has also recently suspended relations with persistently corrupt IMF loan recipients. Finally, the IMF and the World Bank have together endorsed internationally recognized standards and codes related to corporate governance, accounting, auditing, securities, insurance, and transparency.[70]

3.5.3 Anti-Corruption Action Plan of the Asian Development Bank:

The Asian Development Bank (ADB) sponsor the Anti-Corruption Action Plan for Asia and Pacific, a non-binding initiative that contains

[69] Ibid. p. 107.
[70] James Ukropina, "Foreign Corrupt Practice Act", An O'Melveny Handbook, Washington, D.C., 2009, p. 108.

principles and slandered to assist the region's countries in developing policies to combat corruption. The Plan describes three "pillars of action":[71]

i. developing effective and transparent systems for public service;
ii. strengthening anti-bribery legislation; and
iii. supporting active public involvement. Further, the Plan lays out a board plan for implementing these "pillars." The ADB has also given power to investigate corruption allegations and created an enhanced anticorruption division to the office of the Auditor General within the bank.

3.5.4 World Trade Organization's attempting to increases transparency:

The World Trade Organization ("WTO"), through its Committee on Government Procurement and the Government Procurement Agreement, is attempting to increases transparency in the processes by which Governments award contracts. By making the process of, and criteria for, awarding contracts and conferring other benefits more transparent, governments limit the discretion of their officials, thereby reducing the risk of improper influence. WTO members have also agreed to implement domestic procedures to enforce rules against government officials that abuse the procurement process.[72]

3.6. Initiatives of Private Initiatives or Non-Governmental Organizations:

3.6.1. Transparency International

Transparency International (TI), founded in 1993, is a leading international non-governmental organization focusing on combating corruption, with 90 chapters and chapter-in-formation around the world. TI's major achievement in its 18 years of operation has been to bring worldwide attention to the problem of corruption, putting the issue on the agenda of international bodies, such as the United Nations, World Bank, and IMF.[73]

[71] Ibid. p. 108.
[72] James Ukropina, "Foreign Corrupt Practice Act", An O'Melveny Handbook, Washington, D.C., 2009, p. 108.
[73] Ibid.

TI assisted in the formation of a number of international and regional conventions addressing corruption, such as the UN Convention against Corruption, the OECD Anti-Bribery Convention, and the African Union Convention on Preventing and Combating Corruption. TI does not investigate individual instances of corruption, but develops global, regional, and national strategies to combat corruption and aids in implementing these strategies in conjunction with civil society, private, and public partners. TI's five global priorities in the fight against corruption are:[74]

i. corruption in politics,
ii. corruption in public contracting,
iii. corruption in private sector,
iv. international anti-corruption conventions, and
v. poverty and development.

TI has a number of different informative tools to combat corruption in each of these areas. Its most well-known tool is the annual Corruption Perceptions Index (CPI), first released in 1995. Using expert assessments and opinion surveys, the CPI scores and ranks 163 countries by their perceived levels of corruption. Since publishing the CPI, TI has also developed other tools measuring corruption. The Bribe Payers Index reviews the propensity of companies from the 30 leading industrialized countries to bribe when conducting business abroad-i.e., the supply side of corruption.[75]

TI's latest global tool is the Promoting Revenue Transparency Project, which aims to promote transparency and accountability of revenues from extractive industries by reporting data on both companies and host governments. TI also publishes a number of other resources, including the Anti-Corruption Handbook, a cross-sector guide for practitioners on developing and implementing anti-corruption measures; Business Principles for

[74] Ibid.
[75] James Ukropina, "Foreign Corrupt Practice Act", An O'Melveny Handbook, Washington, D.C., 2009, p. 108.

Countering Bribery, which provides companies a comprehensive anti-bribery model; and the corruption Fighter's Tool Kit, a completion of practical and innovative tools developed and implemented by civil society organizations and TI national chapters to monitor public institutions and combat corruption.[76]

TI also works at regional and local levels through its regional departments and national chapters. TI's four regional departments cover African and the Middle East, the Americas, Asia and the Pacific, and Europe and Central Asia, and each department develops regionally specific strategies for combating corruption within the region. In addition to supporting the national chapters and acting as a networking resource, these regional departments aid in TI's five global priorities in fighting corruption.[77]

3.6.2. International Chamber of Commerce

Already in 1977, the International Chamber of Commerce (ICC) adopted its first set of flagship rules against corruption. The ICC Rules on Combating Corruption serve as self-regulatory rules for companies and are described on the ICC's website as "good commercial practices in fighting corruption". The ICC Rules were significantly amended in 2011 and reflect the spirit of the UN Guiding Principles, including reference to due diligence with regard to the reputation and capacity of its business partners to comply with anti-corruption laws. The Rules recommend integrating certain of their provisions into all contracts with business relations.[78]

3.7 U.K. and International Commitments

The United Nations International Convention against Corruption, signed on 9 December 2003 and ratified on 9 February 2006. UK ratification extended to the British Virgin Islands in 2006. The United Nations Convention against Transnational Organised Crime, signed on 14 December 2000 and ratified on 9 February 2006. The OECD Convention on Combating Bribery of Foreign

[76] Ibid.
[77] Ibid. p. 109.
[78] Jan Wouters, Cedric Ryngaert & Ann Sofie Cloots, "The Fight Against Corruption in International Law" Working Paper No. 94 – July 2012, available at: http://www.globalgovernancestudies.eu last visited on 2 November 2012.

Public Officials in International Business Transactions (OECD Anti-Bribery Convention), signed on 17 December 1997 and ratified 14 December 1998. UK ratification extended to the Isle of Man in 2001.

The Council of Europe Criminal Law Convention on Corruption (Criminal Convention), signed on 27 January 1999 and subsequently ratified on 9 December 2003. Section 109 of the Anti-Terrorism, Crime and Security Act 2001 (and section 69 of the Criminal Justice (Scotland) Act 2003) extend the normal jurisdiction of the UK courts over any offence of bribery at common law or under the Public Bodies Corrupt Practices Act 1889 or the Prevention of Corruption Act 1906 to cover offences by UK nationals which take place outside the UK.

The UK, therefore, applies the jurisdictional rule laid down in article 17, paragraph 1(b), except that UK jurisdiction is limited to UK nationals and accordingly does not cover public officials or members of domestic public assemblies except where they are UK nationals. The UK, therefore, makes a declaration under article 17, paragraph 2 that it reserves the right to apply the jurisdictional rule laid down in paragraph 1(b) only where the offender is a UK national. In addition, the UK makes a declaration under article 17, paragraph 2 that it reserves the right not to apply the jurisdictional rule laid down in paragraph 1(c) at all. Since the UK law places no bar on the extradition of UK nationals, the UK does not need to change the law to meet the requirements of article 17, paragraph 3. The conduct referred to in article 7 is largely covered by section 1 of the 1906 Act. The 1906 Act does not, however, cover the case where the undue advantage is not given directly to the agent but is given to a third party. The UK accepts that this aspect of the law is in need of amendment, however, for the time being the UK reserves the right not to establish as a criminal offence all of the conduct referred to in article 7.

The conduct referred to in article 12 is covered by UK law in so far as an agency relationship exists between the person who trades his or her influence and the person he or she influences.

Not all of the conduct referred to in article 12 is criminal under UK law. Accordingly, the UK reserves the right not to establish as a criminal offence all of the conduct referred to in article 12. The additional protocol to the Criminal Convention was opened for signature in May 2003. The protocol entered into force on 1 February 2005 and has been ratified by the UK. The Group of States Against Corruption (GRECO) is responsible for monitoring the implementation of the Convention and the additional protocol.

The Council of Europe Civil Law Convention on Corruption (Civil Law Convention) was signed on 8 June 2000 but is yet to be ratified. The EU Convention on the Protection of the Financial Interests of the Communities and Protocols entered into force on 17 October 2002, having been ratified by all member states. The Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union (Convention on EU Officials) was adopted by the member states on 26 May 1997 and ratified by the UK in April 1999.

3.8 U.S.A. and International Commitments

The United States is a signatory to and has ratified the OECD Anti- Bribery Convention, the OAS Convention and the United Nations Convention against Corruption, all with reservations or declarations. The most significant reservations involve declining to specifically provide the private right of action envisioned by the United Nations Convention against Corruption and not applying the illicit enrichment provisions of the OAS Convention. The United States is also a signatory to the Council of Europe Criminal Law Convention (Criminal Convention) but has not ratified it.

3.9 India's International Commitments on Anti-Corruption

Corruption has become a major governance challenge in almost all countries of the world whether developed or developing. There are thousands of stories about rampant corruption pushing citizens to rise against governments in Latin America and in communist blocks. Gorbachev's Glasnost and Perestroika experimentations in erstwhile Soviet Union were also in response to deep

rooted corruption in ruling communist structures and elites of the USSR. While corruption in any society is undesirable, its impact on developing economy like India is most debilitating as it suffocates socio-economic development and so excludes large number of citizens from the benefits of inclusive growth.[79]

Corruption used to be mostly a complex socio-economic and cultural phenomenon at local level. But in a globalized economy and society, local corruptions are elevated and can trace their roots internationally. Internationally rooted corruptions have had their ramifications in India. From stories of Soviet findings to Communist groups in India to more recent incidents of black money in Swiss Banks, Terror funding from other countries or Hawala (money laundering) rackets operating from Gulf countries are some of many examples. Bofors scandal and most recently controversial Augusta Westland helicopter deals are some other examples of local corruption connected internationally. So, it is important for the countries to seek and commit support bilaterally and multilaterally.[80]

As the world's largest democracy India faces a number of challenges. India is presently under tremendous local pressure to initiate far reaching reforms in anti-corruption, prompted by popular anti-corruption movements in the country. But as one of the most diverse countries in the world and one of the largest economies in the world, India is known for its respect to international protocols and its active roles in international cooperation. India has also signed cooperation treaties bilaterally with many countries to exchange cooperation in fights against crimes and corruption. Being the founder and ordinary member of many global platforms, the country has committed its support to various international initiatives against the corruptions and follows the due procedures as laid down in various commitments. Some of the major international commitments of India are as follow:

[79] Available at http://www.vaniindia.org/publicationpdf/pub3jan15.pdf last visited on 22 July 2013
[80] ibid

a) United Nations Convention against Corruption (UNCAC):

In May 2011, the Indian Government ratified two UN Conventions - the United Nations Convention against Corruption (UNCAC) and the United Nations Convention against Transnational Organised Crime (UNTOC) and its three protocols. The Regional office of UNODC (United Nations Office on Drugs and Crime) for South Asia works in six countries: Bangladesh, Bhutan, India, Maldives, Nepal and Sri Lanka. It was established in 1987 and is based in New Delhi, India. The United Nations Convention against Corruption (UNCAC), which entered into force in December 2005, is the first ever binding global anti-corruption instrument.[81] It obliges the States to prevent and criminalize different corrupt practices, promote international cooperation, cooperate for the recovery of stolen assets and enhance technical assistance and information exchange. The Convention addresses both the public and private spheres and provides a set of comprehensive agreed-upon obligations and provisions to criminalize corruption and enhance transparency and accountability. In order to monitor the progress in the implementation of the Convention, Member States have agreed to conduct "peer-review mechanisms" among themselves, for which UNODC acts as a Secretariat.

b) International Association of Anti-Corruption Agencies:

The Central Vigilance Commissioner of India has been a member of the Executive Committee of the International Association of Anti-Corruption Agencies (IAACA) since its inception in 2006 in Beijing, China. With the aim of facilitating implementation of the United Nations Convention against Corruption, the IAACA has successfully organized series of events in an effort to push forward international cooperation against corruption. Currently the IAACA has more than 300 organizational members who cover nearly all law enforcement for all the national institutions and bodies entrusted with the task of fighting against corruption and more than 2000 individual members,

[81] Available at http://www.unodc.org/southasia/en/ last visited on 16 May 2012

including prosecutors, investigators and experts with experience in anti-corruption research or practice.[82]

c) Asian Development Bank- OECD Anti-Corruption Initiative:

India is an active member in the Asian Development Bank- OECD Anti-Corruption Initiative for the Asia Pacific Region. This initiative seeks to curb corruption to counter its negative effects on political stability, welfare, economic development, and international trade and investment. The 31 member countries in Asia Pacific resolved to cooperate in the fight against corruption as early as 1999, when they launched the Anti- Corruption Initiative for Asia-Pacific under the joint leadership of the Asian Development Bank (ADB) and the Organisation for Economic Cooperation and Development (OECD). The Initiative supports the member governments' efforts through three mechanisms namely, (i) Fostering policy dialogue through Steering Group Meetings and Conferences (ii) Policy analysis, including thematic reviews and stocktaking and (iii) Regional Seminars

d) Anti-Bribery Working Group of OECD:

India participates regularly in the Anti-Bribery Working Group of OECD (Organisation for Economic Cooperation and Development) as an Observer. Established in 1994, the OECD Working Group on Bribery in International Business Transactions (Working Group) is responsible for monitoring the implementation and enforcement of the OECD Anti Bribery Convention, the 2009 Recommendation on Further Combating Bribery of Foreign Bribery in International Business Transactions (2009 Anti-Bribery Recommendation) and related instruments. This peer-review monitoring system is conducted in three phases and is considered by Transparency International to be the 'gold standard' of monitoring.

e) G20 Anti-Corruption Action Plan 2013-14:

Being the member of G-20, India shares concerns and commitments of G-20 nations against corruption. G20 Leaders established the G20 Anti-Corruption Working Group in Toronto in 2010 and endorsed the first Anti-Corruption

[82]Available at http://www.iaaca.org/AboutIAACA/BriefIntroduction/ Last visited on 13 June 2013

Action Plan in Seoul later that year. At the Los Cabos summit, Leaders renewed the mandate of the Working Group and called for a revised Action Plan to be developed. The G20 renews its pledge to implement fully the commitments found in the Seoul Anti-Corruption Action Plan, the Cannes Monitoring Report and subsequent Leaders' declarations adopted at the Summits in Cannes and Los Cabos, noting in particular the commitment in the Los Cabos communiqué to "closing the implementation and enforcement gaps.[83]

f) IBSA Joint Working Group and BRICS:

India is also actively involved in the anti-corruption initiatives of various groups of countries BRICS (Brazil, Russia, India, China, South Africa) and IBSA (India-Brazil-South Africa). An IBSA Joint Working Group (JWG) on Public Administration was launched during the first IBSA Summit held in Brasilia (13 September 2006). The JWG aims at ensuring an effective public service and sharing of best practices in governance amongst the three countries, including effective systems for monitoring and evaluating government performance. The JWG has identified six key areas for sharing knowledge and learning viz. Integrated Monitoring and Evaluation, EGovernance, Human Resource Development, Citizen-Oriented Service Delivery, Anti-Corruption and Ethics, and Accountability and Transparency.[84] BRICS leaders also share their concern on rising corruption in countries and emphasized the same during recent 6th BRICS summit held in Fortaleza, Brazil. Among 72 points of Fortaleza declaration, point no. 17 quotes heads of governments of BRICS countries as[85] "We believe that sustainable development and economic growth will be facilitated by taxation of revenue generated in jurisdictions where economic activity takes place. We express our concern over the harmful impact of tax evasion, transnational fraud and aggressive tax planning on the world economy. We are aware of the challenges brought by aggressive tax avoidance

[83] https://www.g20.org
[84] Available at http://ibsa.nic.in/intro_public_administration.htm last visited on 18 March 2012
[85] http://www.globalresearch.ca/sixth-brics-summit-fortaleza-declaration/5391525?print=1 last visited on 27 May 2013

and non-compliance practices. We, therefore, affirm our commitment to continue a cooperative approach on issues related to tax administrations and to enhance cooperation in the international forums targeting tax base erosion and information exchange for tax purposes. We direct our relevant authorities to explore ways of enhancing cooperation in this area. We also direct our relevant authorities to strengthen cooperation in the field of customs." The 6th BRICS summit declaration reaffirms the commitments of BRICS countries when it says in point no. 58 that 'We recognize that corruption negatively affects sustainable economic growth, poverty reduction and financial stability. We are committed to combat domestic and foreign bribery, and strengthen international cooperation, including law enforcement cooperation, in accordance with multilaterally established principles and norms, especially the UN Convention Against Corruption.[86]"

g) United Nations Global Compact:

Many of Indian business companies have embraced principles of United Nations Global Compact (UNGC) to work against corruption in all its forms forms, including extortions and bribery. The UN Global Compact is a strategic policy initiative for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption. By doing so, business, as a primary driver of globalization, can help ensure that markets, commerce, technology and finance advance in ways that benefit economies and societies everywhere[87].

h) In addition to above, India has also requested to join Asia Pacific Economic Cooperation (APEC) and so, in a way subscribe to the APEC's commitments against corruption, as declared in Santiago in Chile in the year 2004.

[86] Available at http://www.globalresearch.ca/sixth-brics-summit-fortaleza-declaration/5391525?print=1 last visited on 15 January 2013

[87] Available at: http://www.unglobalcompact.org/AboutTheGC/index.html last visited on 8 August 2013

The international anti-corruption legal framework has been substantially strengthened in the past two decades, with impressive progress being made at both global and regional levels. Nevertheless, the work is far from over. For example, the AU Convention is currently not girded by any tangible monitoring mechanism. Even more remarkable is the absence of a regional Asian anti-corruption instrument. Notwithstanding the progress made on the international level, "the battlefield upon which this war is lost or won remains national." In order to bring this struggle to a good end, international monitoring of national implementation and enforcement could use an extra impetus, similar to the OECD monitoring mechanism.[88]

One scholar stated that, "incorruptible governments can be constructed only using incorruptible citizens as their bricks and mortar." Without a doubt, discouragement and prosecution of corrupt practices is not only obtained through international monitoring bodies or national prosecutions. The moral condemnation of corruption should ideally reach such a critical mass that the sheer reputational risk related to corruption is in itself a powerful disincentive. In addition, more lenient sentencing guidelines for companies with a strong internal prevention and detection system may provide additional incentives to establish such internal guidelines and monitoring procedures; these will presumably be strongly influenced by international standards and guidance.[89]

[88] Ibid.
[89] Jan Wouters, Cedric Ryngaert, Ann Sofie Cloots, "The Fight Against Corruption in International Law" Working paper No. 94-July 2012.

CHAPTER-IV

Anti Corruption Laws in UK, USA and India To Combat Corruption

CHAPTER IV

ANTI CORRUPTION LAWS IN U.K., U.S.A. AND INDIA

Corruption is a disease, a cancer that eats into the cultural, political and economic fabric of society, and destroys the functioning of vital organs. In the words of Transparency International, "*Corruption is one of the greatest challenges of the contemporary world. It undermines good government, fundamentally distorts public policy, leads to the misallocation of resources, harms the private sector and private sector development and particularly hurts the poor*"[1].

A number of international organisations, such as the Organisation for Economic Co-operation and Development (OECD) and the International Chamber of Commerce (ICC), have adopted significant regulations to remove corruption and bribery from the global trade environment. States too have found it necessary to pass laws so as to control their companies conducting business beyond national borders. The most well-known state legislations are the U.S. Foreign Corrupt Practices Act 1977 (FCPA) and the UK Bribery Act 2010 (UKBA). The FCPA and the UKBA are the most effective global anti-corruption and anti-bribery laws because of their extraterritorial reach.

Both the FCPA and the UKBA include a tough set of rules prohibiting corruption and bribery. They envisage strict corporate liability for act or omission of their employees, agents or –in some cases- other associated entities. The companies falling under the jurisdiction of the FCPA and the UKPA are required to adopt rigorous and robust compliance policies. Such programs must be consistent with standards defined in the FCPA and the UKBA. However, although their stated goals are similar, the rules of FCPA

[1] Transparency International, http://www.transparancy.de/mission.html last visited on 24 October 2014

and UKBA may be different in some respects. It is crucial for companies to acknowledge the distinction between the FCPA and the UKBA, as modeling their anti-corruption compliance programs only along one of them may not always be sufficient to escape responsibility under the other.

To combat this devastating corruption Indian penal code (IPC) was the main tool during the pre-independence period. Section 161 to 165 of the Indian Penal Code provides the legal framework to prosecute corrupt public servants. At that time the need for a special law to deal with corruption was not felt. But the Second World War created menaces (shortages). Taking advantage of that situation the corrupt elements exploited the situation which led to large scale corruption in public life. Then the law makers sincerely felt that drastic legislative measures needed to be taken immediately. Hence the Prevention of Corruption Act, 1947 was enacted to fight the evils of bribery and corruption.

This Act did not redefine nor expand the definition of offences which resulted in corruption, already existing in the IPC. However, the law defined a new offence criminal misconduct in discharge of official duty for which enhanced punishments was stipulated. Later in 1988, the Prevention of Corruption Act was enacted. It consolidates the provisions of the Prevention of Corruption Act 1947, the Criminal Law Amendment Act, 1952 and some provisions of IPC. It has also certain provisions intended to combat corruption effectively among public servants. In this Act the term Public Servants is broadly defined and a new concept Public Duty is introduced. Besides, trail on cases by Special Judges. Recently, in the way of combating corruption, the prevention of Money Laundering Act 2002 was enacted empowering the Directorate of Enforcement, India, and Financial Intelligence Unit, India to investigate and prosecute such public servants who hold ill-gotten wealth in foreign countries and transfer to their homeland through money laundering. Further, since secrecy in public administration breeds corruption.

The Right Information Act, 2005 has been enacted aiming at ensuring efficiency, transparency and accountability in public life. This is a revolutionary step towards the eradication of corruption from public life. 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. At the federal level, key institutions are include the Central Vigilance Commission (CVC), The Central Bureau of Investigation (CBI), The Office of the Comptroller and Auditor General (C&AG) and the State Level Anti- Corruption Bureaus (ACB) of each State are created to combating the corruption in India.

4.1 Anti-Corruption Laws in UK to Combat Corruption

British anti-bribery law was based on the Public Bodies Corrupt Practices Act 1889[2], the Prevention of Corruption Act 1906[3] and the Prevention of Corruption Act 1916[4], a body of law described as "inconsistent, anachronistic and inadequate". Following the Paulson affair in 1972, the Salmon Committee on Standards in Public Life recommended updating and codifying these statutes, but the government of the time took no action. Similar suggestions were brought up in the first report of the Committee on Standards in Public Life established by John Major in 1994, and the Home Office published a draft consultation paper in 1997, discussing extending anti-bribery and anti-corruption law. This was followed by the Law Commission's report legislating the Criminal Code: Corruption in 1998. The consultation paper and report coincided with mounting criticism from the Organization for Economic Co-operation and Development, who felt that, despite the United Kingdom's ratification of the OECD Anti Bribery Commission, its bribery laws were inadequate.[5]

A draft Bribery Bill was announced in the 2002 Queen's Speech, but was rejected by the joint committee examining it. A second consultation paper was issued in 2005 examining the committee's concerns, before the government

[2] Available at: http://www.legislation.gov.uk/ukpga/Vict/52-53/69/introduction. last visited on 4 January 2014
[3] Available at: http://www.legislation.gov.uk/ukpga/Edw7/6/34 last visited on 12 January 2013
[4] Available at: http://www.legislation.gov.uk/ukpga/1916/64/pdfs/ukpga_19160064_en.pdf last visited on 22 April 2013
[5] Available at: http://www.legislation.gov.uk/ukpga/Edw7/6/34 last visited on 5 July 2014

announced in March that "there was broad support for reform of the current law, but there was no consensus as to how this could be achieved". Following a white paper in March 2009, the Bribery Bill, based on the Law Commission's 2008 report Reforming Bribery was announced in the Queen's Speech. Initially given all-party support after its introduction by Jack Straw in 2009, the Bill was, according to The Guardian, subject to an attempted filibuster by Members of Parliament from the Conservative Party. This followed pressure from the confederation of British Industry, who worried that the Bill in its original form would hamper the competitiveness of British industry.

The Bill was given Royal Assent on 8 April 2010, becoming the Bribery Act 2010, and was expected to come into force immediately. The government instead chose to hold several rounds of public consultations before announcing that it would come into force in April 2011. Following the publication of guidance by the Ministry of Justice, the act came into effect on 1 July 2011. The Ministry of Justice also released a Quick Start Guide, which highlights some key points of the Act. The Quick Start Guide also suggests companies to consult relevant bodies for advice, including the UK Trade and Investment, and the government sponsored Business Anti Corruption Portal In October 2011 Munir Patel, a clerk at Redbridge Magistrates Court, became the first person to be convicted under the Bribery Act, along with misconduct in a public office.
The UK Bribery Act 2010 casts a deeper, wider net than ever in pursuit of bribery offenses. British business organizations as well as international business organizations with subsidiaries in the UK or just conducting business in the UK are subject.[6]

4.1.1 The U.K. Bribery Act, 2010

In United Kingdom, The Bribery Act 2010 has wide application and came into force on 1 July 2011. It repealed and replaced the Public Bodies and Corrupt Practices Act 1889 and the Prevention of Corruption Acts of 1906 and 1916. The age of those Acts demonstrate that the evil of corruption in public

[6] Available at: http://www.legislation.gov.uk/ukpga/1916/64/pdfs/ukpga_19160064_en.pdf last visited on 24 July 2012

office has been recognised for a considerable length of time. The Act, however, does not now differentiate between misfeasance in public office and private, commercial, acts of corruption. The law has been updated to reflect the UK's international obligations under the OECD Convention on Combating Bribery of Foreign Public Officials (1997), the UN Convention Against Corruption and the Council of Europe Criminal Law Convention on Corruption (1998) and Protocol (2005).

4.1.1.1General Bribery Offences

crime of '*bribery'*[7] is described under this Act as occurring when a person offers, gives or promises to give a "financial or other advantage" to another individual in exchange for "improperly" performing a "relevant function or activity".

Offence of *being bribed*[8]described under this Act as requesting, accepting or agreeing to accept such an advantage, in exchange for improperly performing such a function or activity.

The "relevant function or activity" element is explained in this Act, it covers "any function of a public nature; any activity connected with a business, trade or profession; any activity performed in the course of a person's employment; or any activity performed by or on behalf of a body of persons whether corporate or unincorporated"[9]. This applies to both private and public industry, and encompasses activities performed outside the UK, even activities with no link to the country.

Under Section 4 of the UKBA, the activity will be considered to be "improperly" performed when the expectation of good faith or impartiality has been breached, or when the function has been performed in a way not expected of a person in a position of trust.

[7] Section 1 of the U.K. Bribery Act 2010
[8] Section 2 of the UK Bribery Act 2010
[9] Section 3 of the UK Bribery Act 2010

Section 5 of the UKBA provides that the standard in deciding what would be expected is what a reasonable person in the UK might expect of a person in such a position. Where the breach has occurred in a jurisdiction outside the UK, local practices or customs should be disregarded when deciding this, unless they form part of the "written law" of the jurisdiction; "written law" is given to mean any constitution, statute or judicial opinion set down in writing. The general offences also cover situations where the mere acceptance of such an advantage would constitute improperly performing relevant functions or activities.

4.1.1.2 Bribery of Foreign Public Officials

Bribery of foreign public officials is a separate crime under this Act, "*A person will be guilty of this offence if they promise, offer or give a financial or other advantage to a foreign public official, either directly or through a third party, where such an advantage is not legitimately due"*[10].

A foreign public official is defined, as *"an individual holding legislative, administrative or judicial posts or anyone carrying out a public function for a foreign country or the country's public agencies or an official or agent of a public international organisation"*[11].

4.1.1.3 Failure of Commercial Organisations to Prevent Bribery

There is also a specific offence relating to commercial organizations. The UKBA provides that a relevant commercial organization is guilty of an offence if a person associated with that commercial organisation bribes another person, intending to obtain or retain business, or a business advantage, for that commercial organisation. The offence applies whether it is committed in the United Kingdom or overseas.[12] Under Section 7(2), however, that commercial

[10] Section 6 of the U.K. Bribery Act 2010
[11] Section 6(4) of the U.K. Bribery Act 2010
[12] Section 7(1) of the U.K. Bribery Act 2010

organisation has a defence if it can show that it had in place adequate procedures designed to prevent bribery.

4.1.1.4 The Corporate Offence

This offence is set out in Section 7, and deals with "relevant commercial organizations," defined as a body or partnership incorporated or formed in the UK irrespective of where it carries on business, or an incorporated body or partnership, which carries on a business or part of a business in the UK irrespective of the place of incorporation or formation.[13]

A business organization is liable if a person "associated" with it bribes another person, intending to obtain or retain business or a business advantage for the organization. The Act defines a person "associated" with a business organization as a person, either an individual or an incorporated or unincorporated body, who "performs services" for or on behalf of the organization.[14] Section 8 of the Act provides clarifies that the capacity in which the person acts is irrelevant, meaning that employees, agents, and subsidiaries may be considered to perform services for an organization – an issue to be determined by considering all relevant circumstances.[15]

The Government provides the examples of contractors, suppliers, and separate legal entities in joint ventures as possible embodiments of an "associated" person in certain circumstances. There must be proof of intent to obtain, or retain business or any other advantage in the conduct of business for liability to accrue.

4.1.1.5 The Liability of Senior Officers

According to Section 14 of the Act, if an offense under sections 1, 2 or 6 has been committed with the "consent and connivance" of any "senior officer" or "a person purporting to act in such a capacity," that person may be guilty of

[13] Section 7(5) of the UK Bribery Act, 2010
[14] Section 8 of the U.K. Bribery Act, 2010
[15] Section 8(5) of the U.K. Bribery Act, 2010

the same offense committed by the organization.[16] The Act explains, however, that such liability cannot be imposed "unless the senior officer or person has a close connection with the United Kingdom."[17] A person is considered to have a close connection with the UK, if and only if at the time the act or omission was done or made, he or she was, inter alia, a British citizen or resident or a body incorporated under the law of any part of the UK.[18] "Senior Officer" is defined as "a director, manager, secretary or other similar officer."[19]

4.1.1.6 Facilitation Payments

Under the FCPA, facilitation payments, or what is commonly known as "grease payments" are exempted. This is not so under the Act. Under the Act, liability for such payments could be triggered under either Section 6 or Section 1, dealing with the general offenses of bribery, and, therefore, potentially also under Section 7. However, although facilitation payments are illegal, given the prosecutorial guidelines recently promulgated with respect to the offenses under the Act, it is uncertain whether offenses will be prosecuted unless the facilitation payments are seen as systemic or symptomatic of a wider lack of adequate procedures at the corporate level. Nevertheless, it may be advisable as good practice for companies to prohibit such payments and to work to identify and eliminate them, or at least to document any attempts to that effect.

4.1.1.7 Hospitality Payments

Similar to the FCPA, the Act does not ban hospitality payments as long as they are "sensible and proportionate" under the circumstances. Thus, proper judgment should be used in connection with promotional or other business expenses seeking to improve the image of an organization, present products or services, or establish cordial relations.

4.1.1.8 The Reward of Being Proactive

The Act is not all about punishment. It also contains incentives to organizations to develop policies to prevent bribery. Most importantly,

[16] Section 14(2) of the U.K. Bribery Act, 2010
[17] Section 14(3) of the U.K. Bribery Act, 2010
[18] Section 12(4)(a)-(i) of the U.K. Bribery Act, 2010
[19] Section 14(4)(a) of the U.K. Bribery Act, 2010

organizations with appropriate policies and procedures in place may assert the defense of "adequate procedures" as explained in Section 7(2). And, while the determination of what counts as "adequate procedures" is dependent on the nature, size, and complexity of a business, the UK Government has developed six principles to help organizations decide whether there is anything that they need to do differently.

I. Proportionate Procedures

Organizations should implement procedures that are proportionate to the bribery risks it faces, and the nature, scale and complexity of its activities.

II. Top Level Commitment

Proving "adequate procedures" requires the commitment to an anti-corruption culture that comes from the board of directors down. Policies should be visible both within the organization and to external partners and subsidiaries.

III. Risk Assessment

Businesses must understand the risks they face in their particular operations, specifically with respect to the geographical location and type of transaction. For example, activities undertaken in some developing countries are likely to warrant a higher degree of investigation and consideration.

IV. Due Diligence

Due diligence must be employed to identify the potential risks, including enquiring about intended transaction partners and agents, and the risks posed specifically by the geographical location or sector of the intended operation.

V. Communication (including training)

The policies and procedures must be promulgated throughout the organization, backed by training, if appropriate, and clear penalties for breach.

VI. Monitoring and Review

Policies should be reviewed periodically to ensure they develop in light with business needs.

4.1.1.9 Penalties[20]

The penalties for breaching the provisions of the Act are raised significantly by the new law. The Act provides that an offense committed by a body is punishable by an unlimited fine, while an individual guilty of an offense may be convicted to imprisonment for a term not exceeding ten years, or a fine, or both.

A prosecution under the Act can only be brought with the consent of the director of a relevant prosecuting authority in England, Wales or Northern Ireland, as applicable.

An offence under the Act committed by an individual under sections 1 (bribery), section 2 (acceptance of a bribe) or section 6 (bribery of a foreign official) is punishable on summary conviction by a fine up to the statutory maximum for summary conviction (currently £5,000 in England, Wales or Northern Ireland and £10,000 in Scotland), or imprisonment up to 12 months, or both. For conviction on indictment (generally more serious), the fine is unlimited (although certain guidelines may apply) and imprisonment can be up to 10 years, or both.

An offence under the Act committed by a person other than an individual is punishable by a fine. In the case of summary conviction, the fine may be up to the statutory maximum for summary conviction (currently £5,000 in England, Wales or Northern Ireland and £10,000 in Scotland). In the case of conviction on indictment, and violation of section 7 (failure by a commercial organisation to prevent bribery) can only be tried on indictment, the fine is unlimited (although certain guidelines may apply). Although the Act does not include a books and records provision, other statutes including the Companies Act, may impose penalties for certain breaches of requirements. In addition, anti-money laundering statutes can result in the confiscation of the proceeds of crime. And automatic debarment from public procurement will apply in the case of certain criminal convictions.

[20] Section 11 of the U.K. Bribery Act, 2010

4.1.1.10Prosecution and Enforcement

Prosecuting an offense under the Act is a matter for the prosecuting authorities and will follow the same guidelines and procedures as for any other criminal offenses. In March 2011, the Serious Fraud Office (SFO) and the Director of Public Prosecutions published a joint guidance for prosecutors for offenses under the Act. Thus, as will any other criminal offenses, prosecutions under the Act must pass the two-stage test in the Code for Crown Prosecutors:

(I) The evidential stage, and

(II) The public interest stage.[21]

The general rule is that if a conviction is not more likely than not, prosecutors should not go on to consider whether a prosecution is in the public interest, no matter how serious or sensitive the matter is. Moreover, the Guidance on Corporate Prosecutions includes self-reporting as a public interest factor weighing against prosecution (under stage 2). It should also be noted that unlike in the US, the UK procedure does not permit deferred prosecution agreements. Instead, the UK courts retain their discretion to sentence guilty defendants as they see fit. In fact, in some recent cases, the courts have criticized the SFO for trying to push "agreed" fines through the court process.[22]

4.1.2 Money Laundering Law in UK

The UK law dealing with money laundering is scattered over several statutes namely, the Criminal Justice Act 1993, the Drug Trafficking Act 1994, the Prevention of Terrorism Act 1989 and Money Laudering Regulation 1993. Following the Criminal Justice Act 1993, the law as it relates to drugs, terrorist crime, money laundering and other crimes is much the same.

Under the UK law money laundering relates to:

(a) Concealing or disguising property.

(b) Converting or transferring property or removing it from a jurisdiction.

[21] Available at: http:cps.gov.uk/publications last visited on 7 July 2012

[22] *R v. Innospec Limited* [2010] EW Misc 7

The constitute and offence the money must be the proceeds of crime. The salient provisions pertaining to money laundering under the UK law are:

(i) Laundering another persons' proceeds of crime, which means assisting another to retain proceeds of crime, acquiring, pressessing or using another's proceeds of crime, or concealing, etc., another persons' proceeds of crime; to constitute the offence of 'laundering another person's proceeds of crime', knowledge, suspicion or reasonable grounds to believe under varying circumstances are necessary conditions.

(ii) The offence of failure to disclose the knowledge or suspicion of money laundering extends only to drugs and terrorist offences.

(iii) The tipping-off offences, constitute 'tipping-off in connection with money laundering investigation', 'tip-off in connection with disclosures' and 'tip-offs in connection with production orders or warrants.

(iv) Failure to install anti-money laundering systems are covered b the Money Laundering Regulations 1993 and apply to banks and other financial institutions. These regulations mandate that an internal regulatory system be put in place by banks and financial institutions for identification, record keeping and training of employees, so that the employees are aware of the same.

(v) The penal provisions for all the offences relating to money laundering extend from imprisonment to fine.

(vi) Asset sharing and confiscation of the proceeds of crime both domestically and internationally are also provided for the UK law.

(vii) International co-operation amongst countries based upon reciprocity is another feature of the UK law on money laundering.

4.1.3 Whistleblower Protection in UK

The public interest disclosures legislation in the United Kingdom and the United States differ significantly from each other and from the Australian legislation. The UK Public Interest Disclosure Act 1998, which became

effective in July 1999, is very different to the legislation in other countries. The legislation enables a worker to make a complaint to an employment tribunal that he/she has been subjected to a detriment in breach of s 2 of the Public Interest Disclosure Act and under s 47B of the Employment Rights Act. The UK Public Interest Disclosure Act, which came about primarily through amendments to the Employment Rights Act 1996, protects most workers from retaliation by their employer, including dismissal, disciplinary action or a transfer that otherwise would not have happened. Unless the employer can show a valid reason for the dismissal or detriment, an employment tribunal may order the company to compensate the employee for the losses suffered and, in rare cases, mandate re-employment.[23]

The Act applies to all workers, save the armed forces, intelligence officers, volunteers and the self-employed in the UK and in Northern Ireland, and covers breaches of civil, criminal, regulatory or administrative law, miscarriage of justice, dangers to health, safety and the environment. The original arguments for a whistleblower law were built on preventing accidents and disasters. Frequently quoted examples are the capsizing of the Zeebrugge ferry or the Clapham Junction rail disaster. Employees, although aware of the maintenance or operating problems, did not speak out beforehand. Nevertheless, the Act in practice is better described as a whistleblower compensation Act, for it does not protect the complainant, nor does it legislate to investigate the complaint. It compensates the whistleblower for any reprisals. Whistleblowers may make their complaints to their employers or to a prescribed regulator, an industry regulating body.[24] Whistleblowers can also go to the police, the media, MPs and nonprescribed regulators if they are acting in good faith. On external disclosures, whistleblowers must show a factual basis for their beliefs.

The complaint about reprisals is examined by an Employment Tribunal. Tribunals comprise three members, the 'chairman' of which is legally

[23] Available at http://www.whistleblowers.org/html/fca.htm last visited on 25 July 2013
[24] Ibid.

qualified, and appointed by the Lord Chancellor, and the other two members are lay members. Located throughout the British Isles, the tribunals resolve disputes between employers and employees over employment rights.[25]

4.2 Legal Efforts of United States of America to Combat Corruption

Public corruption in any form is the misuse of a public or government office for private gain. Its existence is an indication that something has gone wrong in the management of the government office, whether it be federal, state, or local. In that regard, it is a basic tenet that government is not to be used for personal enrichment and the extending of benefits to the corrupt.

The prevention of corruption is essential not only to make government work for its intended purpose, e.g., ensure that public officials are using their office to further the public interest and not to enrich themselves or others, but also to preserve public confidence in the democratic process. In the case of *United States v. Miss. Valley Generating Co*.[26], the United States Supreme Court has observed: "*A democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption."*

The Foreign Corrupt Practices Act 1977 (FCPA) is a groundbreaking law that targets public corruption and fraud in the international marketplace. The Act, which imposes both civil and criminal penalties, makes it a federal criminal offense for any U.S. person or entity or any issuer of U.S. securities, acting anywhere in the world, or any foreign persons that cause an act in the United States, to make a corrupt payment to any foreign government official, directly or indirectly, to obtain or retain business. It also contains provisions requiring companies with securities registered on U.S. stock exchanges to maintain accurate records and implement adequate internal controls. Although it predated the U.S. Sentencing Guidelines for Organizations by 14 years and the Sarbanes-Oxley Act by 25 years, the FCPA applied many principles later

[25] Available at http://www.whistleblowers.org/html/fca.htm last visited on 25 July 2013
[26] 364 U.S. 520, 562 (1961)

incorporated in those laws. Today, it has an ever-increasing impact on the ways in which companies conduct business around the globe.

Congress enacted the FCPA in 1977 in response to a report by the Watergate Special Prosecutor indicating that major American corporations were engaging in systematic bribery of foreign government officials. Until its passage, the U.S. criminal laws did not expressly prohibit the bribery of foreign officials. The FCPA was the first legislation of its kind, and most other countries did not enact similar anti-corruption regulations until almost 20 years later. As a result, in the years following the FCPA's initial enactment, American businesses with operations overseas complained that they faced a competitive disadvantage and sought to have the legislation relaxed or repealed. Although repeal efforts were unsuccessful, Congress amended the FCPA in 1988 to modify the state of mind required for a violation of the Act when paying an intermediary and by adding one exception and two affirmative defenses. At the same time, Congress urged the executive branch to encourage the United States' trading partners to adopt similar anti-corruption legislation.

Congress amended the FCPA again in 1998, in legislation ratifying and implementing the Organization for Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention"). The 1998 amendments broadened the scope and applicability of the FCPA in several significant ways, including:

I. expanding the jurisdictional reach of the statute to include all U.S. nationals or U.S. companies that do any act outside the United States in furtherance of an improper payment, regardless of whether they use the mails or any means of interstate commerce, as previously required;

II. extending FCPA liability to foreign nationals and foreign businesses that do any act in furtherance of a prohibited payment while in U.S. territory;

III. providing criminal sanctions for FCPA violations for foreign nationals employed by, or acting as agents of, U.S. businesses; expanding the definition of foreign officials to whom payments are prohibited to include officers or employees of public international organizations, as designated by the President; and

IV. prohibiting payments to foreign officials for the purposes of "securing any improper advantage" (previously, the FCPA had prohibited payments for the purpose of (1) influencing a foreign official's acts or decisions, or (2) inducing a foreign official to act in violation of a lawful duty or order to obtain or retain business).

The U.S. Securities and Exchange Commission ("SEC") and the U.S. Department of Justice ("DOJ") were stepping up their FCPA enforcement efforts, marking a dramatic enhancement in U.S. anti-bribery efforts around the globe. As illustrated in the Tables at the end of this introduction, in the ten years since the 1998 amendments, FCPA enforcement has increased exponentially.

4.2.1 The Anti-Corruption Legacy of the United States Constitution

The United States Constitution reflects its framers' intent to deal with corruption which led to the adoption of a number of provisions in the Constitution itself limiting the opportunities for self-enrichment. Thus, the Constitution permits impeachment of any officer of the United States, including the President and Vice President, for "Treason, Bribery, or other high crimes and Misdemeanors."[27] It also prohibits anyone holding "any Office of Profit or Trust without the consent of the Congress, [from accepting] any present, Emolument Office, or Title of any kind whatever, from any King,

[27] Article II, Section 4 of the U.S.A. Constitution.

Prince, or foreign State."[28] Members of Congress are prohibited from taking any public office created during their tenure or any public office whose compensation has been increased during their tenure.[29] The Constitution's Appropriations Clause requires authorization from Congress before any funds could be spent by a federal officer.[30] With respect to the possibility of corruption in the states, no specific provisions were included. However, certain structural protections were enacted, such as trial by jury to protect against corrupt judges, and the ability of state legislatures to enact legislation to combat corruption.

4.2.2 The Foreign Corrupt Practices Act (FCPA)

The FCPA contains two types of provisions: anti-bribery provisions, which prohibit corrupt payments to foreign officials, parties or candidates to assist in obtaining or retaining business or securing any improper advantage; and record-keeping and internal controls provisions, which impose certain obligations on all companies whose securities are registered in the United States or which are required to file reports with the SEC, regardless of whether or not the companies have foreign operations.

4.2.2.1 Anti-Bribery provisions of the FCPA

The anti-bribery provisions of the FCPA are applied to three categories of persons:

I. Issuers[31]
II. Domestic concerns[32], and
III. Other persons[33]

They take any act in furtherance of the corrupt payment while within the territory of the United States. *"Issuers"* means any company whose securities are registered in the United States or which is required to file periodic reports

[28] Article I, Section 9, cl. 8 of the U.S.A Constitution.
[29] Article I, Section 6, cl. 2 of the U.S.A Constitution.
[30] Article I, Section 9, cl. 7 of the U.S.A Constitution.
[31] 15 U.S.C. §§ 78dd-1(a)(3) (for issuers).
[32] 15 U.S.C. §§ 78dd-2(a)(3) (for domestic concerns).
[33] 15 U.S.C. § 78dd-3(a)(3) (for "any person").

with the SEC.[34] *"Domestic concerns"* means any individual who is a citizen, natural or resident of the United States and any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a state of the United States, or a territory, possession, or commonwealth of the United States.[35] The Act now covers persons who commit bribery on U.S. territory regardless of whether the person is a resident or does business in the U.S.[36] Issuers and domestic concerns may be held liable for violating the anti-bribery provisions of the FCPA whether or not they took any action in the United States in furtherance of the corrupt foreign payment.

After 1998 amendment in FCPA, only issuers and domestic concerns could be held liable for only if they used the U.S. mails or instrumentalities of interstate commerce in furtherance of the illicit foreign payment. The 1998 amendments expanded the FCPA's jurisdiction to cover corrupt foreign payments outside the United States by U.S. persons without any link to interstate commerce. The FCPA amendments make it illegal for any United States person to violate the FCPA "irrespective of whether such United States person makes use of the mails or any means or instrumentality of interstate commerce in furtherance of [the illegal foreign activity)."[37] Thus, a U.S. company or issuer can be liable for the conduct of its overseas employees or agents, even if no money was transferred from the United States and no U.S. person participated in any way in the foreign bribery.

4.2.2.2 Elements of the FCPA

A violation of the anti-bribery prohibition consists of five elements:

I. A payment of or an offer, authorization, or promise to pay money or anything of value, directly, or through a third party;

II. To

[34] 15 U.S.C. § 78dd-l(a)
[35] 15 U.S.C. § 78dd-2(h)
[36] 15 U.S.C. §§ 78dd-1(a), dd-2(a) and dd-3(a)
[37] 15 U.S.C. § 78dd-2(i)(l). See also 15 U.S.C. § 78dd-l(g) (setting forth the same rule for "Issuers.")

(a) Any foreign official,

(b) Any foreign political party or party official,

(c) Any candidate for foreign political office,

(d) Any official of a public international organization, or

(e) Any other person while "knowing" that the payment or promise to pay will be passed on to one of the above;

III The use of an instrumentality of interstate commerce (such as telephone, telex, email, or the mail) by any person (whether U.S. or foreign) or an act outside the U.S. by a domestic concern or U.S. person, or an act in the United States by a foreign person in furtherance of the offer, payment or promise to pay;

IV for the corrupt purpose of influencing an official act or decision of that person, inducing that person to do or omit to do any act in violation of his or her lawful duty, securing any improper advantage, or inducing that person to use his influence with a foreign government to affect or influence any government act or decision;

V In order to assist the company in obtaining or retaining business or in directing business to any person or to secure an improper advantage.[38]

4.2.2.3 Key Concepts

A company can be liable under the FCPA not only for making improper payments, but also for an offer, promise or authorization of a corrupt payment, even if its employees or agents do not actually make a payment.

4.2.2.4 Foreign Officials

The term "foreign official" is defined under the Act as "any officer or employee of a foreign government or any department, agency or instrumentality thereof, or of a public international organization, or any person acting in an official capacity or on behalf of any such government, department, agency or instrumentality or for, or on the behalf of any such public international organization."[39] This broad definition is normally considered to

[38] 15 U.S.C. §§ 78dd-l(a), 78dd-2(a), 78dd-3(a).
[39] 15 U.S.C. §§ 78dd-l(f)(l)(A), 78dd-2(h)(2)(A), 7Bdd-3(f)(2)(A).

include executive branch employees, elected legislators or parliamentarians, managers of state-owned enterprises and officials of quasi-governmental entities. The 1998 amendments added "public international organization officials" to the definition of "foreign official." A public international organization is defined as:

(I) An organization that is designated by Executive Order pursuant to section 288 of title 22; or

(II) Any other international organization that is designated by the President by Executive Order for the purposes of this section…"[40] Foreign officials cannot be prosecuted under the FCPA.[41]

4.2.2.5 Foreign Political Party, Political Party Official or Candidate

The FCPA prohibits an unlawful offer and payment not only to a foreign official but also to a foreign political party, an official of a foreign political party, or a candidate for foreign office. A potential problem can arise where a U.S. person's foreign agent or partner makes political campaign contributions to persons in the country where they are doing business. Any United States company should consider instituting a policy that prohibits its foreign agents, partners or consultants from making any political contributions whatsoever for or on behalf of their venture or relating in any way to the venture. Absent a blanket prohibition, all proposed foreign political contributions by an agent, consultant or employee should be reviewed by general counsel on a case-by-case basis.

4.2.2.6 Money or Anything of Value

The FCPA prohibits paying, offering, promising to pay (or authorizing to pay or offer) money, gifts or anything of value. Although no FCPA decision has dealt with the concept of a "thing of value," it clearly includes cash, cash equivalents and other forms of valuable inducements. Federal courts addressing similar criminal statutes have construed the term broadly to include tangible

[40] 15 U.S.C. §§ 78dd-l((f)(l)(B), 78dd-2(h)(2)(B), 78dd-3(f)(2)(B).
[41] *United States v. Blondek*, 741 F.Supp. 116, 119-20 (N.D. Tex. 1990)

and intangible property such as "information,"[42] the testimony of a witness,[43] loans and promises of future employment,[44] a college scholarship[45] and sports equipment.[46]

4.2.2.7 Corrupt Intent

To violate the FCPA's anti-bribery provisions, a payment or offer to pay must be made corruptly. Although the Act does not define "corruptly," its legislative history indicates that the payment must be intended to influence the recipient to "misuse his official position" in order to wrongfully direct, obtain or retain business. In *United States v. Liebo,*[47] the Eighth Circuit affirmed the following jury instruction definition of the term "corruptly": The offer, promise to pay, payment or authorization of payment, must be intended to induce the recipient to misuse his official position or to influence someone else to do so.... an act is "corruptly" done if done voluntarily and intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means. No other Circuit has interpreted the term "corruptly" under the FCPA.

4.2.2.8 Business Purpose Test

The FCPA prohibits payments made in order to assist a company in obtaining or retaining business for or with, or directing business to, any person. Business to be obtained or retained does not need to be with a foreign government or foreign government instrumentality. As a result of the 1998 amendments, the FCPA now prohibits payments to foreign officials for the purpose of securing "any improper advantage" in obtaining or retaining business.

4.2.2.9 Knowledge

The FCPA does not require proof of actual knowledge that a payment or promise to pay an intermediary will be passed on to a foreign official. A person

[42] United States v. Sheker, 618 F.2d 607, 609 (9th Cir. 1980)
[43] United States v .Zouras, 497 F.2d 1115, 1121 (7th Cir. 1974)
[44] United States v. Crozier, 987 F.2d 893, 901 (2d Cir. 1993); United States v. Hare, 618 F.2d 1085 (4th Cir.1980)
[45] United States v. McDade, 827 F. Supp. 1153 (E.D. Pa. 1993)
[46] *Ibid.*
[47] 923 F.2d 1308, 1312 (8th Cir. 1991)

may be equally liable on the basis of constructive knowledge. The FCPA provides as follows:

(2)(A) A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if -

(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or

(ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur. When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.[48]

The FCPA's legislative history speaks of "willful blindness," "deliberate ignorance" and taking a "head-in-the-sand" attitude as constituting knowledge under the statute. Individuals or corporations who consciously disregard or deliberately ignore known circumstances that should have put them on notice of an improper payment may be prosecuted for knowing that a payment would be passed on to a foreign official.

4.2.2.10 Use of Third Parties

A company may be liable for payments by an agent or third party if the company authorizes the payment or if it "knew" the improper payment would be made. A company is deemed to have knowledge of such offer, promise or payment if it is aware of, but consciously disregards a "high probability" that such an offer, promise or payment will be made.[49] The risk of liability because of the actions of third parties means that persons subject to the FCPA must undertake significant steps to minimize the risks of becoming liable due to the actions of third parties.

[48] 15 U.S.C. §§ 78dd-l(f)(2), 78dd-2(h)(3), 78dd-3(f)(3).
[49] 15 U.S.C. § 78dd-l(f)(2)(B) and 78dd-2(h)(3)(B).

4.2.2.11 Facilitating Payments for Routine Governmental Actions

The FCPA provides an exception for so-called "facilitating" or "grease payments" to low-level foreign officials who perform "routine governmental actions."[50] The purpose of this exception is to avoid liability where small sums are paid to facilitate certain routine, non-discretionary government functions such as the processing of permits, licenses, visas and work orders or other official documents; providing police protection, power and water supply, cargo handling or protection of perishable products; and scheduling inspections associated with contract performance or transit of goods across country.[51] "Routine governmental action" does not include any decision by a foreign official to award new business or to continue business with a particular party.[52]

4.2.2.12 Commercial Bribery

The FCPA anti-bribery provisions do not governor prohibit bribes paid to officers or employees of private, non-governmental entities. The FCPA anti-bribery provisions only apply to improper payments made, directly or indirectly, to a foreign official, a foreign political party or official thereof or a foreign political candidate.[53] However, commercial bribery payments that are mischaracterized on the books and records of a public company may constitute an FCPA books and records violation or a violation of the Act's internal control provisions.

4.2.2.13 Record Keeping and Internal Controls

In addition to the anti-bribery provisions, the FCPA imposes certain record-keeping and internal control requirements only on issuers. Essentially, these requirements mandate that publicly traded companies keep accurate books and records. Neither the record keeping nor internal control provisions limit themselves to transactions above a certain amount or impose a materiality requirement. The FCPA's accounting provisions are primarily enforced by the

[50] 15 U.S.C. §§ 78dd-l(b), 78dd-2(b), and 78dd-3(b).
[51] 15 U.S.C. §§ 78dd-l(f)(3), 78dd-2(h)(4), 78dd-3(f)(4).
[52] *Ibid*.
[53] 15 U.S.C. §§ 78dd-1(a), 78dd-2(a)

SEC,[54] but the Department of Justice can bring criminal charges of knowing circumvention of internal controls and knowing falsification of books, records and accounts.[55]

The rationale behind the books and records and internal control provisions being complimentary to the anti-bribery provision was explained by Stanley Sporkin, the former federal judge and 8 SEC Enforcement Director who played a major role in the passage of the FCPA. He stated that the SEC proposed the record-keeping and financial control provisions because investigations had revealed that companies that paid bribes overseas never accurately recorded the illicit transactions on their books. Instead, companies had concealed the bribes by falsely describing the payments as other transactions. Judge Sporkin "theorized that requiring the disclosure of all bribes paid would, in effect, foreclose that activity."[56]

4.2.2.14 Application

The record keeping and internal controls provisions of the FCPA apply to issuers, those companies whose securities are registered with the SEC, or who are required to file reports with the SEC, pursuant to the Securities Exchange Act of 1934, regardless of whether they have any foreign operations.[57]

4.2.2.15 Record-Keeping Provisions

The FCPA requires every issuer to "make and keep books, records, and accounts which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets."

"Reasonable detail" means such level of detail as would satisfy prudent officials in the conduct of their own affairs.[58] Inadvertent mistakes will not give rise to enforcement actions or prosecutions.[59] The Act defines "records" to

[54] 15 U.S.C. § 78(m)(a) (1994).
[55] United States v. Rothrock, 4 FCPA Rep. 699.818801 (W.D. Tex 2001)
[56] Stanley Sporkin, The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on its Twentieth Birthday, 18 Nw. J. Int'l. L. Bus. 269, 274 (1998)
[57] 15 U.S.C. § 78m(a
[58] 15 U.S.C. § 78m (b) (7)
[59] Speech of Securities and Exchange Commission Chairman Harold Williams before the SEC

include "accounts, correspondence, memorandums, tapes, discs, papers, books, and other documents or transcribed information of any type."[60]

Again, these provisions apply to issuers, regardless of whether or not they have foreign operations and whether or not bribery is involved. The act creates an obligation for issuers with respect to their affiliates as well. Where an issuer holds fifty percent or less of the voting power with respect to a foreign or domestic firm, the FCPA requires only that the issuer proceed in good faith to cause the affiliate to devise and maintain a system of internal accounting controls to the extent reasonable under the circumstances.[61] An individual or entity may be criminally liable if he knowingly falsifies a book, record or account.[62]

Record keeping violations normally involve three types of offenses:

I. Records that simply fail to record improper transactions at all, e.g., off-the-books transactions such as bribes and kickbacks;

II. Records that are falsified to disguise aspects of improper transactions otherwise recorded correctly; and

III. Records that correctly set forth the quantitative aspects of transactions but fail to record the qualitative aspects of the transactions that would have revealed their illegality or impropriety, such as the true purpose of particular payments to agents, distributors or customers.[63] It is not necessary to an FCPA violation that the inaccurately recorded transactions in question be material under federal securities laws.

An issuer can violate the books and records provisions if a foreign subsidiary creates false records to conceal an illicit payment, and the issuer parent then incorporates the subsidiary's information into its books and records. For example, in 2000 the SEC brought a books and records action against IBM Corp. related to "presumed illicit payments" to foreign officials by

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Developments Conference of AICPA (January 13, 1981), Securities Exchange Rel. No. 17500 (January 29, 1981).

[60] 15 U.S.C. § 78c (a) (37)

[61] 15 U.S.C. § (m)(b)(6).

[62] 15 U.S.C. § 78(m)(b)(4)-(5).

[63] Cruwer, "*Complying with the Foreign Corrupt Practices Act*", American Bar Association, II nd. Ed. 1999

one of IBM's wholly-owned subsidiaries. The SEC alleged that IBM-Argentina paid money to a subcontractor which payment in turn was given to certain foreign officials. The SEC charged that IBM-Argentina's then-senior management overrode IBM procurement and contracting procedures and fabricated documentation to conceal the details of the subcontract. IBM Argentina allegedly recorded the payments to the subcontractor as third-party subcontractor expenses, and IBM incorporated this information into the form 10-K it filed with the SEC in 1994. Without admitting or denying the SEC's allegations, IBM consented to the entry of a cease and desist order and agreed to pay a $300,000 civil penalty.[64]

Examples of Transactions Which Accounting Records May Fail to Adequately or Accurately Disclose

I. political contributions;
II. smuggling activities;
III. commercial bribes or kickbacks;
IV. income tax violations;
V. customs or currency violations;
VI. payments to foreign government officials; and
VII. extraordinary gifts

4.2.2.16 Internal Controls

The FCPA's internal controls provisions codify existing auditing standards and require issuers to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that:

(I) transactions are executed in accordance with management's general or specific authorization;

(II) transactions are recorded as necessary:

(a) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements; and

(b) to maintain accountability for assets;

[64] *SEC v. International Business Machines Corp*., (Dec. 21, 2000).

(III) access to assets is permitted only in accordance with management's general or specific authorization; and

(IV) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.[65] "Reasonable assurances" means such degree of assurance as would satisfy prudent officials in the conduct of their own affairs.[66]

4.2.2.17 Penalties, Fines and Other Sanctions

The FCPA is a criminal statute for which sentences of individuals and corporations are considered in the context of the United States Sentencing Guidelines (U.S.S.G.). Individuals who commit willful violations of the FCPA anti-bribery provisions may be punished by up to $250,000 in fines and/or five years imprisonment.[67] Individuals who violate the FCPA accounting provisions may be fined up to $5,000,000 and imprisoned up to 20 years.[68] Corporations may be fined up to $2,500,000 per violation of the FCPA accounting provisions[69] and $2,000,000 for violation of the FCPA anti-bribery provisions.[70] Moreover, under the Alternative Fines Act, these fines can be much higher: the actual fine may be up to twice the loss to the victim or benefit the defendant did or sought to obtain by making the corrupt payment.[71] Fines imposed on individuals may not be paid by their employer or principal.[72] An unlawful payment under the FCPA is not deductible under the tax laws as a business expense.[73] The FCPA also allows a civil penalty of up to $10,000 against any firm that violates the antibribery provisions of the FCPA, and against any officer, director, employee, or agent of a firm who willfully violates the anti-bribery provisions of the Act.[74]

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[65] 15 U.S.C. § 78m(b)(2)
[66] 15 U.S.C. § 78m(b)(7)
[67] 15 U.S.C. §§ 78dd-2(g)(2)(A), 78dd-3(e)(2)(A), 78ff(c)(2)(A)
[68] 15 U.S.C. § 78ff(a)
[69] 15 U.S.C. § 78dd-2(g), 78dd-3(e)
[70] 15 U.S.C. § 78ff (a) (accounting) and 15 U.S.C. § 78dd-2(g)(1)(A) (bribery).
[71] 18 U.S.C. §3571(d)
[72] 15 U.S.C. §§ 78dd-2(g)(3), 78dd-3(e)(3), 78ff (c) (3).
[73] 26 U.S.C. § 162(c)
[74] 15 U.S.C. §§ 78dd-2(g)(l)(B) and 78ff(c)(2)(C), 78dd-3(e)(l)(B)

The 1998 amendments eliminated a disparity in penalties between U.S. nationals who are employees or agents of issuers or domestic concerns and foreign nationals who are employees or agents of issuers or domestic concerns. Previously, foreign nationals were subject only to civil penalties under the FCPA. Now, all persons may be subject to civil or criminal penalties.[75]

A person or company found in violation of the FCPA may be suspended or barred from the programs of federal agencies such as the Commodity Futures Trading Commission and the Overseas Private Investment Corporation.[76]

4.2.2.18 Other Governmental Action

Under guidelines issued by the Office of Management and Budget, a person or firm found in violation of the FCPA may be barred from doing business with the Federal government. Indictment alone can lead to suspension of the right to do business with the government. The President has directed that no executive agency shall allow any party to participate in any procurement or non-procurement activity if any agency has debarred, suspended, or otherwise excluded that party from participation in a procurement or non-procurement activity.

4.2.3 Hobbs Act [77]

The Hobbs Act by its express language makes it a crime to obstruct, delay, or affect commerce by robbery or extortion. However, the statute by a series of judicial decisions, including a United States Supreme Court decision United States v. Evans,[78] has been extended to cover practices best characterized as bribery. In that regard, all that has to be shown is that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts. This results in making the Hobbs Act similar to 18 USC §201 insofar as it covers bribery of a federal official. However, the statute would not cover mere receipt of gratuities, as under 18

[75] 15 U.S.C. §§ 78ff(c), 78dd-2(a), 78dd-3(a), 77d-l (a)
[76] 48 C.F.R. § 9.406-2(a)(3).
[77] 18 USC §1951
[78] 504 U.S. 255 [1992]),

USC §201, which is covered by the mail and wire fraud statutes. While the Hobbs Act is limited to conduct that "obstructs, delays or affects interstate commerce [commerce between two or more states]," this requirement is hardly any requirement at all since all that is needed is a small or practically negligible effect. A Hobbs Act violation may serve as the foundation for RICO offenses.

4.2.4 Mail and Wire Fraud[79]

The mail and wire fraud statutes were enacted as anti-fraud statutes, designed to combat as criminal the common law crime of larceny by trick. Even thought the statutes' terms do not specifically embrace corruption, they are extensively used to prosecute acts of public corruption.

For mail fraud, the prosecutor must prove only (a) a scheme to defraud, and (b) the mailing of a letter for the purpose of executing the scheme; and for wire fraud, the prosecutor must prove only (a) a scheme to defraud, and (b) the use of interstate wire communications in furtherance of the scheme. In the case of *Schmuck v. United States*[80], the court observed that, "for purposes of the statute, the requisite mailing can be done through the postal service or a private carrier, and the requisite wire communications include radio transmissions, telephone calls and e-mails. Significantly, the requisite mailing or wiring need not itself contain any fraudulent information and may be entirely innocent. However, they must be shown to be at least a "step" in the scheme".

With respect to the statutes' use in public corruption cases, a fraudulent scheme includes "a scheme . . . to deprive another of the intangible right of honest services." It is this definition which makes the statutes a flexible tool for prosecutors to prosecute public corruption at the state or local level.

A typical "honest services" corruption case arises in two situations. First, "bribery" where the public official was paid for a particular decision or action, which includes a pattern of gratuities over a period of time to obtain favorable action. Secondly, "failure to disclose" a conflict of interest, resulting in personal enrichment, which encompasses circumstances where the official

[79] 18 USC §§1341 (Mail), 1343 (Wire)
[80] 489 U.S. 705, 712 (1989)

has an express or implied duty to inform others of the official's personal relationship to the matter at hand even though no public harm occurred or there was no misuse of office. As to the "conflict of interest" situation, the basis for its condemnation is that "when an official fails to disclose a personal interest in a matter over which he has decision-making power, the public is deprived of its right either to disinterested decision making itself or, as the case may be, to full disclosure as to the official's potential motivation behind an official act."[81] Notably, a person who holds no public office but participates substantially in the operation of government, e.g., a political party leader, may be subject to prosecution under an "honest services" theory.[82]

While there is the need to show in a bribery case intent to give or receive something of value in return for an official act, in a failure to disclose case, the failure is itself sufficient to show the requisite intent. Moreover, there is no need to show the scheme came to fruition or caused harm.

A public official may be charged with a separate count for each mailing or wiring in furtherance of the charged scheme.

In 2002, Congress amended the statutes to allow for a maximum sentence of up to 20 years imprisonment for each violation of the statutes. A violation of the statute serves as the foundation for RICO offenses.

4.2.5 Racketeer Influenced and Corrupt Organizations Act[83] ("RICO")

In 1970, Congress passed the RICO statute as part of the Organized Crime Control Act. It was designed "to seek the eradication of organized crime by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."[84] §1962 has four subdivisions. Subdivisions (a) and (b) have been invoked to combat the infiltration of legitimate business by organized crime, and subdivisions (c) and (d), also designed for that organized crime purpose, have been used as a tool against corrupt public officials.

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[81] United States v. Sawyer, 85 F3d 713, 724 (1st Cir. 1966)
[82] United States v. Margiotta, 688 F.2d 108 (2d Cir. 1982)
[83] 18 USC §1962
[84] United States v. Turkette, 452 U.S. 576, 589 (1981)

§1962(c) makes it unlawful for any person, which includes a public official, "employed by or associated with any enterprise engaged in, or the activities of which affect interstate or foreign commerce, to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity"; and §1962(d) makes it unlawful for a person to conspire to violate subdivision (c) as well as subdivisions (a) and (b).

The elements of a RICO violation as charged against a public official are that the official:

(a) through the commission of two or more chargeable or indictable or punishable predicate offenses,

(i) The requisite offenses include mail or wire fraud and Hobbs Acts offenses;

(b) constituting a "pattern of racketeering",

(i) The statute requires that a pattern include at least two acts of racketeering activity, one of which occurred after the effective date of the statute (October 15, 1970), and the last of which occurred within ten years of a prior act of racketeering activity. The Supreme Court has held that a pattern "requires the showing of a relationship between the predicates, . . . and of the threat of, continuing activity . . ." "Criminal conduct," the Court explained, "forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."[85]

(ii) "Racketeering activity" includes conduct that is "indictable," "chargeable" or "punishable" under various state and federal criminal laws. The acts of racketeering activity are also referred to as predicate offenses, and the list incorporated into the statute covers a wide array of illegal activity, including mail and wire fraud, and Hobbs Act offenses.

(c) directly or indirectly invests in, maintains an interest in, participates in, conducts the affairs of, or acquires income used to acquire an interest in,

(d) an enterprise,

[85] H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 239-240 (1989)

(i) An enterprise includes any individual partnership, corporation, other legal entities or group of individuals or entities associated in fact, which encompasses a government office through which the official(s) conducted the racketeering activities.

(e) The activities of which affect interstate or foreign commerce,

(i) This provision has been liberally construed so that nearly any interstate involvement would satisfy the statute.

(ii) It is difficult to conceive of a government office in the United States whose activities would not be construed as affecting interstate commerce.

When RICO is charged together with the crimes alleged to be the "racketeering activity" upon which the RICO charge is predicated, such as mail and wire fraud and Hobbs Act offenses, the public official faces much higher statutory penalties and the possibility of consecutive sentences.

RICO also provides for criminal forfeiture of any interest acquired or maintained in violation of §1962, any interest in any enterprise operated in violation of §1962, and any property constituting, or derived form, the proceeds of racketeering activity in violation of §1962. The prosecutor may also secure pre-trial orders barring the public official from using available assets to obtain legal representation.

It must also be noted that it is well recognized that charging a public official with a RICO violation carries with it an adverse stigma that casts the official in a worse light than being a mere corrupt official, i.e., the official is involved in organized crime.

4.2.6 Money Laundering Law in US

The Money Laundering Control Act was enacted in the United States in 1986 to deal with the crime of money laundering. This Act was further amended by the Money Laundering Control Act 1988, which was passed as a part of the Anti-Drug Abuse Act 1988. Prior to these enactments, federal enforcement agencies in the United States had to rely on drug charges, racketeering charges and the Banking Secrecy Act 1970 to prosecute money launderers.

The Money Laundering Act Control 1986, as amended in 1988, has the following salient features:

(i) It creates a federal offence of criminal money laundering

(ii) It deals with both domestic and international money laundering.

(iii) It provides for sting/undercover operations.

(iv) It defines both the domestic and international dimensions of money laundering under various circumstances as well as money laundering in sting operations.

(v) The criminal law provisions under this Act include both fines and imprisonment.

(vi) Since money laundering is linked to specified unlawful activity under this Act, that term has also been defined.

(vii) It provides for forfeiture of proceeds of crime; it has provisions for both civil forfeiture and criminal forfeiture.

(viii) It has important provisions relating to asset sharing between domestic agencies of the forfeited proceeds of crime.

(ix) It defines financial institutions and transactions of a financial nature.

(x) It lies down that monetary transactions in excess of USS 10,000 linked to specified unlawful activity are subject to penal provisions of fine and imprisonment. Monetary transactions have also been clearly defined under the Act.

(xi) It prohibits the structuring of currency transactions in order to evade reporting requirements.

(xii) The concept of extra-territorial jurisdictions has been incorporated under Act.

(xiii) It incorporates penalties for financial institutions and their employees in the case of non-compliance with the provisions of the Act.

According to this Act, domestic money laundering is defined as follows:

'Whoever knowing that the property involved in a financial transaction represents the proceeds of crime from specified unlawful activity. Conducts

or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity:

(A) (i) with the intent to promote the carrying on of specified unlawful activity: or (ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986:or

(B) Knowing that the transaction is designed in whole or in part:

(i) To conceal or disguise the nature, the location the source the ownership or the control of the proceeds of specified unlawful activity: or

(ii) To avoid a transaction reporting requirement under State or Federal law shall be sentenced to a fine of not more that s 500.000 or twice the value of the property involved in the transaction. Whichever is greater or imprisonment for not more than twenty years, or both;

It defines international money laundering as:

Whoever transports transmits or transfers, or attempts to transport transmit or transfer a monetary instrument or funds form a place in the United States to or through a place outside the United States or to a place in the United States form or through a place outside the United States:

(A) With the intent to promote the carrying on of specified unlawful activity: or

(B) Knowing that the monetary instrument or funds involved in the transportation transmission or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation transmission or transfer is designed in whole or in part:

(i) To conceal or disguise the nature the location the source, the ownership or the control of the proceeds of specified unlawful activity: or

(ii) To avoid a transaction reporting requirement under State or Federal law shall be sentenced to a fine of not more that s 500.000 or twice the value of the monetary instrument or funds involved in the

transportation. Transmission or transfer whichever is greater or imprisonment for not more than twenty years or both For the purpose of the officer represented the matter specified in subparagraph (B) as true and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true.

It provides for sting operations and money laundering offences through the following provisions:

(a) To promote the carrying on of specified unlawful activity:

(b) To conceal or disguise the nature. Location, source ownership or control of property believed to be the proceeds of specified unlawful activity: or

(c) To avoid a transaction reporting requirement under State or Federal law, conducts or attempts to conduct a financial transaction involving property used to conduct or facilitate specified unlawful activity,

Shall be fined under this title or imprisoned for not more than 20 years or both. For purposes of this title or imprisoned and paragraph (2) the term "represented" means any representation made by a law enforcement officer or by another person at the direction of or with the approval of a Federal Official authorized to investigate or prosecute violations of this section.

The Banking Secrecy Act 1970 as amended in the 1990s also imposes an obligation on the financial institutions to report certain specified transitions and suspicious transactions. It also puts an obligation on the financial institutions to have internal regulations in place to ensure due diligence to guard against money laundering. Record-keeping requirements of financial institutions are also laid down in the amendments to the Banking Secrecy Act.

Federal agencies under the Department of Justice, Department of Treasury and Department of State are charged with enforcing various laundering regulations. The principal agencies under the Department of

Treasury include Fin CEN IRS-Criminal Investigative Division (IRS-CI). The US Customs Service (Customs) the United State Secret service (USSS) and the Bureau of Alcohol Tobacco and Firearms (ATF). The Principal agencies under the Department of Justice are the Asset Forfeiture and Money Laundering Section (AFMLS) of the Criminal division, the Special Operations Division (SOD), the Federal Bureau of Investigation (FBI), and the Drug Enforcement Agency (DEA). The Bureau for International Narcotics and Law Enforcement Affairs (INL) under the Department of State is also an important wing for dealing with money laundering.

In addition, the US postal service, Office of the National Drug Control Policy, Federal Banking Regulators under the Federal Reserve, The Security and the Exchange Commission and Commodities Future Trading Commission all have a role to play in countering money laundering. In the United States, local efforts to combat money laundering are also undertaken and from an important component in this fight. Thirty-three states have laws to deal with money laundering; these states have also set up specialized units for investigation.

The United States has also mandated that a national money laundering strategy is drawn up annually wherein tasks assigned to the various agencies are specified along with the targeted dates for carrying out the same. Thus the National Money Laundering Strategy Report for each year co-ordinates the role of the various agencies of the government both at the federal and state level.

4.2.7 Whistleblower Protection in United States

The US has dozens of whistleblower laws at the state and federal level, as well as separate clauses in legislation designed to achieve other health, safety or welfare objectives.[86] There are over fifty pieces of legislation at the federal level alone. The three principal acts, however, are the Whistleblower Protection Act 1989, the Corporate and Criminal Accountability Act (Sarbanes-

[86] A brief overview can be found available at http://www.whistleblowerlaws.com/protection.htm last visited on 24 July 2013

Oxley Act), and the False Claims Act. It is this legislation that will be examined in a comparison with the Australian Acts.

4.2.7.1 The Whistleblower Protection Act 1989

Initiated with the whistleblower protection provisions in the Civil Service Reform Act of 1978, this Act was revised in 1989, and again in 1994.[87] Initially, for most forms of retaliation, federal workers were to be supported by the Office of the Special Counsel (OSC), but this agency proved to be ineffective. Until passage of the Whistleblower Protection Act in 1989, OSC conducted only one hearing to restore a whistleblower's job. Also created was a Merit Systems Protection Board, of which the OSC was part, designed to protect against retaliatory discrimination in promotion, but it was no more effective than the OSC. They were considered, however, largely symbolic. Thomas Devine, legal director of the not-for-profit Government Accountability Project (GAP) asserts: 'Whistleblower protection is a policy that all government leaders support in public but few in power will tolerate in private.'[88]

Since passage of the 1994 amendments, encouraging patterns started emerging, but the administration of the Act still needs strengthening according to GAP, and its related advocacy organisation, the National Whistleblowing Centre.[89]

Public sector employees are required to disclose wrongdoing to their employer first. This is a weakness if the whistleblower believes that he or she will not get a fair hearing from the employer. They cannot go around an employer that they know will not be receptive to their complaints. It also has no confidentiality clauses. Its major weakness, in a similar vein to the Australian legislation, however, is that the principal initiative lies with the whistleblower. Essentially, the whistleblower must sue whoever makes the threats or carries out the intimidation.

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[87] The Act is available on http://uscode.house.gov/download/title_05 last visited on 3 May 2014
[88] Administrative Law Review, 531, 1999
[89] Available at www.governmentaccountability.org/ and http://www.whistleblowers.org/ last visited on 11 April 2014

4.2.7.2 The Sarbanes-Oxley Act

The Sarbanes-Oxley Act was passed in 2002 to combat corporate criminal fraud and to strengthen corporate accountability. It was a legislative response to the fraudulent activities exemplified by World Com and Enron Corporation. The Act provides for enhanced financial disclosures and auditor independence of publicly held corporations.[90] Section 301 of the Act requires that audit committees of the boards of public corporations establish procedures for 'the confidential, anonymous submission by employees' of complaints regarding internal accounting controls or auditing matters.

The Act provides some protections and assistance for the whistleblower. Employees are not required to complain to their employers first, but may complain to a Federal regulatory or law enforcement agency; any Member of Congress or any committee of Congress; or a person with supervisory authority over the employee.

The Department of Labor is obliged to provide assistance and training. The Act, however, does not specify the possibility that the whistleblower could be relocated, nor does it give them indemnity if they break a confidentiality agreement that they may have signed on taking up employment. It does entertain the right of the whistleblower to take legal action if they suffer retaliation. Those found guilty of retaliation are liable to up to ten years in prison. The Sarbanes-Oxley Act is new, however, and it is possibly too soon to make any judgements. Its impact, however, is primarily limited to financial matters.

4.2.7.3 The False Claims Act

Designed to stop fraud against the government, this act was passed during the US civil war under the administration of Abraham Lincoln. Regarded as the single most successful whistleblowing legislation in the country, the False Claims Act works by providing the whistleblower between 15 and 30 per cent of the government's total recovery, the percentage

[90] Available at http://www.legal-term.com/sarbanesoxleyact-definition.htm last visited on 11 April 2014

depending on the extent to which the whistleblower took the action that enabled the recovery to take place. It was amended in 1986 to establish protections for whistleblowers, and to prevent harassing and retaliation against them.

The Bill, which permits an anonymous disclosure, has been copied by a number of states in the US. For an overview of the federal legislation and processes see the web site of the US non-government organisation, the National Whistleblower Center.[91]

The US Department of Justice, in a 2002 press release, claimed that over $10 billion had been recovered since 1986. In Australia, the private sector whistleblower management group, Your Call, state that $5.8 billion per annum is lost to fraud. It also believes that 85 per cent of major frauds are committed by employees.[92] The Act requires the whistleblower to initiate the case. To this end, a number of legal firms advertise their services on a no-win, no-fee basis.[93]

4.3 Indian Legal Framework to Combat Corruption

Corruption has always been considered as a serious type of anti-social act in criminal law. In India, the first codified criminal law i.e. the Indian Penal Code, 1860. However, it confined its operation to those defined as public servants under Section 21 of the code. Mainly misconduct and abuse of power by public servants were covered under this chapter. Being governed by the traditional rules of criminal liability, the provisions in the I.P.C. could not successfully combat corruption by public servants who constituted a powerful class which had a considerable influence for titling the scales of justice. Moreover, the definition of the public servant suffered from many defects as many important functionaries engaged in discharging public duties were left out of the definition of public servant. However, the redeeming feature of the period till the start of the First world war was that the people in India, by and

[91] Available at http://www.whistleblowers.org/html/fca.htm last visited on 22 June 2013
[92] Available at http://www.your-call.com.au/index.php, last accessed 23 August 2005.
[93] Available at http://www.usawhistleblower.com/pages/1/index.htm last visited on 8 June 2013

large were bound by moral values which abhorred corruption than by materialistic considerations of the industralised western world.[94]

The scope of bribery and corruption by public servants had considerably increased due to war conditions. Even after the Second World War opportunities for corrupt practices remained for a considerable time. Extensive schemes for post war reconstruction opened wide new avenues for corruption among public servants. However, the existing provisions of the I.P.C were found to be insufficient for effective handling and controlling of corrupt public servants. Therefore, to supplement and strengthen law against corruption, the Prevention of Corruption Act, 1947, entered the statute book. The Act being social legislation aimed at eradicating corruption, changed the traditional rules of criminal liability by presuming mens rea on the part of public servant if actus reus was proved.[6] Criminal misconduct in the discharge of official duty was made an offence Under Section 5 of the Act. However, it neither gave separate definition of public servant nor made improvements in Section 21 of the I.P.C through special amending clause. Generally, public servants were prosecuted under Section 161 of the I.P.Cread with Section 5 of the Act. In pursuance of the recommendations of the Santhanam Committee for taking stringent measures against rampant corruption the Act was amended in 1964.[95]

Inspite of the amendment of the Act, the situation viciated by corrupt practices could not be redeemed. Rather corruption expanded its sphere of activity by engulfing the entire society. Even the elected representatives of the people who are supposed to be the repository of public faith by discharging their duties with honesty and integrity succumbed to the vagaries of corruption by sharing its booty with public servants. Efforts made for bringing political corruption within the purview of the Act did not succeed as elected

[94] Available at http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=6202b96e-42d6-4ec9-af5e-77161145beb1&txtsearch=Subject:%20Miscellaneous visited on 23 May 2016
[95] ibid

representatives through whom most of the corruption is routed through were not considered as public servants.[96]

4.3.1 Indian Penal Code, 1860

The Indian Penal Code, 1860 is the central piece of legislation in India in combating all types of crimes. The corresponding procedural legislation describing various steps and courses to be followed in respect investigation, prosecution etc. under the Act is covered by the Code of Criminal Procedure. But corruption, as such, is not mentioned or described as a specific offence in the Indian Penal Code. This is because Corruption is recognized as a category or group of offences, which were earlier individually defined and punishment therefor mentioned in the Indian Penal Code. The various offences were earlier included in the Indian Penal Code under Section 161 to 165 and 165A, but have now been repealed with the Passing of the Prevention of Corruption Act 1988. The provisions that were part of Chapter IX of Indian Penal Code under Section Nos. referred above are now incorporated under Sec. 7, 8, 9, 10, 11 and 12 of the Prevention of Corruption Act, 1988.[97]

These offences covered in the group of offences (commonly recognized as 'corruption in public services) are as under:

- Sec.161 - Public servant taking gratification other than legal remuneration in respect of an official act (presently covered by Sec.7 of Prevention of Corruption Act, 1988)
- Sec.162 -Taking gratification, in order, by corrupt or illegal means to influence public servants (presently covered by Sec.8 of Prevention of Corruption Act, 1988)
- Sec.163 -Taking gratification, for exercise or personal influence with public servant. (presently covered by Sec.9 of Prevention of Corruption Act, 1988)

[96] ibid
[97] Available at http://kannanpersonal.com/projects/integrity2/anticor1.html last visited on 23 May 2016

- Sec.164- Punishment for abetment by Public Servant of offences defined in Section 162 or163. (presently covered by Sec.10 of Prevention of Corruption Act, 1988)
- Sec. 165- Public servant obtaining valuable thing, without consideration, from person concerned in proceeding or business transacted, by such public servant (presently covered by Sec.11 of Prevention of Corruption Act, 1988)
- Sec. 165A- Punishment for abetment of offences defined in Section 161 or Section 165 (presently covered by Sec.12 of Prevention of Corruption Act, 1988)

In 1988 in order to have a single consolidated and precise enactment for dealing with increasing number of criminal cases investigated by the CBI, the P.C Act was again amended by incorporating relevant sections of the Indian Penal Code (sections 16l to165 and 165A) within the ambit of the P.C.Act as referred earlier. The Criminal Law Amendment Act, 1952 was also repealed by incorporating its provisions in the P.C. Act, 1988. The consolidated P.C.Act, 1988 was passed by the Parliament on 9th September 1988. The P.C. Act, 1988 is therefore a substantive as well as procedural legislation to deal with corruption in public services. However proceedings under the Act will still be governed by provisions of the Code of Criminal Procedure and The Indian Evidences Act, those have not been amended by the Act.[98]

4.3.2 Prevention of Corruption Act, 1988

Indian Parliament has enacted Prevention of Corruption Act 1988 in order to curb corruption among the public servants. The PCA, 1988, repealed the PCA of 1947 so as to make the anti corruption law more effective by widening its coverage and by strengthening its provision. This Act is the main legal instrument to fight corruption in the country. The PCA Act, 1988, does not mention any specific date from which it would come into effect. This

[98] Ibid.

received the assent of the President of India on 9th of September, 1988, and was published in the Gazette of India.

4.3.2.1 Historical background of the PCA Act

In *M.P. v. Ram Singh*, [99] the Supreme Court traced the history of the enactment of the Prevention of Corruption Act. It was observed that the menace of corruption was found to have enormously increased by first and Second World War condition. The corruption, at the initial stages, was considered confined to the bureaucracy who had the opportunities to deal with a variety of state largesse in the form of contracts, licenses and grants. Even after the war the opportunities for corruption continued as large amounts of Government surplus stores were required to be disposed of by the public servants. As consequences of the wars the shortage of various goods necessitated the imposition of controls and extensive schemes of post war reconstruction involving the disbursement of huge sums of money which lay in the control of the public servants giving them wide discretion with the result of luring them to the glittering shine of the wealth and property. In order to consolidate and amend the laws relating to prevention of corruption and matters connected thereto, the Prevention of Corruption Act, 1947 was enacted which was amended from time to time. In the year 1988 a new Act on the subject being Act No. 49 of 1988 was enacted with the object of dealing with the circumstances, contingencies and shortcomings which were noticed in the working and implementation of 1947 Act. The law relating to prevention of corruption was essentially made to deal with the public servants, as understood in the common parlance but specifically defined in the Act.

In the case of *In Re Ravi Nandan Sahay, Patna*,[100] a Full Bench of the Patna High Court observed that though the history of the legislation may not lead to a definite conclusion to find out the correct meaning of an expression but at times it may be usefully employed for interpreting the meaning of the

[99] . AIR 2000 SC 870 at p. 873.
[100] . 1993 Cri LJ 2436 (Pat) (FB)

Statute. Similarly, the statements of objects and reasons cannot control the actual words used in the Statute, yet it may be referred to for the purpose of ascertaining the conditions prevailing at the time, which necessitated the making of the law. The statements of object and reasons of the Prevention of Corruption Act clearly show the anxiety of the framers of law to curb the growing tendency among the public servants to indulge in offences mentioned therein.

In the case of *R.S. Nayak v. A.R. Antulay*,[101] the Supreme Court observed that with a view to eradicating the evil of bribery and corruption, the Government of India set up a Committee to make recommendations for the improvement of the laws relating to bribery and corruption under the Chairmanship of Dr. Bakshi Tek Chand. The recommendations of the Committee led to the enactment of the Criminal Law Amendment Act, 1952. By this 1952 Act, power was conferred on the state Government to appoint Special Judges with exclusive jurisdiction to try the offences punishable under Ss. 161, 162, 163, 164, 165 and 165-A, IPC and S. 5 of the 1947 Act and any conspiracy to commit or any attempt to commit or any abetment of any of the offences hereinabove mentioned.

After the second World War, corruption amongst the public servants posed a serious problem to the Government and it was realize that special legislation was required with a view to eradicate the evil of bribery and corruption. Hence, Prevention of Corruption Act, 1947, came into being but to make the law more stringent new Prevention of Corruption Act, 1988, was enacted.[102] The enactment of the Prevention of Corruption Act, 1947, coincided with the inset of the country's independence. Corruption as such has reached dangerous heights and dangerous potentialities.[103]

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[101] AIR 1984 SC 684 at pp.692-93
[102] *Surinder Mohan v. State of H.P*., 2004 (1) Shim LC 346 at p. 353 (HP).
[103] *State v. Bharat Chandra Roul*, 1995 Cri LJ 2417 at p. 2418 (Ori)

4.3.2.2 Statutory and Judicial Definition of "public servant"

The words "public servant" means a person who is in service at the time when the Court is called upon to take cognizance of the offence.[104]

In the recent case, the Supreme Court has held that in construing definition of "public servant" in clause (c) of Section 2 of the Prevention of Corruption Act, 1988, the Court is required to adopt a purposive approach as would give effect to the intention of legislature. The definition of "public servant", is a broad-based one and quite wider when compared to the corresponding term in the IPC. Considering the laudable object behind that enactment, the parliament has consciously spread the wings of that enactment to cover a wide range of person.[105]

In the case of *Reg. v. Ramaji Rao Jiwavhaji,*[106] it was held by West, J. that the word "officer" meant some person employed to exercise to some extent and in certain circumstances a delegated function of government. He was either himself armed with some authority or representative character or his duties were immediately auxiliary to those of someone who was so armed. This decision was considered by the Calcutta High Court in *Nazamuddin v. Queen Empress,*[107] The accused in that case was a peon attached to the office of the superintendent of the Salt Department and he had been convicted under S. 161, IPC. It was contended that he did not fall within the terms of the last portion of clause (9) of S. 21, IPC. This contention was rejected and it was observed as follows:

"The peon who has been convicted as a public servant is in service and pay of the Government, and he is attached to the office of the superintendent of the Salt Department. The exact nature of his duties is not stated, because this objection was not taken at the trial, but we must take it that, from the nature of his appointment, it was his duty to carry out the orders of his official superior,

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[104] *State of Bombay v. Vishwakant Shrikant Pandit,* AIR 1954 Bom 109
[105] *Satheesh v. Enquiry Commissinor and Special Judge,* 2003 (3) Ker LT 480 (ker)
[106] 12 Bom HCR 1
[107] ILR 28 Cal 344 at p.346

who undoubtedly is a public servant, and it that capacity to assist the superintendent in the performance of the public duties of his office in that sense he would be an officer of Government, although he might not possibly exercise 'any delegated function of the Government'. Still his duties would be 'immediately auxiliary to those of the superintendent who is so armed'. We think that 'officer in the service or pay of Government' within terms of Section 21, Penal Code, is one who is appointed to some office for the performance of some public duty. In this sense the peon would come within Section 21, Clause 9."

4.3.2.3 M.P. and M.L.A. – Whether Public Servants

There has been a lot of controversy as to whether the elected representatives, such as Member of Legislative Assembly (M.L.A.) or Member of Parliament (M.P.), are public servants for the purpose of the Prevention of Corruption Act.[108] Though the PC Act as well as IPC, 1860 are silent on the issue but Supreme Court of India in *R.S. Nayak v. A.R. Antulay*[109] observed that a Member of a Legislative Assembly of a state (M.L.A.) was a public servant within the meaning of S. 21 of IPC, It was observed that the Indian Penal Code is a ststute of the year 1860 when there were no elected legislatures and a *fortiori* there were no M.L.As. Even if *Macaulay* is to be adjudged a visionary, who could look far beyond his times yet in 1860 it was inconceivable for him to foresee the constitutional development of India stages by stages and to envisage the setting up of elected legislatures the members of which would without anything more be comprehended as public servant in any of the sub-clauses of S.21.The Supreme Court held that one can justifiable to say that M.L.A. could not be comprehended in any of the clause of Section 21 to be a public servant when the Indian Penal Code was enacted in 1860.

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[108] . Ashok Dhamija, "*Prevention of Corruption Act*", Lexis Nexis Butterworths Wadhwa Nagpur, 2nd ed. 2009, p.106

[109]. AIR 1984 SC 684 at pp.702-3

The Supreme Court noted that a person would be a public servant under Clause (12) (a) of S.21 of IPC if (i) he is in the service of the Government; or (ii) he is in the pay of the Government; or (iii) he is remunerated by fees or commission for the performance of any public duty by the Government.[110] It was held that the use of the expression 'or' in the context in which it is found in said clause (12)(a) of S.21 does appear to be disjunctive, and thus, there are three independent categories comprehended in the said clause (12)(a) and if a person falls in any one of them, he would be a public servant.[111] It was held that even though M.L.A. receives pay and allowances, he is not in the pay of the State Government because Legislature of a State cannot be comprehended in the expression 'State Government'.[112] The Supreme Court further observed that M.L.A. no doubt performs public duties cast on him by the Constitution and his electorate. He thus discharges Constitutional functions for which he is remunerated by fees under the Constitution and not by the Executive.[113] If M.L.A. is not in the pay of the Government in the sense of Executive Government, or is not remunerated by fees for performance of any public duty by the Executive Government, certainly he would not be comprehended in the expression 'public servant' within the meaning of the expression in Clause (12)(a) of S.21 IPC[114]. Thus the Supreme Court concluded that M.L.A. is not a public servant within the meaning of the expression in Clause (12) (a), Clause (3) and Clause (7) of Section 21, IPC.[115]

However, subsequently with the enactment of Prevention of Corruption Act, 1988, the definition of *public servant* underwent a major change. The expression *public servant* is defined in S. 2 (c) of the PCA Act 1988. From the point of view of the question whether M.L.A. is a public servant, clause (viii) of S. 2(c) is the most relevant clause, which provides as under:

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[110] . *R.S. Nayak v. A.R. Antulay* AIR 1984 SC 684 at p.707.
[111]. *Ibid*. at p. 708.
[112]. *Ibid*. at p. 713.
[113] . *Ibid*. at p. 713.
[114] . *Ibid*. at p. 714.
[115]. *Ibid*. at p. 717.

"(viii) any person who holds an office by virtue of which he is authorized or required to perform any public duty,"

Moreover, *public duty* has also been defined in S. 2(b) of the PCA Act as under:

"'public duty' means a duty in the discharge of which the state, the public or the community at large has an interest;"

The said clauses (viii) of 2(c) of the Act thus enormously widen the scope of the expression public servant. So, if M.L.A. can be said to be holding an office by virtue of which he is either authorized or required to perform any public duty, then he would be a public servant. Thus, the emphasis is on the words office and public duty.[116]

The question whether M.L.A. is a public servant in view of its new definition in the Prevention of Corruption Act, 1988, came to be considered by a Division Bench of the Orissa High Court in the case of *Habibulla Khan v. State of Orissa*.[117] The High Court examined the question whether M.L.A. is a public servant from the limited angle of the aforesaid clause (viii) of S. 2(c) of PCA Act. The High Court held that for the aforesaid clause to be attracted, two requirements must be satisfied: (i) an M.L.A. must hold an office; and (ii) he must perform public duty by virtue of holding that office. Orissa High Court was held that the office of the M.L.A. is created by the Constitution read with the Representation of the people Act, 1950, whereas the actual election of M.L.As. is supervised, directed and controlled by the provisions contained in Articles 324 to 329 of the Constitution and the provisions of the Representation of the People Act, 1950, which brings home the distinction between "office" and "holder of the office". It was thus concluded that an M.L.A. does hold an office.

[116] . Ashok Dhamija, "Prevention of Corruption Act", Lexis Nexis Butterworths Wadhwa Nagpur, 2nd ed. 2009, p.109

[117] . 1993 Cri LJ 3604 (Ori) (DB)

Regarding the second requirement, i.e., performance of public duty as holder of such office, it was noted by the High Court that various duties are attached to the office of the M.L.A., as would appear from Chapter III of Part VI of the Constitution – the same being, making of laws, acting conjointly to effectively control the activities of the executive, approval of the finance bill, etc. Thus the High Court concluded that the M.L.A. does perform public duties. Accordingly, it was held by the High Court that an M.L.A. has to be taken as a "public servant" under the Prevention of Corruption Act, 1988.[118]

A similar question again arose before the Supreme Court in *P.V. Narasimha Rao v. State (CBI/SPE).*[119] A Constitutional Bench of 5 Judges considered the question whether a Member of Parliament (MP) is a public servant. Examining the provision contained in the clause (viii) of S. 2(c) of the PCA Act, 1988, all the five Judges concurred (in three separate judgments) that MP is a public servant within the meaning of the said clause. But the Supreme Court held that an M.L.A is not a public servant within the meaning of S.21 of IPC and the majority view was that a Member of Parliament and State Legislature are public servants for the purpose of the Prevention of Corruption Act, 1988.

4.3.2.4 Appointment of Special Judges

Section 3 of the Prevention of Corruption Act, 1988, confers powers on the Central or State Government to appoint a Special Judge, who is or has been a Session Judge or an Additional Session Judge or an Assistant Judge under the Code for Criminal Procedure. This appointment has to be done in respect of an area by the appropriate government by issuing a Notification in the Official Gazette. It is apparent that a Special Judge is the creature of statute; and consequently he can exercise only those powers which are conferred upon him by the Act.

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[118] . *Habibulla Khan v. State of Orissa*. 1993 Cri LJ 3604 (Ori) (DB)
[119] . AIR 1998 SC 2120

Bribery and corruption having been rampant and the need for weeding them out having been urgently felt, it was necessary to enact measures for the purpose of eliminating all possible delay in bringing offenders to book. It was with that end in view that provisions were enacted in the impugned Act for speedier trial of the offences by the appointment of Special Judges who, were invested with exclusive jurisdiction to try the same and were also empowered to take cognizance thereof without the accused being committed to the for trial, and follow the procedure prescribed for the trial of warrant case by Magistrates. All these provisions had the necessary effect of bringing about a speedier trial of these offences and it cannot be denied that this intangible differentia had rational relation to the object sought to be achieved by the Act. Both the condition necessary for Article 14 of the Constitution were thus fulfilled and it could not be urged that the provision of the Criminal Laws Amendment Act, 1952 (now the Act of 1988), were in any manner violation of Article 14 of the Constitution.[120]

Appointment of Special Judges for trying the cases related to Corruption can not be regarded as either discriminatory or of Article 14 of the Constitution on the grounds that it disclose the intention of Government picking and choosing cases and political targeting. In *J. Jayalalita v. Union of India* the Supreme Court of India held that Section 3 of the PCA Act of 1988 is an empowering section and depending upon the necessity the Government has to appoint special Judges for an area or case or group of cases. Even in the same area where a special Judge has already been appointed, a necessity may arise for appointing one more special Judge for dealing with a particular case or group of cases because of some special features of that case or cases or for some other special reasons.[121]

In the case of *Rajiv Ranjan Singh 'Lallan' (VIII) v. Union of India,*[122] a three Judges Bench of the Supreme Court held by a majority decision that the

[120] *Asgarali Nasarali Singaporewalla v. State of Bombey* AIR 1957 SC 503 at p.508
[121] AIR 1999 SC 1912 at pp. 1923-24.
[122]. (2006) 6 SCC 613 at pp.613-32, 634, 644, 651-52, 659-60

Supreme Court cannot go into the question of the appointment of a Special Judge in a collateral proceedings in a public interest litigation since such appointment was exclusive within the domain of the High Court under Articles 233 and 235 of the Constitution. It was further held that it was not for the Supreme Court to scrutinize the correctness of the decision taken by the High Court, and that too at the instance of the third parties. Supreme Court declined to interfere with the appointment of Special Judge.

4.3.2.5 Offences and Penalties under the Prevention of Corruption Act, 1988

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

4.3.2.6 Bribery of Public Servants

Section 7 of the PC Act 1988 punishes a public servant or a person expecting to be a public servant, who accepts or obtains or agree to accept or attempts to obtain from any person, for himself or for any other person, any gratification, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act. The important point to note is that even sheer demand of a bribe or agreeing to accept a bribe is an offence under this law. Actual exchange of a bribe is not an essential requirement to be prosecuted under this law. A willing bribe giver is also punishable under sec. 12 of the Corruption Act. Further, those public servants who do not take a bribe directly, but through middlemen or touts, and those who take valuable things from a person with whom they have or are likely official dealings, are also punishable as per Section 10 and 11 respectively. It is obvious that there is zero tolerance for corruption by public servants in the law and the Corruption Act demands exemplary conduct from them.

All these offences are punishable with a minimum imprisonment of six months, extendable up to five years, and also with fine.

4.3.2.7 Embezzlement, Misappropriation of Property by Public Servants

Section 13 (1) (c) stated about the punishment to the public servants who dishonestly or fraudulently misappropriate or convert to their own use any property entrusted to them as a public servant.

This offence is punishable with a minimum imprisonment of one year, extendable up to seven years, and also with fine.

4.3.2.8 Trading in Influence

Section 8 & 9 provides for punishment to middlemen or touts who accept or obtain or agree to accept or attempt to obtain, gratification as a motive or reward for inducing by corrupt or illegal means, (sec. 8) or by exercise of personal influence (sec. 9), any public servant, to do or forbear do any official act.

These offences are punishable with minimum imprisonment of six months, extendable up to five years, and also with fine.

4.3.2.9 Abuse of Functions by Public Servants

Abuse of Functions by Public Servants is punishable under section 13 (1) (d) Public Servants who abuse their official position to obtain for themselves or any other person, any valuable thing or pecuniary advantage (*quid pro quo* is not an essential requirement). punishable with minimum imprisonment of one year, extendable up to seven years, and also with fine.

4.3.2.10 Illicit Enrichment of Public Servants

Sec. 13 (1) (e) provides that public servants, or any person on their behalf, who are in possession, or who have been in possession, of pecuniary resources or property disproportionate to their known sources of income, at any time during the period of their office. Known sources of income have further been explained as income received from any lawful source only. It is a very important provision**,** particularly for booking public servants in senior position

because often there are not many complaints against them related to bribe seeking or abuse of official position.

This offence is also punishable with minimum imprisonment of one year, extendable up to seven years, and also with fine.

4.3.2.11 Punishment for Habitual Bribe Seekers

Section 13 (1)(a) & (b) of the Corruption Act with a minimum imprisonment of one year, extendable up to seven years, and also with fine. Persons who habitually act as middlemen or touts, or who pay bribes, are punishable with a minimum imprisonment of two years, extendable up to seven years, and also with fine.[123] An attempt at committing offences pertaining to criminal misappropriation of property or abuse of official position by a public servant is punishable with imprisonment for up to three years, and also with a fine.[124]

4.3.3 Prevention of Money Laundering Act, 2002

The Prevention of Money Laundering Act, 2002 (PMLA) forms the core of the legal framework in place in India to combat money laundering. The law, and rules promulgated there under, came into force on July 1, 2005. PMLA imposes obligations on banking companies, financial institutions, and intermediaries to maintain a record of all transactions of a specified nature, verify the identity of clients, and furnish information to the Indian Financial Intelligence Unit.

The Act states that an offense of money laundering has been committed if a person or party to any process connected with the proceeds of crime represents such proceeds as untainted property. “Proceeds of crime” is defined to mean any property obtained by a person as a result of criminal activity as related to specific offenses listed in a Schedule to the PMLA. A person can be

[123] Section 14, Prevention of Corruption Act, 1988
[124] Section 15, Prevention of Corruption Act, 1988

charged with a violation of this law only if he has been charged with perpetrating such an underlying offense.

The penalty for committing a PMLA offense is a term of imprisonment between three and seven years plus a significant fine. The term of imprisonment can reach 10 years if the person is convicted of the underlying offense of violating the Narcotic Drugs and Psychotropic Substances Act, 1985.19 The "Adjudicating Authority," appointed by the central government, shall decide whether any of the property attached or seized is involved in money laundering. Any Appellate Tribunal is authorized to hear appeals to orders of the Adjudicating Authority.

4.3.4 Right to Information Act, 2005

The RTI is a major legislative step in the Indian anti-corruption movement. This law, enacted in October 2005, effectively reverses the Official Secrets Act by forcing public authorities to regularly self-report information about their dealings and also to provide specific information in a timely manner as requested by citizens. RTI Act is facilitating transparency in the duties of all public workers.

4.3.4.1 Basics of the Act

With the enactment of the RTI, citizens of India have a fundamental right to access information related to the functioning of their government. The essence of the RTI is that it enables a citizen to examine, review and assess government actions and decisions to ensure obedience to public interest, integrity and justice. The Act also establishes the government's duty to provide that information. Public authorities must not only make access to this information easy and inexpensive, but must also frequently publish certain information without solicitation. The RTI includes penalty provisions for authorities who refuse to release requested information and for those who do not provide it in a timely manner.

4.3.4.2 Definitions

"Information"

As defined in the RTI of 2005, the term "information" means any form of material, including records, documents, memos, e-mails, opinions, advices, press releases, contracts, papers, samples, logbooks, models, data material in any electronic form and information relating to any private body that can be reached by the public authority under any law in force at the time of the request. It is important to note that India's RTI can reach private bodies to a limited extent, as it applies to all bodies, "owned, controlled or substantially financed directly or indirectly by funds provided by the . . . Government."[125] Under this provision, if a private entity receives financial assistance or subsidies from the government, they may be obligated to provide information under the law. Furthermore, the public may access information "relating to any private body which can be accessed by a public authority under any other law for the time being in force."[126] This means that if a public authority should have obtained information from a private body, but has not, the public is entitled to have access to that information. For example, if a public official should have obtained a copy of a hazardous waste report from a private contractor, but for whatever reason has not yet received the copy, that information can be requested under the RTI. In essence, the public authority's ability to access the document creates a constructive right of the citizen to access the document under the RTI.

"Public Authority"

"Public authority" as defined in the Act means any institution of self-government established by any law, notification, or order made by the appropriate government (federal, state or local) and also covers "all bodies owned, controlled or substantially financed by the government and NGOs

[125] Charmaine Rodrigues, *Promoting Public Accountability in Overseas Development Assistance: Harnessing the Right to Information* 5, COMMONWEALTH HUMAN RIGHTS INITIATIVE, April. 2006.
[126] Ibid.

substantially financed directly or indirectly by the government."[127] This definition of "public authority" is similar to the definition of "public official" included in the 1988 PCA. Like the PCA definition, the definition of "public authority" in the RTI is extensive, and is meant to include not only public officials in the strict sense of the word, but also government contractors, federally funded agencies, and other organizations which are directly or indirectly financed by the government. This somewhat broad definition is meant to encompass a wide range of money handlers, as an attempt to prevent misappropriation of government funds and combat the widespread corruption epidemic.

4.3.4.3 Procedure of the RTI Act

The RTI is enforced in all Indian states (excluding the state of Jammu and Kashmir for reasons of political conflict and accession involving Pakistan) and at all levels of government, including central and state administrations and local bodies, as well as NGOs. The RTI calls for every public authority to appoint public information officers ("PIOs") within one hundred days after its enactment. These PIOs should be appointed at each sub-divisional or sub-district level. The function of the PIO is to receive applications for information or appeals as allowed for under the RTI. In essence, they are the custodians of the law. In this respect, the law provides a check on the public authorities by setting up an independent third party to serve as the intermediary between the citizen and the public authority.

The procedure of the RTI begins when an Indian citizen makes a request to a PIO for access to information. A citizen need not give a reason for the inquiry. A citizen's request triggers the start of a thirty-day time period in which a PIO must respond to the request. If the information is not supplied, the citizen has the right to appeal to a senior authority from the central or state PIO. If that appeal is denied, the citizen may make a second appeal to the Central Information Commission. The Act penalizes officers who delay the

[127] Yashada, RIGHT TO INFORMATION ACT, 2005: A PRIMER 4–5, (Tata McGraw-Hill Publishing Co. Ltd., 2006).

procurement of information or default on their obligation to provide information not falling under any of the rules exceptions.

While there is no specific right to information or even right to freedom of the press in the Constitution of India, the right to information has been read into the Constitutional guarantees which are a part of the Chapter on Fundamental Rights. The Indian Constitution has an impressive array of basic and inalienable rights contained in Chapter Three of the Constitution. These include the Right to Equal Protection of the Laws and the Right to Equality Before the Law[128], the Right to Freedom of Speech and Expression[129] and the Right to Life and Personal Liberty[130]. These are backed by the Right to Constitutional Remedies under Article 32 of the Indian Constitution that is, the Right to approach the Supreme Court, the highest court in the land, in case of infringement of any of these rights.

These rights have received dynamic interpretation by the Supreme Court over the years and can truly said to be the basis for the development of the Rule of Law in India. As pointed out by H.M. Seervai, *"Corruption, nepotism and favouritism have led to the gross abuse of power by the Executive, which abuse has increasingly come to light partly as a result of investigative journalism and partly as a result of litigation in the Courts"*.

The legal position with regard to the right to information has developed through several Supreme Court decisions given in the context of all of the above rights, but more specifically in the context of the Right to Freedom of Speech and Expression, which has been said to be the obverse side of the Right to Know, and one cannot be exercised without the other. The interesting aspect of these judicial pronouncements is that the scope of the right has gradually widened, taking into account the cultural shifts in the polity and in society.

The development of the right to information as a part of the Constitutional Law of the country started with petitions of the press to the Supreme Court for enforcement of certain logistical implications of the right to freedom of speech

[128] Article 14 of the Indian Constitution
[129] Article 19 (1) (a) of the Indian Constitution
[130] Article 21 of the Indian Constitution

and expression such as challenging governmental orders for control of newsprint, bans on distribution of papers, etc. It was through these cases that the concept of the public's right to know developed.

The landmark case in freedom of the press in India was *Bennett Coleman & Co. v. Union of India*[131] in which the petitioners, a publishing house bringing out one of the leading dailies challenged the government's newsprint policy which put restrictions on acquisition, sale and consumption of newsprint. This was challenged as restricting the Petitioner's rights to freedom of speech and expression. The court struck down the newsprint control order saying that it directly affected the Petitioners right to freely publish and circulate their paper. In that, it violated their right to freedom of speech and expression. The judges also remarked, "It is indisputable that by freedom of the press meant the right of all citizens to speak publish and express their views" and "Freedom of speech and expression includes within its compass the right of all citizens to read and be informed."

The dissenting judgement of Justice K.K.Mathew also noted, *"The freedom of speech protects two kinds of interests. There is an individual interest, the need of men to express their opinion on matters vital to them and a social interest in the attainment of truth so that the country may not only accept the wisest course but carry it out in the wisest way. Now in the method of political government the point of ultimate interest is not in the words of the speakers but in the hearts of the hearers".* This principle was even more clearly enunciated in a later case[132]. Where the court remarked, *"The basic purpose of freedom of speech and expression is that all members should be able to form their beliefs and communicate them freely to others. In sum, the fundamental principle involved here is the people's right to know."*

In the case of *Manubhi D. Shah v. Life Corporation*[133] the Supreme Court held that if an official media or channel was made available to one party to express its views or criticism, the same should also be made available to

[131] AIR 1973 SC 783
[132] Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India (1985) 1 SCC 641
[133] AIR 1981 Guj. 15

another contradictory view. The facts of this case, briefly, were: One Mr. Shah who was also a Director of a voluntary consumer rights organisation and had, incidentally, worked extensively on the right to information, including drafting a model Bill, wrote a paper highlighting discriminatory practices by the Life Insurance Corporation which is a government controlled body. The Corporation published a critique of this paper in its institutional publication, to which Mr. Shah wrote a rejoinder which the LIC refused to publish. The Court held that a state instrumentality having monopolistic control over any publication could not refuse to publish any views contrary to its own.

In the area of civil liberties, the courts have built up the right to have a transparent criminal justice system free from arbitrariness. In *Prabha Dutt v. Union of India*[134] the Court held that there excepting clear evidence that the prisoners had refused to be interviewed, there could be no reason for refusing permission to the media to interview prisoners in death row.

Repeated violations of civil rights by the police and other law enforcement agencies have compelled the courts to give, time and again, directions to the concerned agencies for ensuring transparency in their functioning in order to avoid violations like illegal arrests and detention, torture in custody and the like.

In cases concerning the right to life and liberty under Article 21 of the Constitution the Courts have stressed the need for free legal aid to the poor and needy who are not either not aware of the procedures or not in a position to afford lawyers, and therefore unable to avail of the constitutional guarantees of legal help and bail. The Courts have said, that it is the legal obligation of the judge or the magistrate before whom the accused is produced to inform him of the that if he is unable to engage a lawyer on account of poverty or indigence, he is entitled to free legal aid.

In *State of U.P v. Raj Narain*[135] the respondent had summoned documents pertaining to the security arrangements and the expenses thereof of

[134] AIR 1982 SC 6
[135] AIR 1975 SC 865

the then Prime Minister. The Supreme Court, in examining a claim for privilege of certain documents summoned the kept to itself the power to decide whether disclosure of certain privileged documents was in the public interest or not. The Court said, *"While there are overwhelming arguments for giving to the executive the power to determine what matters may prejudice public security, those arguments give no sanction to giving the executive exclusive power to determine what matters may prejudice the public interest. Once considerations of national security are left out there are few matters of public interest which cannot be safely discussed in public"*.

Justice K.K.Mathew said, *"In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security. To cover with veil of secrecy, the common routine business is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for the purpose of parties and politics or personal self-interest or bureaucratic routine. The responsibility of officials to explain or to justify their acts is the chief safeguard against oppression and corruption".*

4.3.5 The Benami Transaction (Prohibition) Act, 1988

A benami transaction is one conducted in a surrogate's name. Benami is a Persian term made up of be, meaning "without," and Benami, meaning "name." It is commonly used to denote a transaction done by a person without using his own name and instead using the name of someone else. The Benami Transactions (Prohibition) Act, 1988 prohibits these kinds of dealings in the purchase of property, except when such transactions are in a person's wife's or unmarried daughter's name. Any person who enters into such a benami

transaction is subject to penalties of up to three years of imprisonment and/or a fine. All properties said to be held "benami" can be acquired by "such authority . . . as may be prescribed" and "no amount shall be payable for . . .[such] acquisition[s]."

4.3.6 The Foreign Contribution (Regulation) Act, 2010

The Foreign Contribution (Regulation) Act, 2010, which came into force on May 1, 2011, replaces The Foreign Contribution (Regulation) Act, 1976. The objective of this law is (1) to regulate the way certain Indian individuals, associations, or companies accept and utilize foreign funds and (2) to prevent foreign entities from interfering in the Indian political, decision-making, and opinion-forming process. The Act, with both national security and anti-corruption objectives, bars a range of Indian persons/entities from accepting foreign contributions or foreign "hospitality," including electoral candidates, members of the media (e.g., newspaper correspondents, contributors, publishers), civil servants, members of the judiciary, legislators, and political parties and/or officeholders of political parties, organizations of a political nature, etc. Certain payments, such as salaries or disbursements in the ordinary course of business, or payments in the course of international commerce, are not prohibited. Also exempt are funds received by legitimate non-government organizations engaged in development activities and payments Indians receive from relatives abroad. The law's definition of "foreign contribution" includes any articles/currency as well as any securities as defined in relevant sections of the Securities Contracts (Regulation) Act, 195622 and the Foreign Exchange Management Act, 1999.23 Persons receiving proscribed payments face punishment of up to five years of imprisonment.

The new FCRA has national scope, applying to the whole of India as well as to Indian citizens outside the country, and to foreign associate branches or foreign subsidiaries of Indian companies and bodies. Whoever accepts, or assists another person in accepting, a foreign contribution in contravention of the FCRA or any rules developed thereunder, can be imprisoned for up to five

years. Similarly, a person who receives a permissible foreign contribution cannot transfer those funds to another unless the transferee is an authorized recipient under the Act. When a company, firm, society, or association commits an offense under the FCRA, those in charge of or responsible to that entity would also be deemed guilty of the violation unless they can establish that they had exercised due diligence to prevent the crime.

As for banks and financial institutions, the new law creates certain reporting obligations with regard to these financial contributions. The nature and source of such foreign remittances must be disclosed to authorities.

While the FCRA represents an intention to enforce greater accountability with regard to funds flowing into India, it does nothing with regard to funds flowing from the country to foreign officials or into opaque overseas investment assets that are held by Indian nationals.

4.3.7 Money Laundering Law in India

Money laundering is a process where the proceeds of crime are transformed into apparently legitimate money or other assets. It is the processing of criminal proceeds to disguise its illegal origin. In simple words, it can be defined as the act of making money that comes from one source to look like it comes from another source. INTERPOL's definition of money laundering is: "any act or attempted act to conceal or disguise the identity of illegally obtained proceeds so that they appear to have originated from legitimate sources". The act of money laundering is done with the intention to conceal money or other assets from the State so as to prevent its loss through taxation, judgment enforcement or blatant confiscation. The criminals herein try to disguise the origin of money obtained through illegal activities to look like it was obtained from legal sources because otherwise they will not be able to use it as it would connect them to the criminal activity and the law enforcement officials would seize it.[136]

[136] Available at http://www.nja.nic.in/4.1.%20Paper-%20Money%20Laundering_1_%20Paridhi%20Saxena.pdf last visited on 18 May 2012

During the second half of the 20th century, with the increasing threat of modern and sophisticated forms of transnational criminal activity, concern has arisen over the lack of effective national laws to combat organized crime and the laundering of its proceeds. India has had separate laws to deal with smuggling, narcotics, foreign trade violations, foreign exchange manipulations etc, and also special legal provisions for preventive detention and forfeiture of property etc, which were enacted over a period of time to deal with such serious crimes. However, the provisions under one of the Indian laws, namely, the Foreign Exchange Regulation Act, 1973 (FERA) were considered to be 'draconian' and it was repealed making foreign exchange violations civil offences under a new law called the Foreign Exchange Management Act (FEMA).[137]

4.3.7.1 Prevention of Money Laundering Act, 2002

In view of an urgent need for the enactment of a comprehensive legislation for preventing money laundering and connected activities, confiscation of proceeds of crime, setting up of agencies and mechanisms for coordinating measures for combating money laundering etc., the Prevention of Money Laundering Bill 1998 was introduced in Parliament on 4th August, 1998. The Bill received the assent of the President and became Prevention of Money Laundering Act, 2002 on 17th January 2003. The Act has come into force with effect from 1st July 2005. It has been amended in 2005, 2009 and recently in 2012. The objective of the Act is to prevent money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto.[138]

A. Scheme of the Act

The Act consists of 10 chapters containing 75 sections and 1 schedule divided in 5 parts. Chapter I contain section 1 and 2 which deals with short title, extent and commencement and definitions. Chapter II contain section 3

[137] Available at http://www.nja.nic.in/4.1.%20Paper-%20Money%20Laundering_1_%20Paridhi%20Saxena.pdf last visited on 2 June 2014
[138] Available at http://www.nja.nic.in/4.1.%20Paper-%20Money%20Laundering_1_%20Paridhi%20Saxena.pdf last visited on 2 June 2014

and 4 which provide for offences and punishment for money laundering. Chapter III has sections 5-11 which provide for attachment of property, adjudication and confiscation. Chapter IV has sections 12-15 which deals with obligations of banking companies, financial institutions and intermediaries. Chapter V has sections 16-24 which relates to summons, searches, seizures, retention, presumptions etc. Chapter VI has sections 25-42 which deals with the establishment, composition, qualifications, powers and procedures etc of the Appellate Tribunal. Chapter VII has sections 43-47 which deal with Special Courts and Chapter VIII has sections 48-54 which provide for various authorities under the Act their appointment, powers, jurisdiction etc. Chapter IX has sections 55-61 which deals with reciprocal arrangement for assistance in certain matters and procedure for attachment and confiscation of property. Chapter X has sections 62-75 which deals miscellaneous provisions including punishments, cognizance of offences, offences by companies etc.[139]

B. Salient Features of the Act

I. Offence of Money Laundering and its punishment

An offence of money laundering is said to be committed when a person in any way deals with the proceeds of crime.[140] The proceeds of the crime referred above include the normal crimes[141] and the scheduled crimes.[142] The prescribed punishment is 3-7 years rigorous imprisonment for an offence of money laundering with fine.[143] In case of an offence mentioned under Part A[144], imprisonment would extend up to 10 years.[145]

II. Attachment, Adjudication and Confiscation

The confiscation of the property under the Act is dealt with in accordance with the chapter III of the said Act. An official not below the rank

[139] ibid
[140] Section 2(u) of the Act: any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken or held outside the country, then the property equivalent in value held within the country.
[141] Crimes which are not mentioned specifically in the schedule of the Act
[142] Section 3 of the PMLA
[143] Section 4 of the PMLA
[144] These deal with the offences under the Narcotic Drugs and Psychotropic Substances Act, 1985, Sections 15, 16, 17,18, 19, 20, 21, 22, 23, 24, 25A, 27A, 29.
[145] Proviso to Section 4 of the PMLA

of Deputy Director can order attachment of proceeds of crime for a period of 180 days, after informing the Magistrate. Thereafter he will send a report containing material information relating to such attachment to the Adjudicating Authority.[146] Section 8 details the procedure of adjudication. After the official forwards the report to the Adjudication Authority, this Authority should send a show cause notice to concerned person(s) within 30 days. After considering the response and all related information, the Authority can give finality to the order of attachment and make a confiscation order, which will thereafter be confirmed or rejected by the Special Court.

III. Obligations of Banking Companies, Financial Institutions and Intermediaries

The reporting entity is required to keep a record of all material information relating to money laundering and forward the same to the Director. Such information should be preserved for 5 years. [147] The functioning of the reporting entity will be supervised by the Director who can impose any monetary penalty or issue warning or order audit of accounts, if the entity violates its obligations.[148] The Central Government, after consulting the Reserve Bank of India is authorised to specify rules relating to managing information by the reporting entity.[149]

IV. Enforcement Paraphernalia

Adjudicating Authority - The Act empowers the Central Government to constitute an Adjudicating Authority having a Chairman and 2 members and define their scope of functioning and other terms of service. The Adjudicating Authority will operate through a Single or Division bench. The Authority has been given autonomous powers to regulate its adjudicating procedure.[150]

[146] Section 5 of the PMLA
[147] Section 12 of PMLA
[148] Section 13 of PMLA
[149] Section 15 of PMLA
[150] Section 6 of PMLA

Administrator - The property laundered will be taken care of i.e. managed after confiscation by an Administrator who will act in accordance with the instructions of the Central Government.[151]

Appellate Tribunal - All appeals from an order made by the Adjudicating Authority will lie to an Appellate Tribunal constituted by the Central Government.[152] It will consist of 2 members headed by a Chairman.[153] An official can resign by sending his resignation to the Central Government thereby giving a 3 months' notice. He can also be removed by an order made by the Central Government on the grounds of misbehaviour or incapacity.[154]

Special Courts - the Central Government, after consulting the High Court is empowered to designate Court of Sessions as Special Courts.[155] The Special courts can try all scheduled offences and that under section 4 and also offence under section 3, but after the authority requests in this behalf.[156]

Authorities under the Act - There shall be the following classes of authorities for the purposes of this Act, namely: (a) Director or Additional Director or Joint Director, (b) Deputy Director, (c) Assistant Director, and (d) such other class of officers as may be appointed for the purposes of this Act.[157]

Summons, Searches and Seizures etc. The power of surveying and scrutinizing records kept at any place is conferred on the Adjudicating Authority. The Authority may ask any of its officials to carry on the search, collect all relevant information, place identification marks and thereafter send a report to it.[158] The search of a person to be conducted is allowed if it is ordered by the Central Government. The authority authorized in this behalf cannot detain a person beyond 24 hours, must ensure the presence of 2 witnesses,

[151] Section 10 of PMLA
[152] Section 25 of PMLA
[153] Section 27 of PMLA
[154] Section 32 of PMLA
[155] Section 43 of PMLA
[156] Section 44 of PMLA
[157] Section 48 of PMLA
[158] Section 16 of PMLA

prepare a list of things seized signed by the witnesses and forward the same to the Adjudicating Authority.[159]

A property confiscated or frozen under this Act can be retained for 180 days. This period can be extended by the Adjudicating Authority after being satisfied of the merits of the case. The Court or the Adjudicating Authority can subsequently also order the release of such property.[160] There shall be a presumption of the ownership of property and records recovered from a person's possession.[161] The burden of proof will be on the accused to prove that he is not guilty of an offence under this Act.[162] The offences under the Act are to be cognizable and non-bailable.[163]

4.3.8 Whistleblower Protection in India

Whistleblower protection is essential to encourage the reporting of misconduct, fraud and corruption. The risk of corruption is significantly heightened in environments where the reporting of wrongdoing is not supported or protected. This applies to both public and private sector environments, especially in cases of bribery: Protecting public sector whistleblowers facilitates the reporting of passive bribery, as well as the misuse of public funds, waste, fraud and other forms of corruption. Protecting private sector whistleblowers facilitates the reporting of active bribery and other corrupt acts committed by companies. Encouraging and facilitating whistleblowing, in particular by providing effective legal protection and clear guidance on reporting procedures, can also help authorities monitor compliance and detect violations of anti-corruption laws. Providing effective protection for whistleblowers supports an open organisational culture where employees are not only aware of how to report but also have confidence in the reporting

[159] Section 18 of PMLA
[160] Retention of Property u/s 20 of PMLA
[161] Presumption as to records or property in certain cases u/s 22 PMLA
[162] Section 24 of PMLA
[163] Section 45 of PMLA

procedures. It also helps businesses prevent and detect bribery in commercial transactions.[164]

The protection of both public and private sector whistleblowers from retaliation for reporting in good faith suspected acts of corruption and other wrongdoing is therefore integral to efforts to combat corruption, promote public sector integrity and accountability, and support a clean business environment. International instruments aimed at combating corruption have also recognised the importance of having whistleblower protection laws in place as part of an effective anti-corruption framework. Whistleblower protection requirements have been introduced in the United Nations Convention against Corruption, the 2009 OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Recommendation), the 1998 OECD Recommendation on Improving Ethical Conduct in Public Service3 , the Council of Europe Civil and Criminal Law Conventions on Corruption, the Inter-American Convention against Corruption, and the, African Union Convention on Preventing and Combating Corruption. Such provisions have strengthened the international legal framework for countries to establish effective whistleblower protection laws.[165]

4.4 Comparative Analysis

Table 1: Comparison of Anti Corruption Laws of UK, USA and India.

Issue	**UK BRIBERY ACT 2010**	**US FOREIGN CORRUPT PRACTICE ACT 1977**	**INDIA'S PREVENTION OF CORRUPTION ACT 1988**
Is having robust corporate compliance	Yes, but unlike FCPA excludes Political parties,	Yes	No

[164] Available at https://www.oecd.org/g20/topics/anti-corruption/48972967.pdf last visited on 22 September 2012

[165] Available at https://www.oecd.org/g20/topics/anti-corruption/48972967.pdf last visited on 22 September 2012

program a defense?	party officials, and candidates for office from definition of "foreign public official."		
Is commercial bribery and bribery of domestic officials illegal?	Yes	No	Yes, but the PCA only prohibits bribery of domestic officials.
Can the receipt of a bribe be prosecuted?	Yes	No	Yes
What is the requisite intent for liability to attach?	Bribing another person (Section 1) and offenses relating to being bribed (Section 2) require basic knowledge and the intent to "bring about improper performance." Bribery of a foreign public official (Section 6) requires the intent to influence the official so as to obtain/retain a business or a business advantage. The "Corporate Offense" of failing to prevent bribery (Section 7) is a strict liability offense not requiring any mens rea. The only statutory defense is to	The FCPA requires the accused to have acted "willfully," "knowingly," and "corruptly." Knowledge, moreover, is defined to include "conscious disregard" or "willful blindness."	The PCA requires that the "gratification" or valuable thing be offered or given as a motive or reward for performance or non-performance of an official act. Motive is presumed upon proof that the defendant offered or received any gratification or valuable thing.

	prove the existence of "adequate systems and controls." The burden of proof for the defense is the "balance of probabilities."4		
Can companies be held criminally liable?	Yes	Yes	yes
Is there a "facilitation/grease payments" exception?	No	Yes, the FCPA exempts small facilitation payments made to expedite or secure the performance of "routine governmental action." That said, the exception is extremely narrow.	No
Is failure to keep accurate books and records an offense?	Although there is no such specific offense, the failure to keep accurate books and records could be interpreted as signifying a failure to have "adequate procedures" in place.	Yes, public companies and other "issuers" are required to file periodic reports with the SEC and to maintain accurate books and records.	No
Are "promotional expenses" exempt?	No, but the UK Ministry of Justice's Guidance announced that "the Government does	Yes, the FCPA provides an affirmative defense for payments that are reasonable and bona fide	No

	not intend for the Act to prohibit reasonable and proportionate hospitality and promotional or other similar business expenditure intended for these purposes."	business expenses (1) directly related to the promotion, demonstration or explanation of products or services, or (2) incurred in connection with the execution or performance of a contract with a foreign government or agency.	
Is the law applied extraterritorially?	es, both individuals and companies may be liable under Section 1 and 2's "general offenses" committed outside the UK, provided the company or individual has a "close connection" with the UK (that is, if they are UK citizens, ordinarily residents, or incorporated in the UK). Section 7'scorporate offense of failing to prevent bribery applies to UK entities and anybody who "carries on a business, or any	Yes, the FCPA applies to acts by US issuers, domestic concerns and their agents and employees that occur wholly outside the US, and to acts by US citizens or residents wherever they occur.	Yes, the PCA applies to offenses committed in India and by Indian citizens outside India.

	part of a business" in the UK.		
Is having robust corporate compliance program a defense?	Yes, if the company can show that it had adequate procedures to promote compliance in place.	No, having a robust compliance programs do not provide a defense to liability. That said, having such a compliance program in place can result in a reduced fine under the amended Federal Sentencing Guidelines.	No
Is there a "local law" exception/ defense?	Yes, there is a defense if the foreign official is permitted or required under written local law to be influenced in his capacity as a foreign public official by the offer, promise, or gift.	Yes, an affirmative defense is available if payment to foreign official is lawful underwritten laws and regulations of foreign country.	No
What are the potential penalties?	Unlimited fines for individuals and companies. Individuals may be imprisoned for up to 10 years.	Anti-Bribery Provision: For corporations, a fine per violation of up to $2M or up to twice the bribe paid or benefit sought or received, whichever is greater; for individuals, a fine of up to	The possible penalty for most offenses is 6 months to 5 years in prison, plus a fine. For "habitual" or "particularly corrupt or dishonest misconduct," the potential punishment is up to

		$250,000 or up to twice the bribe paid or benefit sought or received, whichever is greater, and up to 5 years in prison per violation. Books and Records Provisions: For civil violations, up to $150,000 for individuals and up to $725,000 for corporations, depending on the circumstances, and subject to regulatory inflation factors; for criminal violations, up to $25 million for corporations, and up to $5 million and up to 20 years in prison for individuals.	7 years in prison, plus a fine.

The phenomenon of corruption is as old as humankind and corruption persists in all modern societies in some form or other. Harmful to law, order and governance wherever it occurs, the impact of corruption on socio-economic development is particularly acute. Whilst there are many elements to 'corruption', various forms of criminalized behaviors such as rent seeking and misappropriation of funds for development projects are the particular manifestations which most strongly compromise the ability of development initiatives to achieve their targeted impact. The effects of corruption on

development are profoundly negative and are difficult to overcome, as proven by the global anti-corruption movement's twenty year-long 'fight against corruption'. Anti-corruptionism has grown to play a large role in the international development scene, as nations, organisations and civil society have recognised its major impediment to development. A broadly experienced phenomenon, corruption is a value-ridden, context-dependent problem and experience has shown that treating it as if it were clear-cut and cohesive is inappropriate. Whilst international and domestic laws against corruption are firmly in place, the impact of those laws on development is contingent in practice on their implementation. Technology transfer and contextual collision are important considerations for the application of anti-corruption tools and strategies to specific contexts, underlining the imperative fact that strategies need be responsive to the particular contexts to which they are applied; be that cultural, technological, political or economic. In spite of the remaining chronic need to address corruption to promote development, overzealous promotion and insensitive application of anti-corruptionism may have negative rather than positive outcomes depending on a multitude of factors operating in any given place and time. Whilst anti-corruptionism remains relevant and important, international actors must learn from the failures of the global movement to move to adequately guard against the negative effects of corruption on development into the future.

CHAPTER-V

Institutional Mechanism in UK, USA and India To Combat Corruption

CHAPTER V

INSTITUTIONAL MECHANISM IN UK, USA AND INDIA TO COMBAT CORRUPTION

"Public institutions deliver vital services such as health and education, upon which the poor are particularly dependent. Corruption subverts and undermines all these functions and as such serves as a major impediment to development".[1]

Over the past decade, corruption has been identified as a costly diversion of scarce resources and an impediment to development effectiveness. Most observers note that corruption is a symptom of deeper problems in how a political leadership administers the key financial functions of state. Accordingly, a range of policies have been identified to improve public administration including reforms of public expenditure management, procurement procedures, auditing functions, and rules governing conflicts of interest. One striking development of anti-corruption commissions has been the adoption by numerous governments despite a mounting body of evidence they fail to reduce corruption.[2]

Anti-corruption Agencies are especially problematic when political leaders are only responding to demands from international donors. In such countries, policymakers can ignore domestic demands for reform and enact minimal reforms to satisfy external agents. This minimum may be nothing more than the establishment of an anti-corruption commission, an office of the ombudsman, or an anti-fraud unit without enabling legislation, competent staff,

[1] Jim Yong Kim, president of the World Bank Group, at his speech at the Center for Strategic and International Studies, on January 2013

[2] Available at http://siteresources.worldbank.org/WBI/Resources/wbi37234Heilbrunn.pdf last visited on 23 May 2016

or a budget. Having created offices to which they may point, and situating them in the presidency, policymakers may return to business as usual. In the worst cases, the commissions become tools to repress political rivals and members of the opposition or previous governments become targets of investigation. The impact is to undermine political legitimacy further.[3]

5.1 International Standards for Anti-corruption Institutions

In the mid-1990s the problem of corruption was recognised as a subject of international concern and drew the attention of numerous global and regional intergovernmental organisations. The last decade witnessed a growing collection of international "hard law" (treaties and conventions) and "soft law" (recommendations, resolutions, guidelines and declarations) instruments elaborated and adopted within the framework of organisations such as the United Nations, the Council of Europe, the OECD, the Organization of American States, the African Union, and the European Union. The multitude of international legal instruments on corruption varies in scope, legal status, membership, implementation and monitoring mechanisms. However, all aim to establish common standards for addressing corruption at the domestic level through its criminalisation, enforcement of anti-corruption legislation and preventive measures. International legal instruments also aim to identify and promote good practices and facilitate co-operation between member states.[4]

From the very beginning of this process, it was apparent that merely strengthening legislation would not be sufficient to effectively control corruption. The complex, multifaceted phenomenon of corruption signals a failure of public institutions and good governance. There is consensus within the international community that anti-corruption legislation and measures need to be implemented and monitored through specialized bodies and/or personnel with adequate powers, resources and training. Mechanisms need to be in place

[3] Available at http://siteresources.worldbank.org/WBI/Resources/wbi37234Heilbrunn.pdf 23 May 2016
[4] Specialised Anti-Corruption Institutions, Review of Models, OECD, 2008, available at: http:/ www.oecd.org/publishing/corrigenda last visited on 1 October 2012

to secure a high level of structural, operational and financial autonomy of institutions and persons in charge of the fight against corruption.[5]

A few key provisions of these international instruments are listed below which empowered for establishment of some effective institutions to curb corruption

5.1.1 Twenty Guiding Principles for the Fight against Corruption[6]

Twenty guiding principles for the fight against corruption has ensure that those in charge of the prevention, investigation, prosecution and adjudication of corruption offences enjoy the independence and autonomy appropriate to their functions, are free from improper influence and have effective means for gathering evidence, protecting the persons who help the authorities in combating corruption and preserving the confidentiality of investigations;[7]

Twenty guiding principles for the fight against corruption has Promote the specialisation of persons or bodies in charge of fighting corruption and to provide them with appropriate means and training to perform their tasks.[8]

5.1.2. Council of Europe Criminal Law Convention on Corruption[9]

The Convention provides that each party shall adopt such measures as may be necessary to ensure that persons or entities are specialised in the fight against corruption. They shall have the necessary independence in accordance with the fundamental principles of the legal system of the Party, in order for them to be able to carry out their functions effectively and free from any undue pressure. The Party shall ensure that the staff of such entities has adequate training and financial resources for their tasks.[10]

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[5] Ibid
[6] Resolution (97) 24, adopted by the Committee of Ministers if the Council of Europe on 6 November 1997
[7] Principle 3 of the Twenty guiding principles for the fight against corruption.
[8] Principle 7 of the Twenty guiding principles for the fight against corruption.
[9] Adopted: 4 November 1998; entered into force: 1 July 2002.
[10] Article 20, of the Council of Europe Criminal Law Convention on Corruption

5.1.3. United Nations Convention against Corruption[11]

The Convention has provide that each State Party shall ensure the existence of preventive anti-corruption bodies with necessary independence, to enable the bodies to carry out its functions effectively and free from any undue influence. The name and address of such authority shall be communicated to the Secretary-General of the UN.[12] The Convention also provides that each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement.[13]

There are other regional instruments that include provisions relating to specialized institutions. These include the following:

5.1.4. African Union Convention on Preventing and Combating Corruption[14]

Under the African Convention State parties are required to "ensure that national authorities or agencies are specialized in combating corruption and related offences by, among others, ensuring that the staff are trained and motivated to effectively carry out their duties."[15]

5.1.5. Inter-American Convention against Corruption[16]

Under Article III para-9 of the Inter-American Convention against Corruption provides that Calls are made for "oversight bodies with a view to implementing modern mechanisms for preventing, detecting, punishing and eradicating corrupt acts."

5.2 Intuitional Mechanisms in UK for Combating Corruption

UK has own local investigation and prosecution agencies able to deal with cases of bribery and corruption. These include the: Local police forces, Crown Prosecution Service in England and Wales, Public Prosecution Service in Northern Ireland Crown Office and Procurator Fiscal Service in Scotland.

[11] Adopted: 31 October 2003; entered into force: 14 December 2005.
[12] Article 6 of the UNCAC
[13] Article 36 of the UNCAC
[14] Adopted: 11 July; entered into force: pending.
[15] Article 20 para (5) African Union Convention on Preventing and Combating Corruption
[16] Adopted: 29 March 1996; entered into force: 6 March 1997.

However, the major agency for investigating and dealing with serious bribery and corruption cases, especially those involving corporate offences, is the Serious Fraud Office (SFO), which has jurisdiction to investigate and prosecute in England, Wales and Northern Ireland.

5.2.1 Serious fraud Office (SFO)

The Serious Fraud Office was established in 1987 as an independent public institution within the criminal justice system of the United Kingdom under the oversight of the Attorney General. Its mandate is to investigate and prosecute serious and complex fraud in order to maintain confidence in the integrity of business and financial services in the United Kingdom. The SFO only focuses on serious and complex cases. The distinctive feature of the SFO's approach to investigate is the use of multidisciplinary teams. Each case is allocated to a team of lawyers, financial investigators, police officer, IT and other support staff.[17]

The SFO has a dual role in respect of investigates (with or without police assistance) and prosecutes both serious fraud and bribery (domestic and overseas). It has a wide range of statutory investigation powers, which include search and seizure, compulsory document production notices, interviews under caution and compulsion interviews. The SFO also plays a lead role in intelligence gathering and providing mutual legal assistance to overseas enforcement authorities.[18]

5.2.2 Background Information

In the 1970s and 1980s in the United Kingdom witnessed considerable public dissatisfaction with the system for investigating and prosecuting serious and complex fraud. In 1983 the government established the Fraud Trials Committee, an independent committee of inquiry chaired by Lord Roskill. The

[17] Specialised Anti-Corruption Institutions, Review of Models, OECD, 2008, available at: http:/ www.oecd.org/publishing/corrigenda last visited on 1 September 2012
[18] Ibid.

committee considered the introduction of more effective means of fighting fraud through changes to the law and the criminal proceedings.[19]

The report produced by the Fraud Trials Committee, commonly known as the Roskill Report, was published in 1986. It provided the key impetus for creating of the SFO. In particular, one of its main recommendations was the setting up of a new unified organization responsible for the detection, investigation and prosecution of serious fraud cases.[20]

The SFO was established in April 1988, by the Criminal Justice Act adopted in 1987, as an independent Government Department headed by a Director who exercises powers under the oversight of the Attorney General. It is an integral part of the criminal justice system. Today the SFO is the main body directing investigations and prosecuting corruption offences in the United Kingdom.[21]

5.2.3 Jurisdiction of SFO

The SFO operate only in England, Wales and Northern Ireland. It does not have jurisdiction over Scotland and Islands. The SFO's mandate is to direct investigations and prosecute serious or complex fraud. It investigates and prosecutes corruption offences when they arise in the context of serious or complex fraud.

The primary aim of SFO is to:

"use of powers and resources to bring a case in front of the criminal courts which has a reasonable chance of succeeding in the sense that there is a reasonable chance that a conviction will result."[22]

Corruption in the UK is currently dealt with by both common and statute law in the United Kingdom. Provisions on corruption are also contained in four different criminal statutes, the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916

[19] Available at: http://www.sfo.gov.uk/about/creation.asp last visited on 7 July 2014.
[20] Ibid.
[21] Ibid.
[22] Wardle, Robert, Director of SFO (2003), *The Civil/Criminal Law Interface*, Speech on 6 November 2003, available at http://www.sfo.gov.uk/publications/speechesout/sp_104.asp?id=104 last visited on 7 July 2014.

(collectively called the Prevention of Corruption Acts 1889 to 1916), which apply to the entire United Kingdom and a Anti-Terrorism Crime and Security Act 2000.

Various cases of suspected fraud are referred to the SFO. The SFO is not investigating them all, but choosing only cases of major and complicated fraud. The SFO uses a set of criteria when deciding whether to accept a case. The overriding criterion is whether the suspected fraud is enough serious or complex that its investigation need to be carried out by those responsible for its prosecution.

5.2.4 Powers and Functions of SFO

Once it is decided to start an investigation, each case is allocated to a multidisciplinary team. It consists of lawyers, financial investigators, police officers, IT and support staff. Each team is led by a Case Controller, a senior grade lawyer, who is responsible for all aspects of the investigation and any ensuing prosecution. Counsel and other experts may be instructed at an early stage and work closely with the team throughout.

Main Factors Considered by SFO when Deciding on Whether to Accept a Case[23]

i. Does the value of the alleged fraud exceed 1 million GBP (1, 45 million EUR)?
ii. Is there a significant international dimension?
iii. Is the case likely to be of widespread public concern?
iv. Does the case require a combination of legal, accountancy and investigative skills?
v. Does the case require specialised knowledge, e.g. of financial markets?
vi. Is there a need to use the SFO's special powers, such as specified under the Section 2 of the Criminal Justice Act?

[23] OECD Working Group on Bribery (2005), United Kingdom: Phase II report, Paris, 17 March, p. 35 Available at: http://www.sfo.gov.uk/cases, last visited on 7 July 2014

Overall, the assessment ("vetting") whether a suspected fraud should be accepted for investigation involves a detailed examination of all known facts of the referred case. Regular liaison meetings are held to establish which organisation is most appropriate to deal with a specific suspected fraud. Whether a case should be accepted is normally decided within one month of it being referred to the SFO, although additional information may be requested before a decision can be made. Cases recommended by the vetting team for a formal investigation are submitted to the Director of SFO for final acceptance. Cases not accepted by the SFO are referred back to the originating body. Each year thousands of fraud cases, not falling within the SFO's scope are investigated by police regional fraud or commercial squads, and prosecuted in the courts, by the Crown Prosecution Service. Other government departments also undertake investigations and prosecutions.

In the course of investigation of fraud cases, vast quantities of documents often left in a deliberately obscure and fragmented form need to be examined. This is done by experts having different types of expertise, e.g. police, accountants, lawyers, bankers, stockbrokers and computer specialists, to determine whether offences have been committed and if they have, to arrange the evidence in a compact and coherent form for presentation to the court.

Case meetings are held at regular intervals throughout the investigation involving all members of the case team. The meetings provide opportunity to agree on joint lines of action among all the different specialists in the team, including independent prosecuting counsel, who are usually engaged at an early stage.

Once the case has been investigated - before instituting any criminal proceedings – it is considered whether on the evidence against each potential defendant there is a realistic prospect of securing a conviction and whether the public interest requires a prosecution.

The SFO follows the principles outlined in the Code for Crown Prosecutors, which also applies to Crown Prosecution Service decisions whether to prosecute. The SFO powers are described in the Criminal Justice

Act 1987. Other statutory powers are available to the SFO, police or other law enforcement agencies under inter alia: Police and Criminal Evidence Act 1984; Companies Act 1986; Criminal Justice Act 1988; Regulation of Investigation Powers Act 2000; Financial Services & Markets Act 2000; Proceeds of Crime Act 2003. Section 2 of the Criminal Justice Act gives extensive powers of investigation to the SFO Director. These powers, commonly referred as s2 powers, and which are not specific to SFO, include the following:

i. Require a person to answer questions or otherwise furnish information;
ii. Require production of documents;
iii. Apply to Justices for a search warrant.

S2 powers are designed to obtain information to assist an investigation. They may only be used for the purposes of an investigation of a suspected offence which appears on reasonable grounds to the Director to involve serious or complex fraud and where there is good reason to do so for the purpose of investigating the affairs, or any aspect of the affairs of any person. They are not designed to obtain evidence for direct use in court. Even so, material obtained using s2 powers may subsequently be produced as evidence in the proper form. S2 powers are known as "compulsory" powers because:

i. Failure to comply with an s2 Notice, without a reasonable excuse, is an offence[24]
ii. Giving false or misleading information in response to a Notice is an offence [25]

The "right to silence" does not apply to information obtained under Section 2 - it cannot be used in evidence unless a formal witness statement is obtained. S2 powers are exercised by the written notice, known as Section 2 notices. Many Section 2 mandatory notices are issued to banks, financial institutions, accountants and other professionals, who may, in the ordinary course of their business, hold information or documents relevant to a suspected fraud. In most instances those institutions and persons owe duties of confidence

[24] Section 2(13) of the Criminal Justice Act, 1987

[25] Section 2(14) of the Criminal Justice Act, 1987

to their clients. Many are willing to assist but cannot do so while such duties of confidence remain. A Section 2 notice obliges them lawfully to provide information and documents.

A decision to use s2 powers may be made by the Case Controller either alone or as a result of discussion in a case conference. Considerations, grounds and reasons should be recorded in written minutes and kept in a special registry. Contract staff or seconded staff may be authorised to exercise s2 powers, but the Director remains responsible for the proper exercise of all delegated statutory powers.

S2 notices may be issued and signed by any SFO member or other investigator who has been authorised by the Director. Notices requiring production of banking information additionally require the authority of the Director. The SFO lawyers and investigators may be given a general authority annually; others may be authorised on a case basis. Police officers working with the SFO retain all their own constitutional, common law and statutory powers may not be authorised to use s2 powers. Concerning the organisational structure of the SFO, there are four investigation and prosecution divisions, each headed by an Assistant Director. Each division contains a number of multidisciplinary case teams. Each operational division covers cases of fraud committed in its own geographic area of the country within the SFO's jurisdiction.

However, as a large proportion of cases originate in London these are shared between the divisions. The head of accountancy is an Assistant Director, who is a senior chartered accountant. Accountancy support is allocated from a central resource when needed. This can include employing external accountancy expertise. A forensic computing unit is responsible for the seizure, processing and analysis of all electronic-based evidence. A graphic designer assists case teams and counsel in the preparation of presentations for court hearings.

The Criminal Justice Act 1987 provides for the conduct of investigations by the SFO in conjunction with the police. The constitutional independence of

the police, their accountability and their command structure remain unchanged by the establishment of the SFO or by the attachment of police officers to SFO cases. The police fraud squads have their own specialist expertise to deal with corruption related criminal offences. Within the scope of its operation, the SFO cooperates extensively with the police. The police are involved in the case team. Police involvement in SFO investigations produces real benefits, combining their skills experience and local knowledge with the SFO's legal and financial investigation capability. As mentioned earlier, s2 powers under may not be used by police officers.

5.2.5 Accountability of SFO

The Director of the SFO is appointed by and accountable to the Attorney General. The Prosecutor General, on his turn, is appointed by the Prime Minister and is responsible to Parliament the SFO. The Director of the SFO makes an annual report to the Prosecutor General on the work of the Office. The report is provided to the Parliament and published.[26]

5.2.6 Member and Staff of SFO

The SFO has 150 members of staff, 35 of whom are lawyers. Duties of the SFO lawyers, be it case controllers or investigators, involve interviewing witnesses and suspects, taking statements and analysing evidence. They may need to liaise with other agencies, advise on difficult legal or practical issues, or obtain foreign or expert evidence. Several lawyers also work in the Policy Division, providing guidance on new legislation and the SFO procedure and advising the SFO's Mutual Legal Assistance Unit, which obtains evidence to assist overseas courts, and prosecuting authorities.[27]

5.2.7 Procedure of SFO

The SFO is responsible for the investigation and prosecution of some of the biggest frauds in British history. Approximately 20-30 new cases are

[26] The SFO annual reports are available at http://www.sfo.gov.uk/publications/annual_report.asp. last visited on 7 July 2014

[27] The SFO annual reports are available at: http://www.sfo.gov.uk/publications/annual_report.asp last visited on 7 July 2014.

accepted by the SFO each year. For example, in 2006 there are about 80 cases under investigation or going through the courts. The caseload is expected to increase over the next few years.[28] The cases may involve investment, banking or corporate frauds, frauds on the U.K. government or the European Union, and those involving manipulation or financial markets. Most cases have an international dimension and many involve close working with other agencies such as the Police, Crown Prosecution Service, Department of Trade and Industry, Her Majesty's Customs and Excise and the Financial Services Authority, or their overseas equivalents.[29]

5.3 General Institutions of USA to deals with the cases of Corruption

United States is one of the western democracies that follow the multi-agency model of anti-corruption agencies. The country combats corruption through many agencies and instances but, basically, these are the three main public bodies engaged in this task: The Office of Government Ethics – OGE; The Offices of the Inspectors General – OIG; and The Government Accountability Office – GAO.

5.3.1 The Office of Government Ethics (OGE)

OGE is responsible for establishing the standards of ethical conduct for the executive branch, basically in order to prevent the occurrence of situations of conflicts of interests. Establishment as part of the Office of Personal Management by the Ethics in Government Act of 1978, OGE became separate agency on October 1, 1989, as a result of the passage of the Office of Government Ethics Reauthorization Act of 1988. Until 1989, each public agency was responsible for its own regulation. An Executive Order of the President, signed in April 1989, determined the principles of ethical conduct of the Executive Branch, and appointed OGE to fix and publish the Standards of Ethical Conduct for Employees of the Executive Branch, which became effective starting from February 1993.

[28] Available on http://www.sfo.gov.uk/cases/assessing.asp last visited on 7 July 2014.
[29] Ibid.

5.3.1.1 Structure of the OGE

OGE is headed by a Director who is appointed to a five-year term by President. In addition to the Office of the Director, OGE is divided into five Office that work in concert to carry out OGE's misson. The function of each office are listed below.

5.3.1.2 Functions of the OGE

I. The Office of the Director provides overall direction to the executive branch an ethic program and is responsible for ensuring that OGE fulfills its Congressional and Presidential mandates.

II. The Office of International Assistance and Government Initiatives (OIAGI) coordinate the Office's support of U.S. efforts in promoting international ethics and anti-corruption programs. It is also coordinates the Office's good governance initiatives.

III. The Office of General Counsel and Legal Policy (OGC & LP) is responsible for establishing and maintaining a uniform legal framework of Government ethics for executive branch employees. This Office develops executive branch ethics program policies and regulations, interprets laws and regulations, assists agencies in legal and policy implementations, and recommends changes in conflicts of interest and ethics statutes. It also responds to requests for information from the media, such as newspapers and wire services, and similar other news organizations. The Office also provides liaison to the Congress and to the Office of Management and Budget.

IV. The Office of Agency Programs (OAP) is responsible for monitoring and providing services to Federal executive branch agency ethics programs. This Office has three divisions: Program Services Division, Education Division, and the Program Review Division. The three divisions coordinate their services to assist agencies in carrying out their programs. They work closely with agencies to identify and resolve problem areas; provide educational materials and training, staying

abreast of budgetary concerns and identifying the emergent issues to be addressed by OGE. The Office holds an annual ethics conference for government-wide ethics officials, as well as hosting smaller topic specific events quarterly during the year.

V. The Office of Administration and Information Management (OAIM) provides essential support to all OGE operating programs through two divisions. The Administration Division has program responsibilities for: personnel, payroll, fiscal resource management, printed graphics, facilities and property management, travel, procurement, and the publishing and printing of materials. The Information Resource Management Division is responsible for telecommunications, web graphics, and records management as well as the program management of information and website technologies.

It is a very large, comprehensive and detailed compendium of rules, but still there are gaps. One important criticism addressed to those standards is that they do not reach government contractor´s personnel, which is one of the most opaque aspects of the conflicts of interests. Specially along the crisis of 2008, when some critical situations arose involving huge corporations, the existence of the above mentioned gaps had led government to bailout AIG insurance company, having as a key advisor the Treasury official Dan Jester (as a contractor, not government employee), who owned a huge quantity of Goldman Sachs stocks at that moment. As it is widely known, Goldman Sachs had strategic interest in AIG´s bailout, since the company had sold US$ 500 billion on Credit Default Swaps by the end of 2007, some of which were purchased by Goldman. In face of its imminent insolvency, government decided to bailout AIG, under the allegation that its debacle would contaminate the whole economy. This decision represented an expenditure of over US$ 100 billion for US Treasury, from which almost US$ 13 billion went to Goldman Sachs of investor Dan Jester. Since then, OGE has been trying to improve the reach of

the Standards of Conduct, fiercely increasing contractor´s responsabilities over private personnel´s interests, but it is still a matter of hard approach.

Besides its main task of addressing cases of conflicts of interests, OGE also requires financial disclosure of some of their employees. From those high-level senior officials (some 24,000 people only within the Executive branch), the Standards demand a public financial disclosure. In the other hand, those who occupy strategic positions regarding corruption risks (around 275,000 employees), such as contracting, procurement and grants of licensees, are subject to confidential financial disclosure.

It´s interesting to point out that, although having access to the financial disclosures of such a large quantity of employees, which is indeed a quite valuable data, OGE does not perform any check regarding assets evolution of the civil servants, neither has any interaction with Internal Revenue Service - IRS for crossing-data procedures.

Besides preventing situations of conflicts of interests, which is, in fact, its core business, OGE also keeps educational and training programs, not only for its own personnel, but to the employees of other agencies and, even, other branches. As a matter of fact, counting on a reduced workforce of only 80 people, educating and training other civil servants in ethics is a real need for OGE, so that the agency can multiply its knowledge and expertise among the 5,000 ethics officials spread over all government agencies.

5.3.1.3 The Offices of the Inspectors General (OIG)

The Offices of the Inspectors General play an important role in the fight against corruption in United States. Claimed to be one of the most independent entities in the country, the chain of 74 IG´s are, as a matter of fact, a high-standard group of public officials who has jurisdiction over government bodies in order to detect and investigate allegations of bribery, waste, fraud, civil right violations, as well as assist management in promoting integrity, economy, efficiency and effectiveness. As far as government controls are concerned, the OIG´s may be considered the internal control of government agencies, both

addressing criminal and administrative offences committed against public interests.

The head officials of the OIG´s shall be appointed by the President and submitted to Senate approval. Each Inspector General should report to the head of the agency/department involved, although even the head of the agency cannot prevent or prohibit the OIG from initiating, carrying out or completing any audit or investigation. Only the President can remove or transfer an IG, but shall send before a written justification to the Senate and to the House of Representatives.

Complementary to the jurisdiction of the OGE, whose Standards of Ethics do not reach contractor´s personnel, OIG´s have power to investigate not only employees of their own agencies, but also contractors or any organization receiving grant money from the government.

5.3.2 Government Accountability Office (GAO)

GAO is a large agency, employing more than 3,000 people, mostly in its headquarters in Washington DC, but also with branches in 11 other strategic cities. Its 2012 budget reached US$ 533.6 million, but their records indicate a return of US$ 105 on every dollar invested in the agency. The head of the agency is the Comptroller General of the United States and has a 15-year mandate, which means a great dose of independence, both towards Executive and Legislative branches.

GAO is an agency that performs, from the point of view of the Executive branch, the external control. Founded in 1921, GAO is a congressional agency that oversees how the Executive branch spending the budget and how government programs and public policies are being developed. Its reports supply both legislative houses of technical subsidies for monitoring the proper spending of taxpayers money and, eventually, pushing the Executive for adjustments.

GAO still withdraws its legal framework from the 1921 Budget and Accounting Act, although new legislations have been passed throughout the decades to update the original Act. Besides its legal duties, however, most of

the GAO´s activities are performed under requests of congressional committees or subcommittees.

Notwithstanding, several other important bodies compound the framework, each of them with very specific roles and that may, in one point or another, interface with above mentioned ones in anti-corruption actions or policies. However, they cannot be considered as part of the US anti-corruption strategy, since none of them has the corruption combat as a core task.

That´s the case, for example, of the Internal Revenue Service – IRS, which is the public agency responsible for collecting tax payments. The organization is clearly devoted to deal with taxpayers´ money, but within its structure there is a Criminal Investigation division that may join other agencies in the course a corruption investigation, specially when the corrupt practice is financed by money laundering or similar financial crime, when some financial investigative skills, such as forensic technology, are necessary to reveal a criminal scheme.

Another important agency that helps combating corruption is the Office of Special Counsel – OSC, mainly through its Disclosure Unit, which is an important channel for whistleblower´s reports on corrupt practices.

As far as law enforcement is concerned, the Federal Bureau of Investigation – FBI is the police force in charge of covering large-scale anti-corruption operations in federal level.

5.3.3 The Public Integrity Section (PIN)

The Public Integrity Section (PIN) was created as a part of the U.S. Department of Justice's Criminal Division in March, 1976 for the purpose of consolidating the responsibility for nationwide coordination of the Federal efforts against official corruption at all levels of Government.

5.3.3.1 Function of PIN

The Public Integrity Section oversees the federal effort to combat corruption through the prosecution of elected and appointed public officials at all levels of government. The Section has exclusive jurisdiction over allegations of criminal misconduct on the part of federal judges and also

supervises the nationwide investigation and prosecution of election crimes. Section attorneys prosecute selected cases against federal, state, and local officials, and are available as a source of advice and expertise to other prosecutors and investigators

5.3.4 Federal Bureau of Investigation (FBI)

The FBI originated from a force of special agent created in 1908 by Attorney General Charles Bonaparte during the presidency of Theodore Roosevelt. In the 1935 Department of justice appropriation, Congress officially recognized the Division as the Federal Bureau of Investigation, the FBI. The name became effective on March 22, 1935, when the President signed the appropriation bill.

5.3.4.1 Functions of the FBI

In executing the following priorities, The FBI produces and uses intelligence to protect the nation from threats and to bring to justice those who violate the law.

I. Protect the United States from terrorist attack.
II. Protect the United States against foreign intelligence operations and espionage.
III. Protect the United States against cyber-based attacks and high-technology crimes.
IV. Combat public corruption at all levels.
V. Protect civil rights.
VI. Combat transnational and national criminal organizations and enterprises.
VII. Combat major white-collar crime.
VIII. Combat significant violent crime.
IX. Support federal, state, county, municipal, and international partners.
X. Upgrade technology to successfully perform the FBI's mission.

The FBI is the investigative arm of the US Department of Justice. The FBI's investigative authority can be found in Title 28, Section 533 of the US Code.

Additionally, there are other statutes, such as the Congressional Assassination, Kidnapping, and Assault Act (Title 18, US Code, and Section 351）, which give the FBI responsibility to investigate specific crimes.

5.3.4.2 Structure of the FBI

The FBI is headquartered in Washington D.C. The offices and divisions at FBI Headquarters provide program direction and support to 56 field offices, approximately 400 satellite offices known as resident agencies, four specialized field installations, and over 45 foreign liaison posts known as Legal Attaches. Administration department can be divided into Administrative Services Division, Finance Division, Office of the Chief Information Officer, Office of Professional Responsibility, Records Management Division, Security Division Counterterrorism department can be divided into Counterintelligence Division, Counterterrorism Division, Criminal Investigative Division, Cyber Division, Office of Intelligence Law Enforcement Services department can be divided into Critical Incident Response Group, Criminal Justice Information Services Division, Operational Technology Division, Laboratory Division, Office for Law Enforcement Coordination, Office of International Operations, Training and Development Division. Office of General Counsel (OGC) is composed of four branches: The Litigation Branch, the General Law and Legal Training Branch, the Investigative Law Branch, the National Security Law Branch.

5.4 Initiative of Government of India to Combat Corruption

India endorsed the ADB-OECD Anti-Corruption Action Plan in 2001 and ratified the UN Convention against Corruption (UNCAC) and the UN Convention against Transnational Organized Crime (UNCTOC) recently in May 2011. Therefore, it is duty bound to bring its legislative framework closer to the International norms. Significant effort is required not just to strengthen the anti-graft laws but also to provide teeth and freedom to the implementing

agencies. Following is a snapshot of current institutional framework that is supposed to prevent corruption.

There are various bodies in place for implementing anti-corruption policies and raising awareness on corruption issues. At the federal level, key institutions include the Supreme Court, the Central Vigilance Commission (CVC), the Central Bureau of Investigation (CBI), the Office of the Controller & Auditor General (CAG), and the Chief Information Commission (CIC). At the State level, there are local anti-corruption bureaus such as the Anti-corruption Bureau of Maharashtra.

In recent years, the Supreme Court has taken a stronger stance against corruption. It has challenged the powers of states in several instances. For example, in 2007 in Uttar Pradesh, it challenged the state governor's powers to pardon politically connected individuals based on arbitrary considerations. In other instances, judges have taken on a stronger role in responding to public interest litigation over official corruption and environmental issues. In December 2006, in a landmark ruling, the Supreme Court ruled that prosecutors do not need prior permission to begin proceedings against politicians facing corruption charges. It has also started addressing corruption in the police by mandating the establishment of a police commission to look into these matters and has ruled that corrupt officers can be prosecuted without government consent.

5.4.1 Central Vigilance Commission (CVC)

5.4.1.1 The Santhanam Committee on Prevention of Corruption

The Central Vigilance Commission was established by the Government of India in 1964 on the recommendations of the Santhanam Committee on Prevention of Corruption. Before finalising its report, the Committee submitted its interim recommendations to the government in two parts. The first recommended the establishment of the Central Vigilance Commission. The second suggested conferring powers of the Commission is similar to those

under Sections 4 and 5 of the Commission of Enquiry Act, 1952,[30] so that it could undertake an inquiry into transactions where public servants were suspected of having acted improperly or in a corrupt manner.

The Committee envisaged a wide role for the CVC. It was not satisfied merely with the existing arrangements intended to investigate and punish corruption and misuse of authority by individual officers. "While this is indispensable, the Committee feels that the Central Vigilance organisation should be expanded so as to deal with complaints of failure of justice or oppression or abuse of authority suffered by the citizens though it may be difficult to attribute them to any particular official or officials."[31]

The Committee therefore recommended that the CVC should be vested with jurisdiction and power, inter alia, to "inquire into and investigate: (a) complaints against acts or omissions, decisions or recommendation, or administrative procedures or practices on the grounds that they are: (i) wrong or contrary to law; (ii) unreasonable, unjust, oppressive or improperly discriminatory; (iii) in accordance with a rule of law or a provision of any enactment or a practice that is or may be unreasonable, unjust, oppressive or improperly discriminatory; or (iv) based wholly or partly on a mistake of law or fact."[32]

The Government of India did not accept this recommendation. The Resolution with which the CVC was set up[33] did not have this clause in its charter of functions. The reasoning for its exclusion was explained in these words: "The importance and urgency of providing machinery for looking into grievances of citizens against the administration and for ensuring just and fair exercise of administrative power is fully recognised. But it is considered that

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[30] Powers of a civil court trying a civil suit, like summoning attendance of persons; requisitioning records and documents; receiving evidence on affidavits; issuing commissions for the examination of witnesses or documents, etc.

[31] DO Letter Number 1/4/63-CPC dated 22 February 1963 from Shri K. Santhanam, Chairman, Committee on Prevention of Corruption to Shri Lal Bahadur Shastri, the then Home Minister, Government of India; Paragraph 3.

[32] Paragraph 6 of the Scheme of the CVC forwarded by the Chairman to the Union Home Minister vide his DO Letter dated 22 February 1963.

[33] Resolution No. 24/7/64- A V D dated 11 February 1964.

the problem is big enough to require a separate agency or machinery and that apart from this the Central Vigilance Commission would be overburdened if this responsibility were to be placed upon it, and the Commission might as a result be less effective in dealing with the problem of corruption."[34]

The recommendation made by the Committee in the second part[35] that the CVC should be given through suitable legislation certain powers to enable it to undertake enquiries remained unimplemented till 2003 when the CVC Act was legislated. Though these powers are now available with the Commission,[36] they are not used by it.[37]

5.4.1.2 The Resolution of 1964

The Resolution of 1964 had two significant provisions. One, it defined the charter of the CVC. Its main function was to undertake an enquiry or to cause an enquiry or investigation to be made into any complaint of "corruption, misconduct, lack of integrity, or other kinds of malpractices or misdemeanor on the part of a public servant including members of the All India Services even if such members are for the time being serving in connection with the affairs of a state government."[38] The other was to maintain that though the Commission will be an attached office of the Ministry of Home Affairs, "in the exercise of its powers and functions it will not be subordinate to any Ministry/Department and will have the same measure of independence and autonomy as the Union Public Service Commission."[39]

5.4.2 Central Bureau of Investigation (CBI)

The CBI owes its origin to the SPE established by the government in 1941 to deal with corruption involving wartime purchases and supplies. The SPE was set up through an executive order by the Department of War, with its

[34] Statement laid by the Government of India on the tables of the Lok Sabha and Rajya Sabha about the scheme on 16 December 1963; Paragraph 3.
[35] Paragraph 6 (A) of the Scheme of the CVC forwarded by the Chairman to the Union Home Minister vide his DO Letter No. 1/4/63-CPC dated 17 August 1963.
[36] The CVC Act, 2003, Section 11.
[37] Based on personal communication with a Commissioner, Central Vigilance Commission
[38] Resolution No. 24/7/64: A V D dated 11 February 1964; Paragraph 2 (ii) (b).
[39] Ibid. Paragraph 3.

headquarters in Lahore. After the war ended, the need for a central agency to investigate cases of corruption involving central government employees continued to be felt. In 1946, the Government of India enacted the Delhi Special Police Establishment Act to give the organisation a statutory cover. The organisation was brought under the Home Department and its headquarters shifted to Delhi. In 1948, the post of the IGP was created to head the organisation. The SPE provided the nucleus on which the CBI was established on 1 April 1963 through a Resolution[40] of the Ministry of Home Affairs, Government of India. The need to establish this organisation was felt not only to investigate crimes handled at that time by the Delhi Special Police Establishment (DSPE), including crimes with interstate ramifications, but also to collect crime intelligence, liaise with INTERPOL, maintain crime statistics and disseminate crime and criminal information, conduct police research, and coordinate laws relating to crime. Initially, it consisted of the following six divisions:

I. Anti-Corruption Division(DSPE)
II. Technical Division
III. Crime Records and Statistics Division
IV. Research Division
V. Legal and General Division and
VI. Administration Division.

Over a period of time, the CBI's charter was changed. While some of its functions were transferred to new organisations, such as the Bureau of Police Research and Development and the National Crime Records Bureau, its criminal investigation work increased significantly. A committee headed by the Cabinet Secretary reviewed the CBI's functioning and recommended the reorganisation of its criminal investigation work. This was done in 1987 when it was decided that the Anti-Corruption Division would take up the investigation of corruption cases and Special Crimes Division would investigate major conventional crimes, such as murder, kidnapping, rape,

[40] Resolution No. 4/31/G1 dated 11 April 1963.

rioting, arms smuggling, hijacking, illegal immigration, etc and economic offences, such as banking and other financial frauds, customs offences, counterfeiting of currency, narcotics and drug peddling, black marketing, etc. In 1994, investigation of economic offences was transferred to a separate Economic Offences Division. Thus what was initially an anti-corruption agency developed over a period into a specialised agency with a comprehensive charter to investigate a wide variety of crimes.

The CBI functions under the Ministry of Personnel, Public Grievances and Pensions, Government of India. Its headquarters is in Delhi, but it has branches across the country.

5.4.2.1 Legal Status of CBI

The CBI derives its legal powers from the Delhi Special Police Establishment Act of 1946. This Act was passed "to make provision for the constitution of a special police force in Delhi for the investigation of certain offences in the Union Territories, for the superintendence and administration of the said force and for the extension to other areas of the powers and jurisdiction of members of the said force in regard to the investigation of the said offences."[41] The Act of 1946 is a small piece of legislation, consisting of seven sections in all, including the last one about "repeal". The Act is not confined merely to union territories, as the central government is authorised to extend it to other states and railway areas.[42] With the consent of the state governments, the Act has been extended to all states. The Act authorises the investigating agency to investigate only those offences, which are notified by the central government.[43] Almost all major offences have been specified by various notifications issued periodically by the government. The Act authorises the officers to enjoy all powers, duties, privileges and liabilities that police officers of the area enjoy.[44] The organisation cannot exercise its powers and jurisdiction

[41] The Delhi Special Police Establishment Act, 1946, Preamble
[42] Section 5 (1) of the The Delhi Special Police Establishment Act, 1946
[43] Section 3 of the The Delhi Special Police Establishment Act, 1946
[44] Sections 2 (2) & 5 (2) & (3) of the The Delhi Special Police Establishment Act, 1946

in any area in a state without the consent of the state government.[45] The CBI thus does not have any original jurisdiction to do crime investigation work in a state. If the state government does not invite the CBI, the only way it can work there is when the Supreme Court or High Court asks it to do so. The courts get this power by virtue of their obligation and duty under the Constitution to protect citizens' fundamental rights. Finally, there is the provision that vests the superintendence of this important investigating agency in the central government,[46] though now it partly vests in the CVC too.

5.4.2.2 Investigation by CBI

As the premier investigation agency of the country, the CBI is generally preferred over state police agencies for investigation into high-profile complicated cases, particularly those involving influential people. Why does this happen? Does the CBI get this prominence by default because there is no other similar organisation?

Partly, this is owing to a lack of faith on the part of the public in their local police forces. The state police forces have been so severely politicised that generally, the public are unwilling to trust their ability to function impartially and objectively as agencies of the law. The public therefore want their cases to be investigated by an organisation that is somewhat remote from the scene and cannot be easily manipulated by local politicians.

To some extent this can also be attributed to a view that the CBI would perform a better job of the investigation. This raises a question: Is the CBI better skilled in crime investigation work than the state police forces?

The quality of investigations is determined by two factors: skill and impartiality. Let's take the skill first.

5.4.2.3 Skill

Most of the officers and staff in the CBI are on deputation from the state police forces – the same forces that are considered inferior to the CBI in investigation work. The organisation, in fact, depends very heavily on officers

[45] Section 6 of the The Delhi Special Police Establishment Act, 1946
[46] Section 4 of the The Delhi Special Police Establishment Act, 1946

and others to serve in the CBI on deputation and is unwilling to reduce this dependence. This has not gone down well with the Department-Related Parliamentary Standing Committee of the Ministry, which insists that the CBI induct fewer officers on deputation and depend more on departmental cadre. "The Committee is of the opinion that by the time the deputationists gain sufficient expertise, their term of deputation is likely to be over and they return to their parent organization, which in turn affects the smooth functioning of CBI. Therefore, the Committee is of the firm view that less dependence should be placed on deputation."[47]

Whether one agrees with the Standing Committee's thinking or not, some significant differences between the CBI and state police forces in respect of investigation work must be noted. First, the CBI is a specialised agency, undertaking only crime investigation work, while the state police have to perform multifarious tasks. Second, the level at which crime investigation is carried out and supervised is higher in the CBI than in state police forces.

Unlike the state police forces where investigations are mainly undertaken by Assistant Sub-Inspectors and Sub-Inspectors or at most by Inspectors, most investigations in the CBI are conducted by officers of the rank of at least Deputy Superintendent of Police and are supervised very closely by officers at senior levels. Third, several support services are available to the CBI at its doorsteps, such as forensic science, legal knowledge, chartered accountants, financial experts and specialists in different fields that are not normally available to the investigating officers in state police stations. Fourth, the CBI, unlike the state police forces, does not have to confront the public in adversarial roles and consequently receives better cooperation from them than what the state police forces normally get. The CBI thus does have some advantages over state police forces in doing their investigation work. However, it is not merely investigating skills that determine the outcome; it is also the

[47] Department-Related Parliamentary Standing Committee of the Ministry, Thirty-seventh Report presented to Parliament on 9 March 2010; Chapter III, Paragraph 2.3

element of impartiality and objectivity with which investigations are done that helps in building credibility and the image of the investigating agency.

5.4.3 Office of the Comptroller & Auditor General (CAG)

The CAG is an official mandated by the Constitution to act as a watchdog on government finances and its functioning. He plays an essential role in making the government more transparent and accountable to the legislature as well as civil society. The Constitution tries to ensure that he has substantial autonomy from other arms of the government. He may be removed only by the same process as that for a Supreme Court judge; his salary and other benefits are protected; and he may not be appointed to any other government office after retirement. The CAG audits the accounts of the central and state governments and those of institutions which are government owned or government-funded. Like the auditor of a private company, its job is to ensure that correct standards have been used to account for financial transactions. But beyond this, it checks whether financial transactions conform to appropriate rules. The CAG also assesses the performance of different government departments, companies, pieces of legislation or even welfare schemes such as the National Rural Employment Guarantee Scheme and the Sarva Shiksha Abhiyan.[48]

5.4.3.1 Role of the Office of the Comptroller & Auditor General (CAG)

The Comptroller and Auditor General of India (CAG) and the Indian Audit and Accounts Department (IAAD) functioning together constitute the Supreme Audit Institution of India (SAI). Senior functionaries of the SAI representing the CAG in the states are called Accountants General.[49]

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[48] Available at http://www.prsindia.org/administrator/uploads/general/1240289841~~CAG%20primer.pdf last visited on 25 May 2012

[49] Available at http://www.archive.india.gov.in/spotlight/spotlight_archive.php?id=75 25last visited on May 2012

The Constitution of India has mandated the institution as the auditor to the nation. Articles 148 to 151 of the Constitution prescribe a unique role for the Comptroller and Auditor General of India in assisting the Parliament to enforce the said accountability of the Government departments.[50]

The CAG audits all receipts and expenditure of both Central and State Governments, including those of bodies and authorities substantially financed by the government. The CAG is also the external auditor of government-owned companies.[51]

The reports of the CAG are taken into consideration by the Public Accounts Committees of the Parliament and the State Legislatures. The CAG of India is also the head of the Indian Audits and Accounts Service, represented by the offices of the Principal Accountants General/Directors General, Accountants General/Principal Directors across the country.[52]

5.4.4 Ombudsmen or Lokpal

5.4.4.1 Ombudsman in England

(i) General

The Ombudsman in England is officially known as the Parliamentary Commissioner. The provision for the creation of the office of the Ombudsman was made under the Parliamentary Commissioner Act, 1967. He has an independent status and been given statutory powers. He is appointed by the Crown and holds office till the age of 65 years. He can be dismissed by a motion of Parliament. His salary and pension are charged on the consolidated fund.

The Commissioner cannot entertain a complaint direct from a citizen; it must come through a member of the House of Commons. This is required to reconcile the notion of Ministerial responsibility with the

[50] ibid
[51] ibid
[52] Available at http://www.archive.india.gov.in/spotlight/spotlight_archive.php?id=75 last visited on 22 November 2013

concept of such institution. He does not have any other power except to investigate and report.

He submits his report to the Select Committee of the House of Commons which examines it and proposes action. Ministers are not excluded from the purview of this jurisdiction. But certain matters are excluded, such as matters affecting Foreign Affairs, extradition, investigation of crime. Leaving these exceptions, Parliamentary Commissioner may investigate into allegations of 'mal-administration' i.e. injustice caused by action taken in the exercise of 'administrative functions.'

(ii) Mal-administration

The compendious term 'mal-administration' used in the Parliamentary Commission Act, 1967 has not been defined in the statute. This means that the Ombudsman himself can define this and workout its ramifications. Accordingly the Ombudsman has interpreted the term mal-administration in wide sense as including 'bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness and so on." To this list have also been added decisions 'thoroughly bad in quality' or clearly wrong. According to Wade,15 "Bad decisions are bad administration and bad administration is mal-administration". However, Ombudsman now regards that 'mal-administration' means 'bad administration' which includes any action or inaction by government departments which, he feels, is unreasonable, unjust or oppressive. Mal-administration thus covers a multitude of administrative faults.

(iii) Procedure

The procedure followed by the Ombudsman is informal. However, he is empowered to call for oral or documentary evidence from anybody, excluding Cabinet documents and to take evidence on oath. But he is not empowered to punish anybody for contempt in refusing to comply with his orders in such cases. He has power to refer

the matter for consideration of the High Court.

(iv) Jurisdiction

The jurisdiction of the Ombudsman is confined to faults in administration as distinguished from questions of policy. Moreover he has no power to implement his finding. His only function is to report his finding to the Parliament and it is left to Parliament to decide what action should be taken on his report.

5.4.2 Ombudsman In India : Lokpal

The Indian Lokpal is synonymous to the institution of Ombudsman existing in the Scandinavian countries (Sweden, Finland, Denmark etc). The office of the Ombudsman originated in Sweden in 1809 and has been adopted by many nations. The Swedish word Ombudsman means ―a procurator or agent of civil affairs which may be interpreted as ―the people advocate. Ombudsman is a government official who investigates citizen's complaints against the administrative and judicial action. Though appointed by the legislature he is an independent functionary – independent of all three organs of the state, but reports to the legislature. The Ombudsman can act both on the basis of complaints made by citizens or suo moto-that is, on his own initiative. He can look into allegations of corruption as well as maladministration

The mechanisms available in the regular process of government, are inadequate to check corruption in administrative department, for example, and any decision of an official can be appealed to a higher official all the way up to the head of a department. However this mechanism has inherent flaws. Though officers enjoy departmental fraternity with those against whom complaints are made, and both sail the same boat. Therefore their impartiality in judging appeals is always doubted. On the legislative side, an individual can approach the member representing his constituency for his demands but given the absence of easy access of an ordinary to his representative, this has more remained a myth than reality. Other than this politics is ―now ridden with nepotism and favoritism, criminals have easy access to legislature, political corruption is mounting this is more dangerous than bureaucratic corruption.

5.4.2.1 Historical background of Lokpal

After India attained independence, M.K. Gandhi‘s call to his colleagues in the freedom struggle to convert their association into Lok Sevak Sangh and engage in social constructive work was followed by a few of its true colleagues, one of them is Shri Shambhu Dutta Sharma who had refused to serve under the British and joined him in India‘s struggle for independence. They later formed a Lok Sevak Sangh as a sister organization of the Servants of People Society (founded by Lala Lajpat Rai and inaugurated by M.K. Gandhi in 1921) and undertook the constructive social work during which they came face to face with pervasive corruption which they found as the greatest impediment and hindrance to any developmental work. They identified political corruption as the mother of all corruption and just as in the case of a staircase we have to begin the clean up from top, it decisively undertook the initiative to eliminate corruption, criminality and abuse of authority from Indian politics, which they termed it as political reform work that they undertook as a critical constituent of civil society in association with many fraternal NGOs.

The administrative reform committee of Rajasthan and Maharashtra recommended the establishment of this institution at state level. On 16th December 1963 in parliament the Home Minister also admitted the importance and urgency of providing machinery for looking into the grievances of citizen against administration. The Ist Administrative Reform Commission (ARC) set up in 1966 under the Chairmanship of Morarji Desai in its very first intrim report on the problem of redress of citizens Grievances recommended the constitution of a two-tier machinery of a Lokpal at the Centres and Lokayuktas in the states, as it will remove the sense of injustice from the minds of citizens and also instill the public confidence in the efficiency of administrative machinery.

Sri M. C. Setalvad, in his speech at the All India Lawyers' Conference held in 1962 suggested the idea of establishing an institution similar to that of an ombudsman. Such suggestion was extensively investigated by the

Administrative Reforms Commission.

(ii) Interim Report of the Administrative Reforms Commission: The Proposed Lokpal

In India, the creation of the institution of Lokpal similar to that of the Ombudsman was recommended by the Interim Report of the Administrative Reforms Commission for the following reasons:

(i) Since a democratic government is a 'government of the people, by the people and for the people: it has an obligation to satisfy the citizens about its functioning and to offer them adequate means for the ventilation and redress of their grievances.

(ii) The redressal of citizens' grievances is basic to the functioning of democratic governments, and will strengthen the hands of the government in administering the laws of the land without fear or favour, affection or ill-will and enable it to go up in public faith and confidence without which progress would not be possible.

(iii) The existing institutions of judicial review and Parliamentary control are inadequate in view of the ever expanding range of governmental functions most of which are discretionary.

(iv) There prevails a public feeling against prevalence of corruption, widespread inefficiency and administration's unresponsiveness to popular needs.

On the ground of these factors, the institution of Ombudsman was considered by the Commission as an easy, quick, and inexpensive machinery for the redress of individual grievances of the citizens, as in the same circumstances it was done in other countries where such institution has already been established. The Commission has laid down the following principles which should be borne in mind in establishing such institution in India:

(a) He should be demonstrably independent and impartial.

(b) His investigations and proceedings should be conducted in private and should be informal in character.

(c) His appointment should, as far as possible, be non-political.

(d) His status should be compared with the highest judicial functionary in the Country.

(e) He should deal with matters in the discretionary field involving acts of injustice" corruption and favouritism.

(f) His proceedings should not be subject to judicial interference and he should have the maximum latitude and powers in obtaining information relevant to his duties.

(g) He should not look forward to any benefit or pecuniary advantage from the executive Government.

(iii) Appointment of Lokpal and Service Conditions

As mentioned in the Draft Bill appended to the Interim Report of the Commission, the Lokpal is to be appointed by the President, on the advice of the Prime Minister in consultation with the Chief Justice of India and the Leader of the Opposition in Lok Sabha. The person who is to be appointed as Lokpal must have severed his connection, if any with any Political Party, his Membership in Parliament or the legislature of State or any office of profit. He can hold office for five years with eligibility for reappointment. He shall not be removed except by the procedure of impeachment, as in the case of Supreme Court Judges. His status and salary shall be the same' as that of the Chief Justice of India.

(iv) Jurisdiction

The Lokpal is empowered to investigate into any administrative action taken by or with the approval of a Minister or Secretary of Union or State Government, either on receiving a written complaint by an aggrieved person or suo motu, relating to mal- administration, undue favour or corruption.

But the Lokpal is not to undertake investigation in respect of which the aggrieved person has any remedy before a Court of law or statutory Tribunal.

(v) Matters excluded from the Jurisdiction

However, there are certain matters excluded from the jurisdiction of Lokpal-

(a) Action relating to Foreign Government;

(b) Action taken under Foreigners' Act and the Extradition Act;

(c) Action taken for the investigation of crime;

(d) Exercise of power to determine whether a matter shall go to Court or not;

(e) Action relating to commercial relations governed by contract;

(f) Action taken relating to appointments, removals etc. of personnel;

(g) A discretionary action, except where .there has been no exercise of discretion at all.

(vi) Procedure

A person aggrieved by administrative fault shall make complaint to the l.okpal. Investigation shall be conducted in private and the Minister or Secretary against whom Mal-administration is allowed shall have an opportunity to comment on the allegations so made. The Lokpal shall have the power of a Civil Court for the purpose of summoning witnesses etc. for securing evidence.

(vii) Chequered Career of Lokpal Bill The institution of Lokpal has not so far been established owing to the chequered career of the Lokpal Bill. In its interim report on the "Problem of Redress of Citizen's Grievances" submitted in 1966, the Administrative Reforms Commission recommended the setting up of an institution of Lokpal. On basis of this report, a private member ? brought before Parliament a Lokpal Bill in 1967. It was not passed as the Union Government brought a Lokpal and Lokayukta Bill, 1968. Before this bill could be passed, the Lok Sabha was dissolved and consequently this bill lapsed. A fresh bill was reintroduced in 1971, but this also met similar fate, owing to the dissolution of Lok Sabha In 1977. During Janta regime which followed, a fresh Lokpal Bill was introduced in Parliament. This bill has excluded the office of Lokayukta, which has been left to State legislation. This biil also could not be enacted. Thereafter the Government introduced Lokpal Bill, 1985 in Lok Sabha. The Bill closely follows the model of the Lokpal Bill, 1977. Owing to certain controversies, the 1985 Bill was' referred to Select Committee for reconsideration. In the meantime the term of Lok Sabha ended and consequently the Bill lapsed. A renewed effort was made by the National Front

Government on coming in power in Centre by introducing in Parliament the Lokpal Bill, 1989. In this respect it is convenient to refer to the provision of that Bill indicating the broad features of the institution as proposed to be set up in India.

5.4.3 Role of Anna Hazare in Lokpal Movement

In 2010, following major corruption scandals, the Indian government drafted a version of a *Lokpal* bill. Many citizens and social activists considered the proposed measure weak, as it did not cover the prime minister, members of Parliament, and cabinet ministers. Dissatisfaction gave rise to a national protest movement in 2011 under the leadership of seventy four year-old Anna Hazare of Talegan Siddhi from Maharashtra. Anna‘s social activities as a community organizer against alcohol and ensure water access for individuals in rural areas was already acknowledged.

His popularity was highligted through his work in 2003 for advocating the Freedom of Information Act in India, which was eventually passed in 2005. He has led anticorruption protests for two decades and finally in 2011 under the banner of India Against Corruption Lok Pal movement started. Anna and his team believed that the government‘s version of the *Lokpal* bill was too weak because the ombudsman it would establish could not investigate actions of elected officials. The government argued that an ombudsman was a good idea, but that it would be too powerful if it was able to investigate elected leaders. After unsuccessful discussions and deliberations with the government among, Hazare began a hunger strike on April 5, 2011 for a stronger bill. Subsequently large protests erupted in support of Hazare. Protesters hoped to pressure the Indian government into forming a Joint Drafting Committee for a *Lokpal* bill with five ministers and five civil society members.

The protest sparked extensive discussions across news and social media about whether the bill should include the entire government. It also brought many people to the streets in support of Hazare‘s movement. After four days of Hazare fasting, the government agreed to form the Joint Drafting Committee which met nine times over the course of the next two months with no

substantial result. The significant differences arose between the ministers and civil society members. These differences were primarily over whom the *Lokpal* would have authority to investigate, the obstacle to earlier versions of the bill. Members were further divided after police arrested social activist Baba Ramdev and forcefully removed his supporters, who were peacefully protesting against corruption in Ramlila Maidan (a public square). However, after massive protest across the country, a strong Lokpal bill was introduced in Lok Sabha which excludes the top government officials. Subsequently it was rejected by Anna and the movement continued. Despite strong support for the movement and its ability to gain several key concessions from the Indian government, the stronger version of the *Lokpal* bill developed in August has not passed. On December 27, 2011, the *Lok Sabha*, approved the government‘s latest version of the bill and the demand of strong Lokpal by Anna remained a dream. However, its always better to have a toothless tiger than not to have at all and media has been an instrumental for a present Lok Pal prepared by the government.

The fight against corruption is a challenging task for every country in the modern world, no matter if it is a developed, developing or poor developed economy. For very different realities, as mentioned in this paper, there´s no single remedy. Maybe this is the main difficulty in combating corruption nowadays. The more ideas and experiences are changed, and they should be, the more countries learn what definitely does not work in their own realities. The perfect remedy for each “disease” will depend on a large number of circumstances. So, responding to the question that is placed in the title of this article, panaceas won´t defeat corruption anywhere, but only “handmade” policies, capable of addressing specific hindrances that affect this or that country and, most of all, political will to remove institutional barriers and implement those “handmade” policies.

Comparatively UK and USA institutions are more independent and transparent than Indian anti-corruption institutions. Anti-corruption agencies, here understood as specific bodies dedicated to fight corruption, is just one of

the possible approaches to the matter. As mentioned in the chapter dedicated to the models of anti-corruption bodies, there are very encouraging and tested outcomes from the implementation of ACA around the world. Therefore, the answer is yes, ACA can eventually be a solution for defeating or reducing corruption practices to acceptable levels in any country. In our opinion, what will determine the failure or success of an anti-corruption agency in a given country is the political will to carry out the right approach.

CHAPTER-VI

Role of Judiciary to Combat Corruption

CHAPTER VI

ROLE OF JUDICIARY TO COMBAT CORRUPTION

The role of the judiciary in a democratic society such as ours is a pivotal one. The judiciary is one of the three pillars of the modern democratic nation, state and is essential to the process of check and balance so fundamental to the way societies such as ours are meant to operate and function. In contemporary democratic based on the rule of law, the role of judiciary is to protect the rights and liberties of individuals, providing them with a right to fair trial by an impartial and competent court, and being one of the branches of the state administration, to supervise the other two branches by providing compliance with to the law and constitution. Without a sound and functioning judiciary there is no rule of law.

The three organs of the Indian government – Legislature, Executive and Judiciary perform three essential functions of rulemaking, rule application and rule adjudication respectively. The main principle behind this formulation is separation of powers: which brings accountability, keeps the government restrained and in this way our rights and liberties are safeguarded. In fact the main driving force behind this is based on the simple saying that 'power corrupts man and absolute power corrupts absolutely'. In the words of Montesquieu, "Constant experience has shown us that every man invested with power is apt to abuse it, and to carry his authority until he is confronted with limits'.

In short absolute power without accountability leads to corruption. Corruption in India is always in limelight. In his foreword to the UN Convention Against Corruption, the then Secretary General of the United Nations, Mr. Kofi Annan wrote, "Corruption is an insidious plague that has a

wide range of corrosive effects on society. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and it allows organized crime, terrorism and other threats to human security to flourish." However recently what has caught our attention is the corruption charges levied against judges; examples being a Calcutta High Court Judge Soumitra Sen guilty of misappropriating large sums of money and making false statements regarding it and Chief Justice of Karnataka High Court P D Dinakaran, alleged for land grabbing and corruption. It is nevertheless to be noted that the word 'recently' should not mislead us to think that corruption in Judiciary is a new thing, it has always been there, only less talked about. But given the increase in the rate of corruption charges one can't help but ask the question 'who is judging the judges?'

There is another principle working together with the separation or balance of power i.e., checks and balances. Simply put the theory of checks and balances holds that no organ should be given unchecked powers. The power of one organ should be checked and restrained by the other two, thus a balance is secured. After all 'power alone can be the antidote to power'. So we see in India how the executive is individually and collectively responsible to the legislature, although here the accountability has decreased because of anti-defection law, whereby if there is any amount of dissent from the legislator, he is threatened with removal which can cost his constituency being unrepresented. Thus all decisions of party leaders are now just rubber-stamped by Parliament.[1]

The laws passed by the legislature are checked by the judiciary, if it goes against the Constitution the latter declares it null and void. Moreover the legislature is accountable to the people who elect them for five years. Given this it becomes clear that the judiciary is the guardian of the Constitution and protector of fundamental rights. In spite of this there is a sudden spate of judiciary corruption which is proving to be self-defeating and is indicating

[1] Harsh Gupta, "Defecting from anti-defection", in available at: http://www.livemint.com/2009/06/07212108/Defecting-from-antidefection.html last visited on 15th July, 2011.

towards the lack of accountability in the institution, this is what I will be discussing in my project. This is important because in the preamble we give to ourselves JUSTICE- Social, Economic and Political.

Any authority that has some amount of public power must be responsible to the people. The fact is that in a 'democratic republic', power with accountability of the individuals enjoying it, is essential to avert disaster for any democratic system.[2] But before moving into the concept of accountability, what is important to note and understand is another concept i.e. 'independence' of judiciary. Both these concepts have to be studied together to understand any one.

6.1 Role of Judiciary to Combat Corruption in USA

The United States Supreme Court has observed: "A democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption."[3]

In modern Supreme Court cases—like the recently decided Wisconsin Right to Life, Inc. decision—corruption appears as a fairly weak constitutional danger. Those Justices who do invoke anticorruption interests often do so defensively, or explain them in terms of serving other interests, like equality or speech. Justice Antonin Scalia has argued that the concept of corruption has become logically unsustainable; Justice John Paul Stevens (as well as several commentators) has attempted to cram it into equality frameworks instead of corruption standing alone. Justice Clarence Thomas has offered to do us a service and throw it out entirely, arguing it means nothing more than the criminal law of bribery.

For the last forty years, the U.S. Supreme Court has grappled with perceived tension between the First Amendment's Free Speech Clause—which

[2] J.S. Verma , 'Mechanism for judicial accountability' ,p.1,in http://www.judicialreforms.org/files/mechanism_jud_acc_verma.pdf, last accessed on 4th of July, 2011.

[3] United States v. Miss. Valley Generating Co., 364 U.S. 520, 562 (1961)

it has interpreted as including the right to spend money to influence elections—and the regulation of political corruption.

This tension has caused the Supreme Court's positions on campaign finance to swing dramatically through time. Over most of the last forty years of modern campaign finance jurisprudence, the Court has held that corruption, the appearance of corruption, the corruption of "influence" and "gratitude," even the "appearance of influence" justifies limitations on money in politics. For the last eight years, however, the pendulum has swung the other way in a series of 5-4 decisions, with the new majority limiting "corruption" to the quid pro quo sale of official action, and suggesting that gratitude and access are not corrupt but rather are inherent in representative government.

Indeed, the current Supreme Court majority has gone so far as to redefine how a democratic system should operate, recasting what many previous courts deemed "corruption" as unexceptionable officeholder "responsiveness." In its 2003 decision in *McConnell v. FEC*, the Court stressed that lawmakers should remain relatively objective on matters of policy—guided by the concerns of their constituents, but not responsive to their donors. Campaign finance regulation was deemed necessary to avert "the danger that officeholders will decide issues not on merits or the desires of their constituencies, but on the wishes of those who have made large financial contributions valued by the officeholder." But eleven years later in *McCutcheon v. FEC*, the Supreme Court expressed a significantly different take. As was the case in McConnell, officeholders were to remain responsive to their "constituents," but now the Court appeared to include in an officeholder's "constituents" his donors, such as Mr. McCutcheon. The aggregate contribution limits at issue in McCutcheon were unconstitutional, according to the Court, because:

Constituents have the right to support candidates who share their views and concerns. Representatives are not to follow constituent orders, but can be expected to be cognizant of and responsive to those concerns.

Of course, the aggregate limits did not prevent a "constituent" from "supporting" a candidate—they limited only big donors from making six-figure contributions to a candidate and her party, raising the question about who exactly the McCutcheon majority viewed as a lawmaker's true "constituents." Finally, in the Supreme Court most recent decision concerning campaign finance, Williams-Yulee v. Florida Bar, the Court dropped the pretext of "constituents" and suggested that political officeholders can and should be expected to be responsive to their "supporters," such as donors. In reviewing a restriction on solicitation by judicial candidates, the Court distinguished between judicial and political elections, noting that "[a] State's interest in preserving public confidence in the integrity of its judiciary extends beyond its interest in preventing the appearance of corruption in legislative and executive elections, because a judge's role differs from that of a politician." The Court then went on to note that "unlike a politician, who is expected to be appropriately responsive to the preferences of supporters, a judge in deciding cases may not follow the preferences of his supporters or provide any special consideration to his campaign donors."

Why is this debate about the meaning of "corruption"—and the degree of appropriate officeholder "responsiveness"—so important? It occurs because of the Court's holding in *Buckley v. Valeo* that regulation of political contributions and spending may only be justified under the First Amendment if it has a tight nexus to the prevention of corruption and the appearance of corruption. The government may not regulate to "level the playing field," or to limit spending so that "too much" money is not raised and spent in elections, or for other public policy reasons. So if a campaign finance restriction is unlikely to prevent "corruption," it is likely to be struck down as unconstitutional.

To fully appreciate the transformation in campaign finance jurisprudence on this point, it is useful to review briefly the Court's journey through changing definitions of "corruption" and the "appearance of corruption" in several key decisions over this period:

In the seminal Buckley case[4], the Court explicitly rejected the argument that anti-bribery laws provided a sufficient alternative to the contribution limits in the Federal Election Campaign Act. The Court recognized the dangers posed by wealthy individuals gaining influence over politicians through large donations, even if this activity did not fall under the strict definition of bribery:

> *The primary interest served by the limitations and, indeed, by the Act as a whole, is the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office.*

The prevention of the mere appearance of corruption resulting from large, influential donations was declared by the Court to be a compelling interest to limit contributions.

> *Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.*

Finally, the Buckley Court stated that disclosure of donors was not enough to eliminate the risk of corruption or the appearance thereof:

[4] Buckley v. Valeo – 1976

Laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action. And while disclosure requirements serve the many salutary purposes discussed elsewhere in this opinion, Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the identities of the contributors and the amounts of their contributions are fully disclosed.

In McConnell[5], the Supreme Court upheld the Bipartisan Campaign Reform Act almost in its entirety, and in so holding, affirmed the principle that the danger of undue influence of large donors is not limited to the basic definition of quid pro quo bribery. A powerful corporation or individual need not buy votes outright, but rather can buy influence and access with the same result: preferential treatment from those who write the law of the land. The Court noted:

in speaking of improper influence and opportunities for abuse in the addition toquid pro quo arrangements, we [have] recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliance with the wishes of large contributors.

More importantly, plaintiffs conceive of corruption too narrowly. Our cases have firmly established that Congress' legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing undue influence on an officeholder's judgment, and the appearance of such

[5] McConnell v. FEC – 2003

influence. Many of the deeply disturbing examples of corruption cited by this Court in Buckley to justify the contribution limits were not episodes of vote buying, but evidence that various corporate interests had given substantial donations to gain access to high-level government officials. Even if that access did not secure actual influence, it certainly gave the "appearance of such influence.

The Court's majority took on Justice Kennedy's interpretation of the First Amendment expressed in his dissent, stating that it failed to take into account the undue influence that wealthy interests can wield beyond direct bribery.

Justice Kennedy's interpretation of the First Amendment would render Congress powerless to address more subtle but equally dispiriting forms of corruption. Just as troubling to a functioning democracy as classic quid pro quo corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder. Even if it occurs only occasionally, the potential for such undue influence is manifest. And unlike straight cash-for-votes transactions, such corruption is neither easily detected nor practical to criminalize. The best means of prevention is to identify and to remove the temptation.

Significantly, the 5-4 majority of Justices that upheld this reform law included Sandra Day O'Connor, the last Justice to have run for elective office or served in a legislative body (and thus to have known first-hand how the sausage was made).

In Citizens United[6], the Court took a sharp turn away from its traditional jurisprudence on corruption. Instead of viewing access and influence as the

[6] Citizens United v. FEC – 2010

corrupting factors, the Supreme Court under Justice Roberts shrank the definition of corruption down to the explicit exchange of money for votes.

Justice Kennedy's opinion stated that the fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt:

> *Favoritism and influence are not . . . avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.*

Justice Kennedy then concludes with an unsubstantiated statement of fact clothed as a legal finding: "the appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy."

In McCutcheon[7], a challenge to the federal aggregate contribution limits, the Roberts Court continued to narrow the definition of corruption, reiterating that only quid pro quoexchanges are to be considered corruption. With this conception of corruption as the backdrop, the Court came to the conclusion that the aggregate limits were not justified by any important governmental interest and consequently are prohibited by the First Amendment:

> *Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to such quid pro quo corruption. Nor*

[7] McCutcheon v. FEC – 2014

does the possibility that an individual who spends large sums may garner influence over or access to elected officials or political parties.

Key to understanding this debate about what is and is not corrupt is that the Supreme Court's interpretation of "corruption" will ultimately completely determine the parameters of permissible regulation of campaign finance speech under the First Amendment.

It is clear that "corruption" is being narrowly defined to avoid providing a constitutional basis for regulating money in politics. This was confirmed by Justice Roberts' opinion last week in Williams-Yulee out of Florida. There he held that judges are not "politicians," even if they run in elections. The state has an interest in preventing the appearance of the sale of access by judges through their solicitation of campaign contributions, he wrote, because judges are supposed to be impartial and be seen as impartial. The converse is that mere politicians are expected to be "responsive" to their donors that are the nature of our political system, in the perspective of the Chief Justice. Good news for those concerned about corruption of our judicial system less heartening news for those concerned about the other two branches of government. Thus, while the Court's conception of corruption may have remained constant in connection to judicial elections, its understanding of corruption in connection to political elections is considerably narrower today, and its acceptance of political "responsiveness" at an all-time high.

6.2 Role of Indian Judiciary to Combat Corruption

The very first promise of the Constitution of India is to secure 'justice' for all its citizens. Presumably, all the instruments of the Constitution are to contribute towards this end; however, the designated agency to ensure that this be done is the Judiciary. The Constitution also gives a wide definition of the term Justice, including in its ambit social, economic and political justice. Thus,

the mandate given to this pillar of government is a very large and critical one – the judiciary is the final jury and arbiter in this regard.[8]

The people's expectations is that there will be quick and reliable justice available to all, wrongdoers and criminals will be punished effectively and also that innocent people will not be harassed by the judicial system. The judiciary is expected to 'uphold the rule of law' in all its dimensions – provide swift and reliable justice, supervise and keep a tight leash on all institutions and agencies connected with the judicial process so that they contribute to meeting the ends of justice in an expeditious and reliable manner with integrity.[9] The judiciary is the most important institution visualized by our Constitution to guarantee clean and good governance.[10]

Corruption – free governance is one important aspect of transparency and ensuring accountability.[11] Indian judiciary has taken a proactive role in ensuring good governance.

Based on the recommendations of the Santhanam Committee the Central Bureau of Investigation was constituted in the year 1963 and the Central Vigilance Commission was established in the year 1964. Since then the Government of India has been taking several administrative and legislative measures to combat corruption in public services. Special judges have been created for exclusively trying the corruption cases. The prevention of Corruption Act of 1947 was amended in 1964 along with some other enactments by the Anti- Corruption Laws (Amendment) Act, 1964. In order to make the existing law more effective by widening its coverage and strengthening the provision and providing for enhanced punishments the Corruption Act of 1988 was enacted repealing the earlier Act of 1947. In this

[8] T.S.R. Subramanian,' *Government Mint in India-An Inside* View', Rupa & Co., New Delhi, 2009, pp. 45.
[9] T.S.R. Subramanian,' *Government Mint in India-An Inside* View', Rupa & Co., New Delhi, 2009, pp. 45.
[10] N. Vittal, '*Ending Corruption? How To Clean Up India'*, Penguin Books India Pvt. Ltd, New Delhi, 2012, pp. 140
[11] C. Raj Kumar, '*Corruption and Human Rights in India Comparative Perspectives on Transparency and Good Governance'* Oxford University Press, New Delhi, 1st Ed. 2011, pp. 94.

Act the definition of the expression "public Servant" has been widened bringing into its fold several categories of persons in various institutions owned controlled or aided by the Government. The Supreme Court held in ***M. Karunanidhi v. Union of India***[12] that Chief Minister is a public servant within the meaning of Section 21 (12) of the Indian Penal Code. The Supreme Court in ***P.V. Narasimha Rao v. State CBI/SPE***[13], declared that M.L.A's and M. Ps fall within the definition of "public Servant" under Section 2 (c) (iii) of the P.C. Act 1988.

Inspite of the various measures taken by the Union Government and the Governments of the States from time to time to control corruption it is an undisputed fact that there has been a steady increase in the cases of corruption by public servants of all categories at all levels including persons in public life particularly at the level of Chief Ministers and Ministers.

During the period between 1970 and 2007 several Chief Ministers and Union Ministers State Ministers, M. l. A.s and M. Ps involved in cases of corruption were prosecuted for various offences and some important cases are mentioned below-

In the case of ***M. Karunnidhi v. Union of India***,[14] Shri M. Karunanidhi who functioned as Chief Minister of State of Tamilnadu during 1974-1975 faced prosecution by the C.B.I. for abusing his official position and committing offences u/s. 5(2) r/w 5(1) (d) of P.C. Act, 1947 and u/s. 161 468 and 471 IPS in the matter of purchase of wheat from Punjab.

In the case of ***State (Delhi Admin) v. V.C. Shukla***,[15] Shri V.C. Shukla the Union Minister of Information and Broadcasting during the year 1975 and Shri Sanjay Gandhi were convicted by the Special judge in connection with the destruction of the Film "Kissa Kursi Ka" for offences under Sections 120-B r/w

[12] AIR 1979 SC 898
[13] AIR 1998 SC 2120
[14] AIR 1979 SC 898
[15] AIR 1980 SC 1382 : 1980 Cr.LJ 965

409, 435, 411, 414, IPC. When the case went upto the Supreme Court, while acquitting both of them for want of sufficient evidence against them, the Supreme Court referred to the Special Courts Act, 1979, which provided for trial by Special Courts presided by sitting judges of High Courts for quick disposal of cases of offences committed by persons who held "high public or political offices" in the country, and made the following observations:

"A perusal of the observations made in the various text books referred to above clearly shows that 'political office' is an office which forms part of a Political Department of the Government or the Political Executive. This, therefore, clearly includes Cabinet Ministers, Ministers, Deputy Ministers and Parliamentary Secretaries who are running the Department formulating policies and are responsible to the Parliament. The word 'high' is indication of a top position and enabling the holder thereof to take major policy decisions. Thus, the term 'high public or political office' used in the Act contemplates only a special class of officers or politicians who may be categorized as (1) Officials wielding extraordinary powers entitling them to take major policy decisions and holding positions of trust and answerable and accountable for their wrongs. (2) Persons responsible for giving to the State a clean, stable and honest administration; (3) Persons occupying every elevated status in whose hands lies the destiny of the nation."

In the case of ***Nandini Satpathy v. P.L. Dani,***[16] Smt. Nandini Satpathy former Chief Minister of Orissa, faced allegations of corruption in 1976 that she acquired assets disproportionate to the known sources of income in her name and in the names of her sons and others. When the case was being investigated by the concerned police officer, she raised several constitutional and legal issues and the Surpeme Court gave several directions to her and to the investigating officer for completing the investigations in accordance with those directions.

[16] AIR 1978 SC 1025 : 1978 Cr.LJ 968 (SC)

In the case of ***R.S. Nayak v. A.R. Antuly***[17] Shri A.R. Antulay former Chief Minister of the State of Maharashtra during the period and committing various offences punishable u/s. 5 (2) r/w 5 (1) (d) of PC Act, 1947 and Sections 161, 165, 384, 420 IPC r/w Section 109 and 120-B IPC.

When the case was posted for evidence, he raised several legal issues and went up to the Supreme Court twice and ultimately the Supreme Court held that here was prima facie case to proceed with trial in respect of 19 charges and directed the trial to proceed accordingly.

In the case of ***Vinit Narain v. Union of India***[18] A batch writ petitions were filed before the Supreme Court in public interest under Article 32 of the Constitution of India by Vineet Narain and others making allegations that Government agencies like the CBI and the revenue authorities had failed to perform their duties and legal obligations in as much as they had failed to investigate matters arising out of the seizure of several documents including two diaries and two note books recovered during the course of searches of the premises of Shri Surender Kumar Jain, his brothers, relations and business premises in the year 1991, which contained detailed accounts of payments made to high ranking politicians. It was further alleged that the entries in the diaries had led to the discovery of financial support to the Jains by clandestine and illegal means using tainted funds obtained through 'Hawala' transactions; that this had also disclosed a nexus between politicians, bureaucrats and criminals, who were recipients of money from unlawful sources, given for unlawful considerations; that the CBI and other Government agencies had failed to investigate the matter, take it to its logical conclusion and prosecute all persons who were found to have committed an offence with a view to protect the persons involved, who were very influential and powerful.

[17] AIR 1986 SC 2045 : (1986) Cr.LJ 1922
[18] AIR 1998 CCR 190 : 1998 (1) Crimes 12 (SC)

The Supreme Court after taking into consideration the political personalities of the people to be investigated in the "Jain diaries" case and the time already lost in commencing the investigations, made the following observations-

(a) The CBI and other Governmental agencies had not carried out their public duty in investigate the offences disclosed.

(b) Even after this matter was brought to the notice of the Supreme Court complaining of the inertia of CBI and the other agencies to investigate into the offences because of the alleged involvement of several persons holding high offices in the executive, for quite some time the disinclination of the agencies, to proceed with the investigation was apparent. The accusation if true revealed a nexus between high-ranking politicians and bureaucrats who were alleged to have been funded by a source linked with the source funding the terrorists foreign currency and some undesirable foreign elements appeared to be connected. This revealed a grave situation posing a serious threat even to the unity and integrity of the nation.

(c) To eliminate any impression of bias and avoid erosion of credibility of the investigations being made by the CBI and the impression of lack of fairness and objectivity therein, the CBI would not take any instructions from report to or furnish any particulars thereof to any authority personally interested in or likely to be affected by the outcome of the investigations into any accusation.

The Supreme Court struck down the Singh Directive No 4.7 (3) issued to CBI by the Govt. of India, which requires prior sanction of the designated authority to initiate the investigation against the officers of Govt. and Public Sector Undertakings and Nationalised Banks above a certain level.

The Supreme Court further held that the power of superintendence over the functioning of the CBI vested in the Central Government under Sec. 4 91) of the D.S.P.E. Act, 1946 does not extend to initiation and actual process of investigation of the offence, which are governed by the statutory provisions.

The Supreme Court gave several direction on various aspects relating to the appointment, powers and functions of the C.V.C., CBI and Enforcement Directorate, constitution of Nodal Agency for coordinated action in cases having politico-bureaucrat criminal nexus.

In the Jain Hawala Cases 34 charge-sheets were filed by the CBI in the Court of Special Judge, New Delhi against several politicians including some Union Ministers, Members of the Parliament and Leaders of political parties, other Public Servants and Chief Executives of some Public Sector Undertakings and others, along with S.K. Jain, B.R. Jain and N.K. Jain who were brothers and J.K. Jain their employee for offences punishable under Section 7, 12 and 13 (2) r/w 13 (1) (d) of the PC Act, 1988 and Section 1207B IPC.

The common allegations in the all charge-sheets were that during the years 1991 the Jains entered into a criminal conspiracy among themselves with the object of receiving unaccounted money and to disburse the same to other and with that view they lobbied with various public servants and Executives of Public Sector undertakings in the power and steel sectors of the government of India and persuaded them to award contracts to different foreign bidders from whom they had received kickbacks through Hawala channels and paid huge amounts to those public servants for the official favours shown by them. An account of receipts and disbursements of the monies were regularly maintained by J.K. Jain, in the dairies and files recovered from his house by the CBI, during a house search.

Out of the 34 charge-sheets filed before the Special Judge, in the first instance, the Special Judge took cognizance of two cases, one against Shri V.C. Shukla and the Jains and the other against Shri L.K. Advani and the Jains. In the case against Shri Shukla it was alleged that he received about Rs. 39 lakhs from Rs. 60 lakhs from them. During the course of preliminary arguments before framing of the charges, all the accused raised several legal and factual grounds for discharging them. The Special Judge rejected their contentions and

issued orders to frame charges against all the accused for offences punishable u/s. 13 (2) r/w 13 (1) (d) and Sections 7 and 12 the PC Act, 1988 r/w section 120-B IPC.

All the accused filed petitions u/s 482 Cr. PC before the High Court for quashing the proceedings which were allowed by the High Court. At the instance of the CBI, the orders of the High Court were challenged before the Supreme Court.

The Supreme Court after hearing Senior Counsel of both sides and examining the material on record pointed out that no charge was framed by the trail court against the Jains for having entered into a criminal conspiracy amongst themselves (even though such was the allegation in the charge sheet) and held that the charge of criminal conspiracy between the Jains and Shri Shukla and Shri Advani is not established as there is no independent evidence to show that het amounts were actually paid to Shri Shukla and Shri Advani, except the entries made in the Diary by the Jains which are admissible against the Jains only.[19]

In the case of ***P.V. Narasimha Rao v. State (CBI/SPE)***[20]Shri P.V. Narasimha Rao, (A1) former Prime Minster, Shri Bhuta Singh, (A-7) Minster, Three Members of Parliament (A-2 and A-14), one Member of Legislature (A-10), all of them belonging to Congress Party, two private persons (A-12 and A-13) supporting the congress party, four MPs belonging to JMM party (A-3 to A-6) S/Shri Ajit Singh and six other MPs., belonging to J.D (A) party (A-15 to A-21), wer all prosecuted for various offences u/s. 120-B IPC and Sections 7, 12, 13 (2), r/w 13 (1) (d) of PC Act, 1988, in connection with the motion of No Confidence moved against the Government in the Lok Sabha in July, 1993.

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[19] The readers are advised to read the book "Bad Money Bad Politics-the untold Hawala Story" by Sanjay Kapoor, Chief of the Delhi Bureau of BLITZ (Editor, R.K. Karanjia), published by Har-Anand Publications, 364-A, Chirag, Delhi-110017 (1996 Edition); which gives a graphic description of the "Jain Hawala Scandal" mentioning the names of several Union Ministers, Chief Ministers of States belonging to the Congress Party and also several leaders of other political parties to whom illegal payments were made.

[20] AIR 1998 SC 2120 : 1998 Cr.LJ 2930 (SC)

When all of them approached the Supreme Court challenging the order of the Special Judge to frame charges against them, raising several constitutional and legal issues, the constitution bench of the Supreme Court held that he trial of the accused NO's 1, 2, 7, 8, 9, 10, 11, 12, 13, 14 and 15 shall proceed in respect of the charges proposed against them. The Supreme Court further held that the bribe takers, accused NO's 3, 4, 5, 6, 16, 17, 18, 19, 20, 21 who had voted on the No-confidence motion are entitled to the immunity conferred by Article 105 (2) of the Constitution.

In the case of ***J. Jayalalitha v. Union of India***,[21]Ms. J. Jayalalitha who was Chief Minister of Tamilnadu during the period 1991-96 was prosecuted in the Courts of the concerned Special Judges along with others in several cases for various offences punishable under section 120 B IPC and under Section 13 (2) r/w 13 (1) (d) of PC Act, 1988, and also in another case for offence u/s. 120-B r/w 409 IPC and Section 13 (2) r/w 13 (2) r/w 13 (1) (d) of PC Act, 1988. She went upto the Supreme Court raising several legal issues but her contentions were rejected by the Supreme Court.

She was also involved in another criminal case for having purchased some sick units of Tamilnadu Small Industries Corporation Limited, (State Government Company), on Behalf of two firms M/s. Jaya Publications and M/s. Sasi Enterprises, of which she was a partner, in violation of the Code of Conduct for ministers.

When the case went upto the Supreme Court in 2004, while holding that the prosecution case was not established against her in view of the various facts and circumstances of the case, the Supreme Court made the following observations:

"Though we have come to the conclusion that A-1 is not guilty of the offence with which she was charged, it is clear that the property belonging to public sector undertakings was sold to firms of which A-1 is a partner at a time

[21] 1999 Cr.LJ 2859 (SC)

when she held the office of the Chief Minister. Under the articles of association of the public sector undertaking, there is a requirement that before the sale of property is effected approval of the government is needed and sale cannot be completed without such approval because such an act will be *ultra vires* the powers of the Board of Directors of the company. Such approval as readily given by the Government machinery, though on paper, she remained out of picture".

"Officers even holding small posts like a Railway Property Keeper or a Cattle Pound Keeper or a Process Nazir who is put in charge of the sale of properties in a court auction cannot purchase the properties over which they have control. In the present case, in view of the fact that Government headed by the 1st Respondent has to give permission in respect of the sale of property of these two companies, it certainly exercises powers over the same and thus there is conflict of interest. Where there is conflict of interest law has always avoided such sales being effected in favour of those who can jeopardize the fair outcome of the transaction. Whatever may be our findings on the question of valuation of the property whether it resulted in a pecuniary advantage to A-1 or not, we are clear in our mind that if the officers and others become aware of the fact that the Chief Minister of the State is interested in purchasing some properties, the bureaucracy will be over-enthusiastic to see that the sale goes through smoothly and at a price desired by such Chief Minster. Though we can visualize such situation, such facts have to be established by concrete evidence to be convicted in a criminal case and is hard or difficult to get. At any rate, it is plain that such conduct is opposed to the spirit of the Code of Conduct if not its letter. Morally speaking, can there be one law for small officials of the Government and another law for the Chief Minister? In matters of such nature, is the Code of Conduct meant only to be kept as an 'ornamental relic' in a museum but not to be practiced? These aspects do worry our conscience. Respondent No. 1 in her anxiety to save her skin wnet to any length even to deny her signature on documents which her auditor and other Government officials identified".

In the case of ***K. Karunakaran v. State of Kerala***[22], Shri K.Karunakaran former Chief Minister of Kerala State during the period 1991-95 challenged the registration of FIR and investigation by the police for offences punishable under Sec. 13 (2) r/w 13 (1) (d) of PC Act 1988 r/w Sec. 120-B IPC and sections 406, 409, 420, 201 and 34 r/w 120-B IPC. He went upto the Supreme Court twice raising several constitutional and legal issues, but the Supreme Court rejected his contentions and directed all such pleas may be raised during the trial of the case.

In the case of ***Lalu Prasad Yadav v. State of Bihar***[23] Shri Lalu Prasad Yadav Chief Minister of State of Bihar during the period 1990 to 1996 was prosecuted by the CBI on the allegation that he had acquired assets disproportionate to the known sources of his income for the offence u/s.13 (2) r/w 13 (1) (e) of the PC Act, 1988. His wife Smt. Rabridevi was also charge sheeted along with him for abetment of the said offence u/s. 109 IPC r/w Sec. 13 (2) r/w 13 (1) (e) of PC Act, 1988.

Two members of Parliament had also filed writ petitions in the High Court of Patna and before the Supreme Court alleging large-scale defalcation of public funds and falsification of accounts involving hundreds of crores of rupees in the Department of Animal Husbandry in the State of Bihar and imp leading Shri Lalu Prasad and Smt. Rabri Devi.

He went up to the Supreme Court in both the cases raising several legal and factual issues and the Supreme Court has issued appropriate direction in that regard.

In the case of ***State by C.B.I. v. Shri S. Bangarappa***,[24] Shri S. Bangarappa former Chief Minister of Karnataka State, was prosecuted along with some others, for offences u/s. 7, 12 and 13 (2) r/w 13 (1) (d) of PC Act, 1988 r/w Sec. 120-B IPC and also on the allegation that he had amassed wealth grossly

[22] 2000 Cr.LJ 2278 (SC) : (2000) 3 SCC 761
[23] (2007) 1 SCC 49 : IV (2006) CCR 328 (SC)
[24] 2001 Cr.Lj 111 (SC)

disproportionate to his known sources of income during the period 1988 to 1997 while he was holding public offices either as MLA or as a Minister of State Cabinet or as Chief Minister of the State or as a Member of Parliament and thereby committing an offence u/s. 13 (2) r/w 13 (1) (e) of PC Act, 1988.

In the case of **M.*C. Mehta v. Union of India***[25] In regard to the "Taj Heritage Corridor Project" which was started in March, 2003, the Supreme Court after obtaining a report of enquiry from the CBI, directed that CBI shall take steps to hold investigation against the Chief Minister of U.P., Ms. Mayawati and Naseemuddin Siddique former Minister for Environment and other senior officers for the Commission of irregularities and illegalities in that connection and also to initiate departmental action against the concerned officials.

Subsequently, after the CBI completed the investigation, the Supreme Court directed CBI to file the report u/s. 173 (2) Cr. PC in the court of the concerned Special Judge who will decide the matter in accordance with law.

In the case of ***Prakash Singh Badal v. State of Panjab***[26],Shri Parkash Singh Badal, former Chief Minister of the State of Punjab, was charge-sheeted along with his wife, his son who was an MP and four ministers in his cabinet before the designated court for offences punishable under various Sections of the Prevention of Corruption Act, 1988 and Sections 120 B, 420, 467, 468 and 471 IPC. All of them filed petitions before the High Court of Punjab and Haryana questioning the validity of the proceedings on various legal grounds. When the petitions were dismissed by the High Court, they filed appeals before the Supreme Court. After hearing the Senior Counsel appearing on both sides and refereeing to a large number of earlier decisions of Supreme Court on the various legal issues, the Supreme Court dismissed the appeals recently and directed the trial to be proceeded before the concerned Special Judge.

[25] (2003) 8 SCC 696
[26] (2007) 1 SCC 1 : 2006 (4) Crimes 388 (SC)

In the case of ***State of M.P. v. Ram Singh*** the Supreme Court has observed that,

'Corruption in a civilised society is a disease like a cancer, which if not detected in time is sure to maliganise the polity of country leading to disastrous consequences. It is termed as plague which is not only contagious but if not controlled spreads like a fire in a jungle. Its virus is compared with HIV leading to AIDS, being incurable. It has also been termed as Royal thievery. The socio-political system exposed to such a dreaded communicable disease is likely to crumble under its own weight. Corruption is opposed to democracy and social order, being not only anti people, but aimed and targeted against them. It affects the economy and destroys the cultural heritage. Unless nipped in the bud at the earliest, it is likely to cause turbulence shaking of the socio-economic-political system in an otherwise healthy, wealthy, effective and vibrating society'.[27]

In the case of ***Tara Chand Vyas v. Chairman & Disciplinary Authority*** the Supreme Court has observed on Corruption that,

"*Corruption has taken deep roots among the sections of the society and the employees holding public office or responsibility equally become amenable to corrupt conduct in the discharge of their official duty for illegal gratification. Mere rhetorical preaching of apostolic sermons listing out the evils of corruption and raising slogans with catch-words are of no use in the absence of practical and effective steps to eradicate them; because "evil tolerated is evil propagated". At the same time, one should also be alive to cases where false and frivolous accusations of corruption are maliciously made against an adversary exposing him to social ridicule and oblique with an ulterior motive of wreaking vengeance due to past animosity or personal pique*

[27] *State of M.P. v. Ram Singh*, AIR 2000 SC 870 at p. 873.

or merely out of spite regardless of the fact whether the proceedings will ultimately culminate into conviction or not".[28]

In *State of* ***M.P. v. Shambhu Dayal Nagar*** the Supreme Court has observed that,

"Bribery and graft by public officers is one of the important crimes which have been characterized as white collar crimes. The rise of such crimes in many countries has coincided with the progress made in those countries in the economic and industrial fields. It is hardly surprising that the two processes should go together considering that most of the white-collar crimes are, directly or indirectly, connected with the production and distribution of wealth. In a welfare State, the Government tends to control a vast number of means of production and distribution of goods and material services. The Constitution of India provides that the State shall in particular direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good that the operation of the economic system does not result in the concentration of wealth and means of production to the common determent. During the last several decades the country has seen the execution of various five-year plans involving huge expenditure by the Government for various nation-building activities. The corrupt officers, businessmen and contractors never had it so good. No doubt the country did make some progress, but a big chunk of money earmarked for developmental projects has been pocketed by the white-collar criminals".[29]

The corruption by public servants has become a gigantic problem. It has spread everywhere. No facet of public activity has been left unaffected by the stink of corruption. It has deep and pervasive impact on the functioning of the entire country. Large-scale corruption retards the nation-building activities and everyone has to suffer on that count.[30]

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[28] *Tara Chand Vyas v. Chairman & Disciplinary Authority*, (1997) 4 SCC 565 at p.567
[29] *State of Orissa v. Bharat Chandra Roul*, 1995 Cri LJ 2417 at p. 2418
[30] *State of M.P. v. Shambhu Dayal Nagar*, (2006) 8 SCC 693 at p. 701

Corruption cannot be looked upon as an ordinary crime and has to be considered as a serious crime eating away the national character and national wealth.[31] Corruption nowadays has become a cancer in the society and this crime cannot be looked upon as a trivial offence.[32]

Both the law and dharma have been developed with the roots of ethics, moral values and humanity. Though, the Courts feel satisfied that the criminal is punished in the cases like the instant case, wherein the paltry amount of Rs. 150/- was received and that the accused has to undergo the sentence, if we consider the material life as the sea or ocean, the trap laid is just like catching a fish in the sea, wherein the whales live comfortably by swallowing many more fishes and are not brought under the clutches of law or it can be said that the existing law is not sufficient to bring the whales in the web. Hence, the Government has to bestow its attention towards the whales and aimed the law so that whales are also brought within the clutches of law and save the people from the harassment and create an atmosphere of secured feeling. But, the fact that there is no such law at present cannot be a concession in the instant case, where from the evidence the crime under the existing law is proved.[33]

In case of ***Shivdas Dasharath jadhav v. State of Maharashtra***, the Supreme Court has observed that,

"Cancer of corruption has spread over its tentacles in the social life to such an extent that belief of common man on the institutional work is obliterated. The social fabric is destroyed by corrupt practices in the public services. Not only that such corruption causes loss of faith in public administration, but it also demoralizes bunch of honest officers in the concerned institution. The efficiency in public service would improve only when the public servants exhibit honesty in day-to-day affairs".[34]

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[31] *Jai Bhagwan v. State (NCT of Delhi)*, (2008) 150 DLT 46 (Del)
[32] *Babu Ram v. CBI*, Manu/DE/8597/2007(Del)
[33] *S. Siddaramegowda v. State of Karnataka*, 2009 Cri LJ 2158 at p. 2165.
[34] *Shivdas Dasharath jadhav v. State of Maharashtra*, 2008 (110) Bom LR 1842 (Bom)

If in any manner the tendency of the corruption is increased amongst the public servants, it will become incurable disease of the society and will develop a parallel system of corruption and it will try to establish a rule of corruption in the place of rule of law.[35] If the corruption is not checked or is not rooted out, the system of the governance of the State will utterly fail.[36]

In the case of ***Jai Bhagwan v. State (NCT of Delhi)*** the Supreme Court has observed that,

"The menace of corruption has to be looked in a proper perspective. Corruption cannot be considered as a trivial offence. When a defence inspector, responsible for approving the quality of components of tanks, armed carrier and other vehicles deployed during war time, turns corrupt and procures inferior quality of components, the persons who die because of this corruption are the innocent soldiers who go to the war front fighting for the nation. When an inspector, responsible for removing squatters from the roads, turns corrupt and accepts bribe / hafta from the squatters, driving and walking on the roads becomes nightmare resulting into accidental deaths and loss of lives which could be saved had the person not been corrupt. When a health inspector, responsible for the checking of food adulteration or food being sold in open, turns corrupt and accepts bribe, the person who fell prey to his corruption are those poor persons who eat unhygienic food. When overloaded trucks go beyond control of drivers killing someone, you must be reminded of traffic inspector who turned corrupt and allowed to move the truck. When you find patients having died hospital because of spurious drugs, you must feel the invisible hands of many involved in the spurious drug racket. When you find that the flat allotted to you has already been sold without your knowledge, you must remember a corrupt Babu in local development authority. When you find no action is taken against criminals despite FIRs, you must be reminded of corrupt police inspector. Tentacles of devil of corruption can be seen

[35] *Jai Narayan v. State of U.P.*, Manu/UP/0074/2005 (All)
[36] *Yogendra Singh v. State of U.P.*, 2006 (1) All Crl R 441 (All)

everywhere. It has crippled and reduced to naught many a scheme run for the benefit of poor, resulting into death by starvation and malnutrition of the downtrodden.[37]

The God is omnipotent, omniscient and omnipresent. Now, we have been seeing that there is a constant and continuous attempt being made to replace the word "God" by the word "corruption". Day-in and day-out there is a preaching of sermons listing out the evils of corruption and raising slogans with catch-words against the corruption. Similarly, we have been seeing that there are positive and constructive remedial measures and steps taken for its eradication by the agency concerned. We have also been seeing that there is a constant debate throughout the globe regarding the magnitude and multi-dimensional causes of corruption. But even then, "omnipresent" corruption with its tentacles poses a great threat to the welfare of society and grows in menacing proportion.[38] An impression is also created by and large that corruption is an inevitable evil. However, the persons who are at the helm of affairs do forget the popular saying: "Dharmo Rakshathi Rakshithaha". If we protect "Dharma", Dharma will protect us. If we protect "law", law will protect us. To put it differently, if we do not protect law, law will not protect us.[39]

In British India, corruption was kept under check by the effective enforcement of laws by the police. After independence, we had the Prevention of Corruption Act, 1947. Later, the Prevention of Corruption Act, 1988, came into force to contain corruption. Vigilance Commission came into being both at the Centre and the States to deal with the complaints of corruption. Despite all these, we witness a steady rise in the magnitude of corruption in public life. The above measures have not prevented the slide in the overall integrity of those in public service. It is said that the corruption has now become a way of life and permeates almost every sphere of our daily lives. It is also said that there is virtually no activity of the government programme is safe. Corruption

[37] *Jai Bhagwan v. State (NCT of Delhi),* (2008) 150 DLT 46 (Del)
[38] *V.R. Nedunchezhian v. State*, 2000 Cri LJ 976 at pp.977-78 (Mad).
[39] *V.R. Nedunchezhian v. State*, 2000 Cri LJ 976 at p.978 (Mad).

in the administrative set up hampers efficiency of the Government. The law-enforcing agency cannot turn a blind eye to the present sorry state of affairs marked by rampant corruption. Corruption basically implies "misuse of public office for private profit". The range of transactions and deals involved are vast from the elemental speed money deals to commissions on simple purchases and works contracts. There is an imperative need for cleansing of the administrative system which has been nurturing corruption. The people as such are now fed up with corruption and abuse of power at all levels. Greasing the palms continues to be a way of life for anything and everything. In the words of Krishna Aiyer, J., "gratification is speed money". At present our country has been afflicted with this virus of corruption which is eating into the vitals of our character and strength. Corruption or graft is a cancer which has to be contained, if it cannot be completely eradicated. Corruption is becoming more and more organized and sophisticated.[40]

Once upon a time, there was a feeling in the minds of the people that an act of giving bribe or the act of getting bribe for getting things done, was considered to be an act of disgrace. Could it be said that such gracious feeling continuous in our society? Is it not true, that the public servants, who are clean, are heckled as useless? Who is responsible for this unhealthy degeneration? What are the ways to attain independence from this all powerful evil? It cannot be denied that every wing of the society and every leader of the various sects of the whole country like parents, teachers, politicians, heads of the Government, Press, etc., shall bear the responsibility. If the "Zurasic Park" is allowed to grow further, certainly there would be a situation, where the lawlessness will be the law of the country. The amendments by introducing various Acts alone would not be sufficient to eradicate the evil of corruption. But, the mending of the mental make up of the public is quite essential, as that alone would create a corruption-free society to a large extent. Hence, a systematic effort to inculcate values of integrity, honest and probity in public life need to be undertaken on a

[40] *V.R. Nedunchezhian v. State*, 2000 Cri LJ 976 at p.978 (Mad).

large scale at all levels in the entire country so that we can have a clean and corrupt-free administration in India as a whole.[41]

Corruption is a policing concept. A corrupt act is one that violates the norms of the institution. As such, a conception of corruption depends on a theory of the institution involved. Legislative corruption thus depends on a theory of a representative's role in a democracy. Recognition of the reciprocal relationship between a definition of corruption and a theory of democratic politics has important implications for campaign finance law. In recent cases, the Court has flip-flopped between broader and narrower understandings of corruption, with its most recent pronouncement on this question adopting a narrow definition. Because a definition of corruption relies on a definition of the healthy functioning of a democracy, the Court's campaign finance cases in fact constitutionalize a theory of representation.[42]

In this respect, campaign finance cases are importantly similar to apportionment and gerrymandering cases, for these too implicate the Court in articulating a particular theory of democracy. But unlike those cases, the Court's campaign finance cases fail to make explicit the fact that they implicate the Court in constitutionalizing questions of democratic form as deeply as do cases dealing with the drawing of district lines. The appropriate role of money in politics, like the drawing of districts, addresses foundational questions about the form of our democracy. If the latter cases provide reasons for judicial deference to legislative judgment, then so do the former. In both types of cases, there are important reasons for judicial oversight as well as for judicial deference. Oversight is called for because individual rights are at stake (free speech or the right to vote). In both types of cases, these rights have a purely individual-rights cast and a more systemic cast that implicates questions of democratic theory. Delineating proper from improper influence on legislative judgment is no easy task. The reasons to largely leave such a judgment to

[41] *V.R. Nedunchezhian v. State*, 2000 Cri LJ 976 at pp.978-79 (Mad).
[42] Deborah Hellman *" DEFINING CORRUPTION AND CONSTITUTIONALIZING DEMOCRACY"* Michigan Law Review, June 2013, Vol. 111:1385 p. 1421

legislators are not only that these questions involve trade-offs among competing policy considerations and that legislators are familiar with these sorts of challenges but most importantly that doing so allows us the freedom of trial and error that constitutionalizing this question rules out. If this is right, we must then ask how the Court should weigh the competing reasons for oversight and deference. Here too, it is helpful to look at how the Court addresses this question in other contexts in which it must weigh an individual right against something other than a simple state interest. I suggest that in such cases, the Court should look at the degree of intrusion into the individual right. Applying this approach, many campaign finance laws would be constitutionally permissible. There are reasons for deference to legislative judgment about what good representation in a democracy requires. So long as the law at issue does not impose an undue burden on an individual's right to free speech, these reasons for judicial deference to legislative conceptions of the proper role of a legislator in a democracy outweigh the reasons for judicial oversight.[43]

[43] Deborah Hellman *" DEFINING CORRUPTION AND CONSTITUTIONALIZING DEMOCRACY"* Michigan Law Review, June 2013, Vol. 111:1385 p. 1422

CHAPTER-VII

Conclusion and Suggestions

CHAPTER VII

CONCLUSION AND SUGGESTIONS

"*Countries can control the growth of corruption by strengthening their legislative and judicial branches, promoting strong and independent auditing agencies, and devoting adequate resources to combating illegal activities*."[1]

Conclusion

The link between corruption and development is clear. Various studies involving different countries have shown that the more corrupt a government, the more underdeveloped the country becomes. Poverty becomes more rampant, social services are reduced and investments in infrastructure and social services are diminished. Corruption fosters an anti-democratic environment characterized by uncertainty, unpredictability, declining moral values and disrespect for constitutional institutions and authority. Corruption embodies, not just a governance deficit, but also an amputation of democratic values and human rights, resulting to poverty and threatening human security.[2]

Corruption is a governance issue because it involves effective functioning of institutions and management of society thru its political, economic, social and judicial mechanisms. When these formal and informal institutions break down, laws and policies that ensure accountability and transparency of the government become harder to implement.[3]

[1] Transparency International's President Huguette Labelle
[2] Anti-Corruption, UNDP, 2004
[3] Ibid,

The anti-corruption strategy should be reinforced by a committed leadership and able management skills to implement the programs and sustain the progress made. Continued reengineering of the bureaucracy is also necessary, with reforms focused not only on achieving efficiency and effectiveness, but also instilling a culture of rules in the system.

The measures taken by countries are powerful tools that are useful in the fight against corruption. A substantial amount of criminal proceeds are generated from corruption offences. Criminal proceeds are generated from corruption offences as well as from bribery, embezzlement, trading in influence, abuse of functions and other offences, in both the public and the private sector, and by a variety of illicit means. Corruption offences are generally committed for the purpose of obtaining private gain. The proceeds of corruption are often laundered so that they can be enjoyed without fear of detection or confiscation. Accordingly, corrupt officials and individuals take great pains to disguise their identity and the original source of the funds in order to place funds derived from corruption in the financial system without detection and to purchase assets. Likewise, often in corruption cases, bribe payers tend to disguise the financial link between them and the corrupt officials, including the destination of the funds, using money laundering schemes. The United Nations Convention against Corruption (UNCAC), which is the only legally binding universal anti-corruption instrument, recognises the importance of fighting money laundering in the anti-corruption context by requiring States parties to criminalize money laundering, to adopt measures to effectively prevent it, and by urging the recovery of the proceeds of corruption and the establishment of financial intelligence units.[4]

Corruption in its different manifestation was condoned in all societies since antiquity; however, in the recent years this phenomenon has received greater deal of attention from the international community than before. In fact, the degree of attention attributed to combat corruption has been unprecedented that

[4] The use of the Fatf Recommendations to Combat Corruption, Best Practices Paper, October 2013, available at: www.fatf-gafi.org last visited on 6th may 2016.

the effort made at the international level has paved the way for the negotiation and adoption of five legally binding international anti-corruption instruments within a short span of time. These international and regional agreements have attempted to establish a legal framework and harmonize international rules to combat corruption.[5]

Establishing a legal framework to combat corruption at the national and international levels is not easy task. While many States have already embarked upon a national strategy to deal with corruption, and criminalized it when committed domestically, there is no uniformity in approach taken by these countries. Further, the issue of corruption as a transnational crime poses many challenges. The different legal systems do not have the same notion about establishing "criminality" regarding corruption as a crime. The lack of effective cooperation in sharing of information and investigation, the complications in judicial assistance, bank secrecy regulations etc., are just few examples which pose problems of great magnitude.[6]

Corruption is a worldwide problem and has transnational implications, global action is imperative and it was recognized that an international anti-corruption instrument in the form of a convention or treaty is imperative not only to bridge the gaps in national legal systems but also to forge close cooperation among States. As causes of corruption differ from one country to another, and preventive, enforcement and prosecutorial measures that work in some countries may not work in others, the United Nations, an organization with universal membership and a global mandate, is ideally positioned to deal with global challenges. It was in this context that the UN office for Drugs and Crime (ODC) through the UN General Assembly to establish an Ad Hoc

[5] R. Rajesh Babu, The United Nations Convention Against Corruption: A Critical Overview, available at http://ssrn.com/abstract=891898 last visited on 8 October 2012.
[6] Ibid.

Committee to negotiate a comprehensive United Nations Convention against Corruption (UNCAC), which entered into force in December 2005.[7]

A number of international organisations, such as the Organisation for Economic Co-operation and Development (OECD) and the International Chamber of Commerce (ICC), have adopted significant regulations to remove corruption and bribery from the global trade environment. States too have found it necessary to pass laws so as to control their companies conducting business beyond national borders. The most well-known state legislations are the U.S. Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act (UKBA). The FCPA and the UKBA are in fact the most effective global anti-corruption and anti-bribery laws because of their extraterritorial reach.

Both the FCPA and the UKBA include a tough set of rules prohibiting corruption and bribery. They envisage strict corporate liability for act or omission of their employees, agents or –in some cases- other associated entities. The companies falling under the jurisdiction of the FCPA and the UKPA are required to adopt rigorous and robust compliance policies. Such programs must be consistent with standards defined in the FCPA and the UKBA. However, although their stated goals are similar, the rules of FCPA and UKBA may be different in some respects. It is crucial for companies to acknowledge the distinction between the FCPA and the UKBA, as modeling their anti-corruption compliance programs only along one of them may not always be sufficient to escape responsibility under the other.

To combat this devastating corruption Indian penal code (IPC) was the main tool during the pre-independence period. The code had a chapter on ―offences by public servants‘. Section 161 to 165 provides the legal framework to prosecute corrupt public servants. At that time the need for a special law to deal with corruption was not felt. But the Second World War created menaces (shortages). Taking advantage of that situation the unscrupulous elements exploited the situation which led to large scale

[7] R. Rajesh Babu, The United Nations Convention Against Corruption: A Critical Overview, available at: http://ssrn.com/abstract=891898 last visited 8on October 2012.

corruption in public life. Then the law makers sincerely felt that drastic legislative measures needed to be taken immediately. Hence the Prevention of Corruption Act, 1947 was enacted to fight the evils of bribery and corruption. This Act did not redefine nor expand the definition of offences resulted to corruption, already existing in the IPC. However, the law defined a new offence _criminal misconduct in discharge of official duty for which enhanced punishments was stipulated. Later in 1988, the Prevention of Corruption Act was enacted. It consolidates the provisions of the Prevention of Corruption Act 1947, the Criminal Law Amendment Act, 1952 and some provisions of IPC. It has also certain provisions intended to combat corruption effectively among public servants. In this Act the term Public Servants is broadly defined and a new concept Public Duty is introduced. Besides, trail on cases by Special Judges. Recently, in the way of combating corruption, the prevention of Money Laundering Act 2002 was enacted empowering the Directorate of Enforcement, India, and Financial Intelligence Unit, India to investigate and prosecute such public servants who hold ill-gotten wealth in foreign countries and transfer to their homeland through money laundering. Further, since secrecy in public administration breeds corruption. The Right Information Act, 2005 has been enacted aiming at ensuring efficiency, transparency and accountability in public life. This is a revolutionary step towards the eradication of corruption from public life. 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. At the federal level, key institutions are include the Central Vigilance Commission (CVC), The Central Bureau of Investigation (CBI), The Office of the Comptroller and Auditor General (C&AG) and the State Level Anti- Corruption Bureaus (ACB) of each State are created to combating the corruption in India.

In the mid-1990s the problem of corruption was recognised as a subject of international concern and drew the attention of numerous global and regional intergovernmental organisations. The last decade witnessed a growing

collection of international "hard law" (treaties and conventions) and "soft law" (recommendations, resolutions, guidelines and declarations) instruments elaborated and adopted within the framework of organisations such as the United Nations, the Council of Europe, the OECD, the Organization of American States, the African Union, and the European Union. The multitude of international legal instruments on corruption varies in scope, legal status, membership, implementation and monitoring mechanisms. However, all aim to establish common standards for addressing corruption at the domestic level through its criminalisation, enforcement of anti-corruption legislation and preventive measures. International legal instruments also aim to identify and promote good practices and facilitate co-operation between member states.[8]

UK has own local investigation and prosecution agencies are able to deal with cases of bribery and corruption. These include the: Local police forces, Crown Prosecution Service in England and Wales, Public Prosecution Service in Northern Ireland Crown Office and Procurator Fiscal Service in Scotland. However, the major agency for investigating and dealing with serious bribery and corruption cases, especially those involving corporate offences, is the Serious Fraud Office (SFO), which has jurisdiction to investigate and prosecute in England, Wales and Northern Ireland.

United States is one of the western democracies that follow the multi-agency model of anti-corruption agencies. The country combats corruption through many agencies and instances but, basically, these are the three main public bodies engaged in this task: The Office of Government Ethics – OGE; The Offices of the Inspectors General – OIG; and The Government Accountability Office – GAO.

India endorsed the ADB-OECD Anti-Corruption Action Plan in 2001 and ratified the UN Convention against Corruption (UNCAC) and the UN Convention against Transnational Organized Crime (UNCTOC) recently in May 2011. Therefore, it is duty bound to bring its legislative framework closer

[8] Specialised Anti-Corruption Institutions, Review of Models, OECD, 2008, available at: http:/ www.oecd.org/publishing/corrigenda.last visited on 1 October 2012

to the International norms. Significant effort is required not just to strengthen the anti-graft laws but also to provide teeth and freedom to the implementing agencies. Following is a snapshot of current institutional framework that is supposed to prevent corruption.

There are various bodies in place for implementing anti-corruption policies and raising awareness on corruption issues. At the federal level, key institutions include the Supreme Court, the Central Vigilance Commission (CVC), the Central Bureau of Investigation (CBI), the Office of the Controller & Auditor General (C&AG), and the Chief Information Commission (CIC).

The three organs of the government – Legislature, Executive and Judiciary perform three essential functions of rulemaking, rule application and rule adjudication respectively. The main principle behind this formulation is separation of powers: which brings accountability, keeps the government restrained and in this way our rights and liberties are safeguarded. In fact the main driving force behind this is based on the simple saying that 'power corrupts man and absolute power corrupts absolutely'. In the words of Montesquieu, "Constant experience has shown us that every man invested with power is apt to abuse it, and to carry his authority until he is confronted with limits'.

In short absolute power without accountability leads to corruption. Corruption in India is always in limelight. In his foreword to the UN Convention Against Corruption, the then Secretary General of the United Nations, Mr. Kofi Annan wrote, "Corruption is an insidious plague that has a wide range of corrosive effects on society. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and it allows organized crime, terrorism and other threats to human security to flourish." However recently what has caught our attention is the corruption charges levied against judges; examples being a Calcutta High Court Judge Soumitra Sen guilty of misappropriating large sums of money and making false statements regarding it and Chief Justice of Karnataka High Court

P D Dinakaran, alleged for land grabbing and corruption. It is nevertheless to be noted that the word ‘recently’ should not mislead us to think that corruption in Judiciary is a new thing, it has always been there, only less talked about. But given the increase in the rate of corruption charges one can’t help but ask the question ‘who is judging the judges?’

Suggestions

1. The Prevention of Corruption Act 1988 deals with only public servants but not a single article is there to check the private sector, so there should be include the private sector within the Act.
2. Trial of corruption cases should be proclaimed by Special Judges day by day with priority.
3. Punishment should be increased under the Prevention of Corruption Act 1988 like a Bribery Act 2010 and Foreign Corrupt Practice Act 1977.
4. Fine should be increased under the Prevention of Corruption Act 1988 like a Bribery Act 2010 and Foreign Corrupt Practice Act 1977.
5. India ratified to UNCAC, so all the provisions of UNCAC should be implement in India.
6. There is no witness protection. If the witness becomes hostile there is no any provision for them. So there should be protected under the Corruption Act.
7. International Co-operation is very must because corrupt public servants are easily transferring their money (Black Money) to other countries.
8. The Central Bureau of Investigation or Central Vigilance Commission can not tackle the corruption cases with successive manner. The country needs more effective and creative mechanism.
9. There should be independent commission to tackle the corruption cases with no interference.
10. Record keeping must be implemented within the all departments in India like UK and USA.
11. Commercial bribery is not illegal under the Prevention of Corruption Act 1988. So there should be including like UK.

12. Introduce state-funding as part of election reforms: The high cost of elections and candidates' dependence on money, often of questionable provenance, compromises them from the very outset. Once beholden to moneybags, they are under obligation to return the favour if they win. Of course, not all candidates can be funded by the state. So, we suggest that only candidates belonging to national parties receive election money from the state.
13. Liberal and contemporary laws that citizens can understand and respect
14. Reduce the role of the state in people's lives to the absolutely essential.
15. Introduce sweeping police reforms and stronger judicial accountability
16. Blacklist corrupt businessmen: Private businesses caught indulging in corrupt practices or bribing officials should be blacklisted.
17. The first tool is ‘education’. With the help of education we can reduce corruption. Corrupt public servants try to make fool of them and often demands for bribe. It is due to unawareness in the field of law, public rights and procedures thereof that a common and an uneducated suffer out of the corrupt society. This suggests that if we are educated, we can understand our rights well.
18. We can reduce corruption by increasing direct contact between government and the governed. E-governance could help a lot towards this direction.
19. Lack of effective corruption treatment is another reason. That means, instruments which are in use, are not running properly. For example Prevention of Corruption Act 1988 came into force on 9th September, 1988. But corruption is still flourishing. People don’t have any fear of this act and the court. The act may thus be revised for its better implementation.
20. Lack of transparency and professional accountability is yet another big reason. We should be honest to ourselves. Until and unless we will not be honest, we can’t control corruption. We need to pay attention towards professional accountability i.e., how much we are faithful and truthful

towards our profession. Corruption may be controlled by handling five major professions:A lekhpal, medical, revenue, police and judicial.

21. Targeting selected departments and agencies. Based on perception survey, the following initial list of target agencies demand intervention: Bureau of Internal Revenue, Bureau of Customs, Department of Public Works and Highways, Department of Environment and Natural Resources, Department of Education, Culture and Sports.
22. Law-enforcement and the judiciary should conduct mandatory corruption-awareness training programmes that are based on real cases and institutional experience.
23. Decentralisation may be particularly successful where there is local capacity and high levels of participation.
24. Effective and timely international co-operation is essential for the detection, freezing and seizing, and confiscation of assets related to corruption.
25. It is commonly assumed civil society has a role to play in the fight against corruption, by holding public institutions accountable and advocating for anti-corruption reforms.
26. Transparency has a positive impact on corruption control. So there should be transparent work within the departments of all the government bodies.

The first principle, is that corruption must be exposed for what it is, a form of organised crime and a serious abuse of human rights. Much of the current anti-corruption activity acknowledges that corruption is an ethical issue, but focuses on it at as a practical issue. This will not provide the foundation for a sustained campaign. Drawing a lesson from the last century we may note that practical drawbacks in slave trading may have strengthened the arguments of the anti-slavery campaigners, but it was slaving as a moral issue that stirred public concern and eventually carried abolition through parliament.

Second, the developed world must not be allowed to use the corruption issue as a way to pin the blame for development failures wholly on the developing world. Nor should anticorruption measures be confused with moves to reshape developing economies to suit the West. To suppose that economic and political liberalisation will resolve the problem of corruption is, quite frankly, simplistic. All the evidence indicates that corruption can flourish in regulated and unregulated markets, under democracies or dictatorships.

Third, the issue of corruption will never be resolved if it is treated as a problem solely, or mainly, of the Third World. The developed world must set an example by addressing its own corruption. Then it needs to acknowledge that it is aiding and abetting the corrupt of the developing world. It is not enough to pursue the burglar and ignore the receiver of stolen goods. Key issues here are the maintenance of offshore havens, and the activities of export credit guarantee agencies.

Fourth, corruption cannot be tackled in isolation, but only in the context of efforts to reduce world poverty. Corrupt individuals and companies may be exposed and punished, but of itself this will only redirect the corruption. Other issues such as the burden of Third World debt and the imbalance of power in world trade need to be addressed at the same time as tackling corruption.

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ANNEXURE-1

THE

PREVENTION

OF

CORRUPTION ACT,

CONTENTS

1988

[Act No. 49 of 1988 dated 9th. September, 1988]

CONTENTS

An Act to consolidate and amend the law relating to the prevention of corruption and for matters connected therewith.

BE it enacted by Parliament in the Thirty-ninth Year of the Republic of India as follows: -

CHAPTER I:
PRELIMINARY

1. Short title and extent

(1) This Act may be called the Prevention of Corruption Act, 1988.

(2) It extends to the whole of India except the State of Jammu and Kashmir and it applies also to all citizens of India outside India.

2. Definitions

In this Act, unless the context otherwise requires,-

(a) "election" means any election, by whatever means held under any law for the purpose of selecting members of Parliament or of any Legislature, local authority or other public authority;

(b) "public duty" means a duty in the discharge of which the State, the public or the community at large has an interest;
Explanation.-In this clause "State" includes a corporation established by or under a Central, Provincial or State Act, or an authority or a body owned or controlled or aided by the Government or a Government company as defined in section 617 of the Companies Act, 1956.

(c) "public servant" means-

(i) any person in the service or pay of the Government or remunerated by the Government by fees or commission for the performance of any public duty;

(ii) any person in the service or pay of a local authority ;

(iii) any person in the service or pay of a corporation established by or under a Central, Provincial or State Act, or an authority or a body owned or controlled or aided by the Government or a Government company as defined in section 617 of the Companies Act, 1956;

(iv) any Judge, including any person empowered by law to discharge, whether by himself or as a member of any body of persons, any adjudicatory functions;

(v) any person authorised by a court of justice to perform any duty, in connection with the administration of justice, including a liquidator, receiver or commissioner appointed by such court;

(vi) any arbitrator or other person to whom any cause or matter has been referred for decision or report by a court of justice or by a competent public authority;

(vii) any person who holds an office by virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election;

(viii) any person who holds an office by virtue of which he is authorised or required to perform any public duty;

(ix) any person who is the president, secretary or other office-bearer of a registered co-operative society engaged in agriculture, industry, trade or banking, receiving or having received any financial aid from the Central Government or a State Government or from any corporation established by or under a Central, Provincial or State Act, or any authority or body owned or controlled or aided by the Government or a Government company as defined in section 617 of the Companies Act, 1956;

(x) any person who is a chairman, member or employee of any Service Commission or Board, by whatever name called, or a member of any selection committee appointed by such Commission or Board for the conduct of any examination or making any selection on behalf of such Commission or Board;

(xi) any person who is a Vice-Chancellor or member of any governing body, professor, reader, lecturer or any other teacher or employee, by whatever designation called, of any University and any person whose services have been availed of by a University or any other public authority in connection with holding or conducting examinations;

(xii) any person who is an office-bearer or an employee of an educational, scientific, social, cultural or other institution, in whatever manner established, receiving or having received any financial assistance from the Central Government or any State Government, or local or other public authority.

Explanation 1.-Persons falling under any of the above sub-clauses are public servants, whether appointed by the Government or not.

Explanation 2.-Wherever the words "public servant" occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation.

3. Power to appoint special Judges

(1) The Central Government or the State Government may, by notification in the. Official Gazette, appoint as many special Judges as may be necessary for such area or areas or for such case or group of cases as may be specified in the notification to try the following offences, namely: -

(a) any offence punishable under this Act; and

(b) any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in clause (a).

(2) A person shall not be qualified for appointment as a special Judge under this Act unless he is or has been a Sessions Judge or an Additional Sessions Judge or an Assistant Sessions Judge under the Code of Criminal Procedure, 1973.

4. Cases triable by special Judges

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, or in any other law for the time being in force, the offences specified in sub-section (1) of section 3 shall be tried by special Judges only.
(2) Every offence specified in sub-section (1) of section 3 shall be tried by the special Judge for the area within which it was committed, or, as the case may be, by the special Judge appointed for the case, or where there are more special Judges than one for such area, by such one of them as may be specified in this behalf by the Central Government.

(3) When trying any case, a special Judge may also try any offence, other than an offence specified in section 3, with which the accused may, under the Code of Criminal Procedure. 1973, be charged at the same trial.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, a special Judge shall, as far as practicable, hold the trial of an offence on day-to-day basis.

5. Procedure and powers of special Judge

(1) A special Judge may take cognizance of offences without the accused being committed to him for trial and, in trying the accused persons, shall follow the procedure prescribed by the Code of Criminal Procedure, 1973. for the trial of warrant cases by Magistrates.

(2) A special Judge may, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to, an offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole circumstances within his knowledge. relating to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof and any pardon so tendered shall, for the purposes of sub-sections (1) to (5) of section 308 of the Code of Criminal Procedure, 1973, be deemed to have been tendered under section 307 of that Code.

(3) Save as provided in sub-sections (1) or sub-section (2), the provisions of the Code of Criminal Procedure, 1973, shall, so far as they are not inconsistent with this Act, apply to the proceedings before a special Judge; and for the purposes of the said provisions, the Court of the special Judge shall be deemed to be a Court of Session and the person conducting a prosecution before a special Judge shall be deemed to be a public prosecutor.

(4) In particular and without prejudice to the generality of the provisions contained in sub-section (3), the provisions of sections 326 and 475 of the Code of Criminal Procedure, 1973, shall, so for as may be, apply to the proceedings before a special Judge and for the purposes of the said provisions, a special Judge shall be deemed to be a Magistrate.

(5) A special Judge may pass upon any person convicted by him any sentence authorised by law for the punishment of the offence of which such person is convicted.

(6) A special Judge, while trying an offence punishable under this Act, shall exercise all the powers and functions exercisable by a District Judge under the Criminal Law Amendment Ordinance, 1944.

6. Power to try summarily

(1) Where a special Judge tries any offence specified in sub-section (1) of section 3, alleged to have been committed by a public servant in relation to the contravention of any special order referred to in sub-section (1) of section 12A of the Essential Commodities Act, 1955 or of an order referred to in clause (a) of sub-section (2) of that section, then, notwithstanding anything contained in sub-section (1) of section 5 of this Act or section 260 of the Code of Criminal Procedure, 1973, the special Judge shall try the offence in a summary way, and the provisions of sections 262 to 265 (both inclusive) of the said Code shall, as far as may be, apply to such trial:

Provided that, in the case of any conviction in a summary trial under this section, it shall be lawful for the special Judge to pass a sentence of imprisonment for a term not exceeding one year:

Provided further that when at the commencement of, or in the course of, a summary trial under this section, it appears to the special Judge that the nature of the case is such that a sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily, the special Judge shall, after hearing the parties, record an order to that effect and thereafter recall any witnesses who may have been examined and proceed to hear or re-hear the case in accordance with the procedure prescribed by the said Code for the trial of warrant cases by Magistrates.

(2) Notwithstanding anything to the contrary contained in this Act or in the code of Criminal Procedure, 1973, there shall be no appeal by a convicted person in any case tried summarily under this section in which the special Judge passes a sentence of imprisonment not exceeding one month, and of fine not exceeding two thousand rupees whether or not any order under section 452 of the said Code is made in addition to such sentence, but an appeal shall lie where any sentence in excess of the aforesaid limits is passed by the special Judge.

CHAPTER III:
OFFENCES AND PENALTIES

7. Public servant taking gratification other than legal remuneration in respect of an official act

Whoever, being, or expecting to be a public servant, accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person or for rendering or attempting to render any service or disservice to any person, with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of section 2, or with any public servant, whether named or otherwise, shall be punishable with imprisonment which shall be not less than six months but which may extend to five years and shall also be liable to fine.

Explanations.-
(a) "Expecting to be a public servant." If a person not expecting to be in office obtains a gratification by deceiving others into a belief that he is about to be in office, and that he will then serve them, he may be guilty of cheating, but he is not guilty of the offence defined in this section.

(b) "Gratification." The word "gratification" is not restricted to pecuniary gratifications or to gratifications estimable in money.

(c) "Legal remuneration." The words "legal remuneration" are not restricted to remuneration which a public servant can lawfully demand, but include all remuneration which he is permitted by the Government or the organisation, which he serves, to accept.

(d) "A motive or reward for doing." A person who receives a gratification as a motive or reward for doing what he does not intend or is not in a position to do, or has not done, comes within this expression.

(e) Where a public servant induces a person erroneously to believe that his influence with the Government has obtained a title for that person and thus induces that person to give the public servant, money or any other gratification as a reward for this service, the public servant has committed an offence under this section.

8. Taking gratification, in order, by corrupt or illegal means, to influence public servant

Whoever accepts or obtains, or agrees to accept, or attempts to obtain, from any person, for himself or for any other person, any gratification whatever as a motive or reward for inducing, by corrupt or illegal means, any public servant, whether named or otherwise, to do or to forbear to do any official act, or in the exercise of the official functions of such public

servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of section 2, or with any public servant, whether named or otherwise, shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine.

9. Taking gratification, for exercise of personal influence with public servant

Whoever accepts or obtains or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification whatever, as a motive or reward for inducing, by the exercise of personal influence, any public servant whether named or otherwise to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of section 2, or with any public servant, whether named or otherwise, shall be punishable with imprisonment for a term which shall be not less than six months but which may extend. to five years and shall also be liable to fine.

10. Punishment for abetment by public servant of offences defined in section 8 or 9

Whoever, being a public servant, in respect of whom either of the offences defined in section 8 or section 9 is committed, abets the offence, whether or not that offence is committed in consequence of that abetment, shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine.

11. Public servant obtaining valuable thing, without consideration from person concerned in proceeding or business transacted by such public servant

Whoever, being a public servant, accepts or obtains or agrees to accept or attempts to obtain for himself, or for any other person, any valuable thing without consideration, or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine.

12. Punishment for abetment of offences defined in section 7 or 11

Whoever abets any offence punishable under section 7 or section 11 whether or not that offence is committed in consequence of that abetment, shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine,

13. Criminal misconduct by a public servant

(1) A public servant is said to commit the offence of criminal misconduct,-

(a) if he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person any gratification other than legal remuneration as a motive or reward such as is mentioned in section 7; or

(b) if he habitually accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any valuable thing without consideration or for a consideration which he knows to be inadequate from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned; or

(c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do; or

(d) if he,-

(i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest; or

(e) if he or any person on his behalf, is in possession or has, at any time during the period of his office, been in possession for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income.
Explanation.-For the purposes of this section, "known sources of income" means income received from any lawful source and such receipt has been intimated in accordance with the provisions of any law, rules or orders for the time being applicable to a public servant.

(2) Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall be not less than one year but which may extend to seven years and shall also be liable to fine.

14. Habitual committing of offence under sections 8, 9 and 12

Whoever habitually commits-

(a) an offence punishable under section 8 or section 9; or

(b) an offence punishable under section 12,

shall be punishable with imprisonment for a term which shall be not less than two years but which may extend to seven years and shall also be liable to fine.

15. Punishment for attempt

Whoever attempts to commit an offence referred to in clause (c) or clause (d) of sub-section (1) of section 13 shall be punishable with imprisonment for a term which may extend to three years and with fine.

16. Matters to be taken into consideration for fixing fine

Where a sentence of fine is imposed. under sub-section (2) of section 13 or section 14, the court in fixing the amount of the fine shall taken into consideration the amount or the value of the property, if any, which the accused person has obtained by committing the offence or where the conviction is for an offence referred to in clause (e) of sub-section (1) of section 13, the pecuniary resources or property referred to in that clause for which the accused person is unable to account satisfactorily.

CHAPTER IV:
INVESTIGATION INTO CASES UNDER THE ACT

17. Persons authorised to investigate

Notwithstanding anything contained in the Code of Criminal Procedure, 1973, no police officer below the rank,-

(a) in the case of the Delhi Special Police Establishment, of an Inspector of Police;

(b) in the metropolitan areas of Bombay, Calcutta, Madras and Ahmedabad and in any other metropolitan area notified as such under sub-section (1) of section 8 of the Code of Criminal Procedure, 1973, of an Assistant Commissioner of Police;

(c) elsewhere, of a Deputy Superintendent of Police or a police officer of equivalent rank,
shall investigate any offence punishable under this Act without the order of a Metropolitan Magistrate or a Magistrate of the first class, as the case may be, or make any arrest therefor without a warrant:
Provided that if a police officer not below the rank of an Inspector of Police is authorised by the State Government in this behalf by general or special order, he may also investigate any such offence without the order of a Metropolitan Magistrate or a Magistrate of the first class, as the case may be, or make arrest therefor without a warrant:
Provided further that an offence referred to in clause (e) of sub-section (1) of section 13 shall not be investigated without the older of a police officer not below the rank of a Superintendent of Police.

18. Power to inspect bankers' books

If from information received or otherwise, a police officer has reason to suspect the commission of an offence which he is empowered to investigate under section 17 and considers that for the purpose of investigation or inquiry into such offence, it is necessary to inspect any bankers’ books, then, notwithstanding anything contained in any law for the time being in force, he may inspect any bankers’ books in so far as they relate to the accounts of the persons suspected to have committed that offence or of any other person suspected to be holding money on behalf of such person, and take or cause to be taken certified copies of the relevant entries therefrom, and the bank concerned shall be bound to assist the police officer in the exercise of his powers under this section:

Provided that no power under this section in relation to the accounts of any person shall be exercised by a police officer below the rank of a Superintendent of Police, unless he is specially authorised in this behalf by a police officer of or above the rank of a superintendent of Police.

Explanation-In this section, the expressions "bank" and "bankers’ books" shall have the meanings respectively assigned to them in the Bankers’ Books Evidence Act, 1891.

19. Previous sanction necessary for prosecution

(1) No court shall take cognizance of an offence punishable under section 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.

(2) Where for any reason whatsoever any doubt arises as to whether the previous sanction as required under sub-section (1) should be given by the Central Government or the State Government or any other authority, such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed.

(3) Notwithstanding anything contained in the code of Criminal Procedure, 1973,-

(a) no finding, sentence or order passed by a special Judge shall be reversed or altered by a Court in appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in, the sanction required under sub-section (1), unless in the opinion of that court, a failure of justice has in fact been occasioned thereby;

(b) no court shall stay the proceedings under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice;

(c) no court shall stay the proceedings under this Act on any other ground and no court shall exercise the powers of revision in relation to any interlocutory order passed in any inquiry, trial, appeal or other proceedings.

(4) In determining under sub-section (3) whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice the court shall have regard to the fact whether the objection could and should have been raised at any earlier stage in the proceedings.
Explanation.-For the purposes of this section,-

(a) error includes competency of the authority to grant sanction;

(b) a sanction required for prosecution includes reference to any requirement that the prosecution shall be at the instance of a specified authority or with the sanction of a specified person or any requirement of a similar nature.

20. Presumption where public servant accepts gratification other than legal remuneration

(1) Where, in any trial of an offence punishable under section 7 or section 11 or clause (a) or clause (b) of sub-section (1) of section 13 it is proved that an accused person has accepted or obtained or has agreed to accept or attempted to obtain for himself, or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed, unless the contrary is proved, that he accepted or obtained or agreed to accept or attempted to obtain that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in section 7 or, as the case may be, without consideration or for a consideration which he knows to be Inadequate.

(2) Where in any trial of an offence punishable under section 12 or under clause (b) of section 14, it is proved that any gratification (other than legal remuneration) or any valuable thing has been given or offered to be given or attempted to be given by an accused person, it shall be presumed, unless the contrary is proved, that he gave or offered to give or attempted to give that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in section 7, or, as the case may be, without consideration or for a consideration which he knows to be inadequate.

(3) Notwithstanding anything contained in sub-section (1) and (2), the court may decline to draw the presumption referred to in either of the said sub-sections, if the gratification or thing aforesaid is, in its opinion, so trivial that no inference of corruption may fairly be drawn.

21. Accused person to be a competent witness

Any person charged with an offence punishable under this Act, shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial:
Provided that-
(a) he shall not be called as a witness except at his own request;

(b) his failure to give evidence shall not be made the subject of any comment by the prosecution or give rise to any presumption against himself or any person charged together with him at the same trial;

(c) he shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of any offence other than the offence with which he is charged, or is of bad character, unless-

(i) the proof that he has committed or been convicted of such offence is admissible evidence to that he is guilty of the offence with which he is charged, or

(ii) he has personally or by his pleader asked any question of any witness for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or of any witness for the prosecution, or
(iii) he has given evidence against any other person charged with the same offence.

22. The Code of Criminal Procedure, 1973 to apply subject to certain modifications

The provisions of the Code of Criminal Procedure, 1973, shall in their application to any proceeding in relation to an offence punishable under this Act have effect as if,-

(a) in sub-section (1) of section 243, for the words "The accused shall then be called upon", the words "The accused shall then be required to give in writing at once or within. such time as the Court may allow, a list of the persons (if any) whom he proposes to examine as his witnesses and of the documents (if any) on which he proposes to rely and he shall then be called upon" had been substituted;

(b) in sub-section (2) of section 309, after the 'third proviso, the following proviso had been inserted, namely:-
"Provided also that the proceeding shall not be adjourned or postponed merely on the ground that an application under section 397 has been made by a party to the proceeding.";

(c) after sub-section (2) of section 317, the following sub-section had been inserted, namely:-
"(3) Notwithstanding anything contained in sub-section (1) or sub-section (2), the Judge may, if he thinks fit and for reasons to be recorded by him, proceed with inquiry or trial in the absence of the accused or his pleader and record the evidence of any witness subject to the right of the accused to recall the witness for cross-examination.";

(d) in sub-section (1) of section 397, before the Explanation, the following proviso had been inserted, namely:-
"Provided that where the powers under this section are exercised by a Court on an application made by a party to such proceedings, the Court shall not ordinarily call for the record of the proceedings:-

(a) without giving the other party an opportunity of showing cause why the record should not be called for; or

(b) if it is satisfied that an examination of the record of the proceedings may be made from the certified copies.".

23. Particulars in a charge in relation to an offence under section 13(1) (c).

Notwithstanding anything contained in the Code of Criminal Procedure, 1973, when an accused is charged with an offence under clause (c) of sub-section (1) of section 13, it shall be sufficient to describe in the charge the property in respect of which the offence is alleged to have been committed , and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 219 of the said Code:
Provided that the time included between the first and last of such dates shall not exceed one year.

24. Statement by bribe giver not to subject him to prosecution

Notwithstanding anything contained in any law for the time being in force, a statement made by a person in any proceeding against a public servant for an offence under sections 7 to 11 or under section 13 or section 15, that he offered or agreed to offer any gratification (other than legal remuneration) or any valuable thing to the public servant, shall not subject such person to a prosecution under section 12.

25. Military, Naval and Air Force or other law not to be affected

(1) Nothing in this Act shall affect the jurisdiction exercisable by, or the procedure applicable to, any court or other authority under the Army Act. 1950, the Air Force Act, 1950, the Navy Act, 1957, the Border Security Force Act, 1968, the Coast Guard Act, 1978 and the National Security Guard Act, 1986.

(2) For the removal of doubts, it is hereby declared that for the purposes of any such law as is referred to in sub-section (1), the court of a special Judge shall be deemed to be a court of ordinary criminal justice.

26. Special Judges appointed under Act 46 of 1952 to be special Judges appointed under this Act

Every special Judge appointed under the Criminal Law Amendment Act, 1952,, for any area or areas and is holding office on the commencement of this Act shall be deemed to be a special Judge appointed under section 3 of this Act for that area or areas and, accordingly, on and from such commencement, every such Judge shall continue to deal with all the proceedings pending before him on such commencement in accordance with the provisions of this Act.

27. Appeal and revision

Subject to the provisions of this Act, the High Court may exercise, so far as they may be applicable, all the powers of appeal and revision conferred by the Code of Criminal Procedure, 1973 on a High Court as if the court of special Judge were a court of Session trying cases within the local limits of the High Court.

28. Act to be in addition to any other law

The provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being in force, and nothing contained herein shall exempt any public servant from any proceeding which might, apart from this Act, be instituted against him.

29. Amendment of the Ordinance 38 of 1944

In the Criminal Law Amendment Ordinance, 1944,-

(a) in sub-section (1) of section 3, sub-section (1) of sector 9, clause (a) of section 10, sub-section (1) of section 11 and sub-section (1) of section 13, for the words "State Government", wherever they occur, the words "State Government or, as the case may be, the Central Government" shall be substituted;

(b) in section 10, in clause (a), for the words " three months", the words "one year" shall be substituted;

(c) in the Schedule,-

(i) paragraph 1 shall be omitted;

(ii) in paragraphs 2 and 4,-

(a) after the words "a local authority", the words and figures "or a corporation established by or under a Central, Provincial or State Act, or an authority or a body owned or controlled or aided by Government or a Government company as defined in section 617 of the Companies Act, 1956 or a society aided by such corporation, authority. body or Government company" shall be inserted;

(b) after the words "or authority", the words "or corporation or body or Government company or society" shall be inserted;

(iii) for paragraph 4A, the following paragraph shall be substituted, namely: -
"4A. An offence punishable under the Prevention of Corruption Act, 1988.";

(iv) in paragraph 5, for the words and figures "items 2, 3 and 4", the words, figures and letter "items 2, 3, 4 and 4A" shall be substituted.

30. Repeal and saving

(1) The Prevention of Corruption Act, 1947 and the Criminal Law Amendment Act, 1952 are hereby repealed.

(2) Notwithstanding such repeal, but without prejudice to the application of section 6 of the General Clauses Act, 1897, anything done or any action taken or purported to 'have been done or taken under or in pursuance of the Acts so repealed shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken, under or in pursuance of the corresponding provision of this Act.

31. Omission of certain sections of Act 45 of 1860

Sections 161 to 165A (both inclusive) of the Indian Penal Code shall be omitted, and section 6 of the General Clauses Act, 1897, shall apply to such omission as if the said sections had been repealed by a Central Act.

ANNEXURE-2

रजिस्ट्री सं॰ डी॰ एल॰—(एन)04/0007/2003—14 REGISTERED NO. DL—(N)04/0007/2003—14

भारत का राजपत्र
The Gazette of India

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इस भाग में भिन्न पृष्ठ संख्या दी जाती है जिससे कि यह अलग संकलन के रूप में रखा जा सके।
Separate paging is given to this Part in order that it may be filed as a separate compilation.

MINISTRY OF LAW AND JUSTICE
(Legislative Department)

New Delhi, the 12*th May,* 2014*/Vaisakha* 22, 1936 *(Saka)*

The following Act of Parliament received the assent of the President on the 9th May, 2014, and is hereby published for general information:—

THE WHISTLE BLOWERS PROTECTION ACT, 2011

No. 17 of 2014

[9*th May*, 2014.]

AN ACT to establish a mechanism to receive complaints relating to disclosure on any allegation of corruption or wilful misuse of power or wilful misuse of discretion against any public servant and to inquire or cause an inquiry into such disclosure and to provide adequate safeguards against victimisation of the person making such complaint and for matters connected therewith and incidental thereto.

BE it enacted by Parliament in the Sixty-second Year of the Republic of India as follows:—

CHAPTER I

PRELIMINARY

Short title, extent and commencement.

1. (*1*) This Act may be called the Whistle Blowers Protection Act, 2011.

(*2*) It extends to the whole of India except the State of Jammu and Kashmir.

(*3*) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint; and different dates may be appointed for different provisions of this Act and any reference in any provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

Provisions of this Act not to apply to Special Protection Group.

2. The provisions of this Act shall not apply to the armed forces of the Union, being the Special Protection Group constituted under the Special Protection Group Act, 1988. 34 of 1988.

Definitions.

3. In this Act, unless the context otherwise requires,—

(*a*) "Central Vigilance Commission" means the Commission constituted under sub-section (*1*) of section 3 of the Central Vigilance Commission Act, 2003; 45 of 2003.

(*b*) "Competent Authority" means—

(*i*) in relation to a Member of the Union Council of Ministers, the Prime Minister;

(*ii*) in relation to a Member of Parliament, other than a Minister, the Chairman of the Council of States if such Member is a Member of the Council of States or the Speaker of the House of the People if such Member is a Member of the House of the People, as the case may be;

(*iii*) in relation to a Member of the Council of Ministers in a State or Union territory, the Chief Minister of the State or Union territory, as the case may be;

(*iv*) in relation to a Member of Legislative Council or Legislative Assembly of a State or Union territory, other than a Minister, the Chairman of the Legislative Council if such Member is a Member of the Council or the Speaker of the Legislative Assembly if such Member is a Member of the Assembly, as the case may be;

(*v*) in relation to—

(*A*) any Judge (except a Judge of the Supreme Court or of a High Court) including any person empowered by law to discharge, whether by himself or as a member of any body of persons, any adjudicatory functions; or

(*B*) any person authorised by a court of justice to perform any duty, in connection with the administration of justice, including a liquidator, receiver or commissioner appointed by such court; or

(*C*) any arbitrator or other person to whom any cause or matter has been referred for decision or report by a court of justice or by a competent public authority,

the High Court;

(*vi*) in relation to—

(*A*) any person in the service or pay of the Central Government or remunerated by the Central Government by way of fees or commission for the performance of any public duty except Ministers, Members of Parliament and members or persons referred to in clause (*a*) or clause (*b*) or clause (*c*) or clause (*d*) of article 33 of the Constitution, or in the service or pay of a society or local authority or any corporation established by or under any Central Act, or an authority or a body owned or controlled or aided by the Central Government or a Government company as defined in section 617 of the Companies Act, 1956, owned or controlled by the Central Government; or 1 of 1956.

(*B*) any person who holds an office by virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election in relation to elections to Parliament or a State Legislature; or

(*C*) any person who holds an office by virtue of which he is authorised or required to perform any public duty (except Ministers and Members of Parliament); or

(*D*) any person who is the president, secretary or other office-bearer of a registered co-operative society engaged in agriculture, industry, trade or banking, receiving or having received any financial aid from the Central Government or from any corporation established by or under a Central Act, or any authority or body or a Government company as defined in section 617 of the Companies Act, 1956 owned or controlled or aided by the Central Government; or

1 of 1956.

(*E*) any person who is a chairman, member or employee of any Central Service Commission or Board, by whatever name called, or a member of any selection committee appointed by such Commission or Board for the conduct of any examination or making any selection on behalf of such Commission or Board; or

(*F*) any person who is a Vice-Chancellor or member of any governing body, professor, associate professor, assistant professor, reader, lecturer or any other teacher or employee, by whatever designation called, of any University established by a Central Act or established or controlled or funded by the Central Government or any person whose services have been availed of by such University or any such other public authority in connection with holding or conducting examinations; or

(*G*) any person who is an office-bearer or an employee of an educational, scientific, social, cultural or other institution, in whatever manner established, receiving or having received any financial assistance from the Central Government or any local or other public authority,

the Central Vigilance Commission or any other authority, as the Central Government may, by notification in the Official Gazette, specify in this behalf under this Act;

(*vii*) in relation to—

(*A*) any person in the service or pay of the State Government or remunerated by the State Government by way of fees or commission, for the performance of any public duty except Ministers, Members of Legislative Council or Legislative Assembly of the State, or in the service or pay of a society or local authority or any corporation established by or under a Provincial or State Act, or an authority or a body owned or controlled or aided by the State Government or a Government company as defined in section 617 of the Companies Act, 1956, owned or controlled by the State Government; or

1 of 1956.

(*B*) any person who holds an office by virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election in relation to municipality or Panchayats or other local body in the State; or

(*C*) any person who holds an office by virtue of which he is authorised or required to perform any public duty in relation to the affairs of the State Government (except Ministers and Members of Legislative Council or Legislative Assembly of the State); or

(*D*) any person who is the president, secretary or other office-bearer of a registered co-operative society engaged in agriculture, industry, trade or banking, receiving or having received any financial aid from the State Government or from any corporation established by or under a Provincial or State Act, or any authority or body or a Government company as defined in section 617 of the Companies Act, 1956 owned or controlled or aided by the State Government; or

1 of 1956.

(*E*) any person who is a chairman, member or employee of any State Service Commission or Board, by whatever name called, or a member of any selection committee appointed by such Commission or Board for the conduct of any examination or making any selection on behalf of such Commission or Board; or

(*F*) any person who is a Vice-Chancellor or member of any governing body, professor, associate professor, assistant professor, reader, lecturer or any other teacher or employee, by whatever designation called, of any University established by a Provincial or State Act or established or controlled or funded by the State Government and any person whose services have been availed of by such University or any such other public authority in connection with holding or conducting examinations; or

(*G*) any person who is an office-bearer or an employee of an educational, scientific, social, cultural or other institution, in whatever manner established, receiving or having received any financial assistance from the State Government or any local or other public authority,

the State Vigilance Commission, if any, or any officer of the State Government or any other authority, as the State Government may, by notification in the Official Gazette, specify in this behalf under this Act;

(*viii*) in relation to members or persons referred to in clause (*a*) or clause (*b*) or clause (*c*) or clause (*d*) of article 33 of the Constitution, any authority or authorities as the Central Government or the State Government, as the case may be, having jurisdiction in respect thereof, may, by notification in the Official Gazette, specify in this behalf under this Act;

(*c*) "complainant" means any person who makes a complaint relating to disclosure under this Act;

(*d*) "disclosure" means a complaint relating to,—

(*i*) an attempt to commit or commission of an offence under the Prevention of Corruption Act, 1988; 49 of 1988.

(*ii*) wilful misuse of power or wilful misuse of discretion by virtue of which demonstrable loss is caused to the Government or demonstrable wrongful gain accrues to the public servant or to any third party;

(*iii*) attempt to commit or commission of a criminal offence by a public servant,

made in writing or by electronic mail or electronic mail message, against the public servant and includes public interest disclosure referred to in sub-section (*2*) of section 4;

(*e*) "electronic mail" or "electronic mail message" means a message or information created or transmitted or received on any computer, computer system, computer resource or communication device including attachments in text, image, audio, video and any other electronic record, which may be transmitted with the message;

(*f*) "Government company" means a company referred to in section 617 of the Companies Act, 1956; 1 of 1956.

(*g*) "notification" means a notification published in the Gazette of India or, as the case may be, the Official Gazette of a State;

(*h*) "public authority" means any authority, body or institution falling within the jurisdiction of the Competent Authority;

(*i*) "public servant" shall have the same meaning as assigned to it in clause (*c*) of section 2 of the Prevention of Corruption Act, 1988 but shall not include a Judge of the Supreme Court or a Judge of a High Court; 49 of 1988.

(*j*) "prescribed" means prescribed by rules made by the Central Government and the State Government, as the case may be, under this Act;

(*k*) "regulations" means the regulations made by the Competent Authority under this Act.

CHAPTER II

PUBLIC INTEREST DISCLOSURE

Requirement of public interest disclosure.

4. (*1*) Notwithstanding anything contained in the provisions of the Official Secrets Act, 1923, any public servant or any other person including any non-governmental organisation, may make a public interest disclosure before the Competent Authority. 19 of 1923.

(*2*) Any disclosure made under this Act shall be treated as public interest disclosure for the purposes of this Act and shall be made before the Competent Authority and the complaint making the disclosure shall, on behalf of the Competent Authority, be received by such authority as may be specified by regulations made by the Competent Authority.

(*3*) Every disclosure shall be made in good faith and the person making disclosure shall make a personal declaration stating that he reasonably believes that the information disclosed by him and allegation contained therein is substantially true.

(*4*) Every disclosure shall be made in writing or by electronic mail or electronic mail message in accordance with the procedure as may be prescribed and contain full particulars and be accompanied by supporting documents, or other materials, if any.

(*5*) The Competent Authority may, if it deems fit, call for further information or particulars from the person making the disclosure.

(*6*) No action shall be taken on public interest disclosure by the Competent Authority if the disclosure does not indicate the identity of the complainant or public servant making public interest disclosure or the identity of the complainant or public servant is found incorrect or false.

CHAPTER III

INQUIRY IN RELATION TO PUBLIC INTEREST DISCLOSURE

Powers and functions of Competent Authority on receipt of public interest disclosure.

5. (*1*) Subject to the provisions of this Act, the Competent Authority shall, on receipt of a public interest disclosure under section 4,—

(*a*) ascertain from the complainant or the public servant whether he was the person or the public servant who made the disclosure or not;

(*b*) conceal the indentity of the complainant unless the complainant himself has revealed his identity to any other office or authority while making public interest disclosure or in his complaint or otherwise.

(*2*) The Competent Authority shall, upon receipt of the complaint and concealing the identity of the complainant, or the public servant in the first instance, make discreet inquiry, in such manner and within such time as may be prescribed, to ascertain whether there is any basis for proceeding further to investigate the disclosure.

(*3*) If the Competent Authority, either as a result of the discreet inquiry, or on the basis of the disclosure itself without any inquiry, is of the opinion that the disclosure requires to be investigated, it shall seek comments or explanation or report from the Head of the Department of the organisation or authority, board or corporation concerned or office concerned within such time as may be specified by it.

(*4*) While seeking comments or explanations or report referred to in sub-section (*3*), the Competent Authority shall not reveal the identity of the complainant or the public servant and direct the Head of the Department of the organisation concerned or office concerned not to reveal the identity of the complainant or public servant:

Provided that if the Competent Authority is of the opinion that it has, for the purpose of seeking comments or explanation or report from them under sub-section (*3*) on the public disclosure, become necessary to reveal the identity of the complainant or public servant to the Head of the Department of the organisation or authority, board or corporation concerned or office concerned, the Competent Authority may, with the prior written consent of the complainant or public servant, reveal the identity of the complainant or public servant to such Head of the Department of the organisation or authority, board or corporation concerned or office concerned for the said purpose:

Provided further that in case the complainant or public servant does not agree to his name being revealed to the Head of the Department, in that case, the complainant or public servant, as the case may be, shall provide all documentary evidence in support of his complaint to the Competent Authority.

(*5*) The Head of the organisation or office concerned shall not directly or indirectly reveal the identity of the complainant or public servant who made the disclosure.

(*6*) The Competent Authority, if after conducting an inquiry, is of the opinion that—

(*a*) the facts and allegations contained in the disclosure are frivolous or vexatious; or

(*b*) there are no sufficient grounds for proceeding with the inquiry,

it shall close the matter.

(*7*) After receipt of the comments or explanations or report referred to in sub-section (*3*), if the Competent Authority is of the opinion that such comments or explanations or report reveals either wilful misuse of power or wilful misuse of discretion or substantiates allegations of corruption, it shall recommend to the public authority to take any one or more of the following measures, namely:—

(*i*) initiating proceedings against the concerned public servant;

(*ii*) taking appropriate administrative steps for redressing the loss caused to the Government as a result of the corrupt practice or misuse of office or misuse of discretion, as the case may be;

(*iii*) recommend to the appropriate authority or agency for initiation of criminal proceedings under the relevant laws for the time being in force, if so warranted by the facts and circumstances of the case;

(*iv*) recommend for taking of corrective measures;

(*v*) take any other measures not falling under clauses (*i*) to (*iv*) which may be necessary for the purpose of this Act.

(*8*) The public authority to whom a recommendation is made under sub-section (*7*) shall take a decision on such recommendation within three months of receipt of such recommendation, or within such extended period not exceeding three months, as the Competent Authority may allow on a request made by the public authority:

Provided that in case the public authority does not agree with the recommendation of the Competent Authority, it shall record the reasons for such disagreement.

(*9*) The Competent Authority shall, after making an inquiry, inform the complainant or public servant about the action taken on the complaint and the final outcome thereof:

Provided that in a case where, after making an inquiry, the Competent Authority decides to close the case, it shall, before passing the order for closure of the case, provide an opportunity of being heard to the complainant, if the complainant so desires.

Matters not to be inquired by Competent Authority.

6. (*1*) If any matter specified or an issue raised in a disclosure has been determined by a Court or Tribunal authorised to determine the issue, after consideration of the matters specified or issue raised in the disclosure, the Competent Authority shall not take notice of the disclosure to the extent that the disclosure seeks to reopen such issue.

(2) The Competent Authority shall not entertain or inquire into any disclosure—

(a) in respect of which a formal and public inquiry has been ordered under the Public Servants (Inquiries) Act, 1850; or 37 of 1850.

(b) in respect of a matter which has been referred for inquiry under the Commissions of Inquiry Act, 1952. 60 of 1952.

(3) The Competent Authority shall not investigate, any disclosure involving an allegation, if the complaint is made after the expiry of seven years from the date on which the action complained against is alleged to have taken place.

(4) Nothing in this Act shall be construed as empowering the Competent Authority to question, in any inquiry under this Act, any *bona fide* action or *bona fide* discretion (including administrative or statutory discretion) exercised in discharge of duty by the employee.

CHAPTER IV

POWERS OF COMPETENT AUTHORITY

Powers of Competent Authority.

7. (*1*) Without prejudice to the powers conferred upon the Competent Authority under any other law for the time being in force, the Competent Authority, may require, for the purpose of any inquiry any public servant or any other person who in its opinion shall be able to furnish information or produce documents relevant to the inquiry or assist in the inquiry, to furnish any such information or produce any such document as may be necessary for the said purpose.

(2) For the purpose of any such inquiry (including the preliminary inquiry), the Competent Authority shall have all the powers of a Civil Court while trying a suit under the Code of Civil Procedure, 1908, in respect of the following matters, namely:— 5 of 1908.

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of any document;

(c) receiving evidence on affidavits;

(d) requisitioning any public record or copy thereof from any court or office;

(e) issuing commissions for the examination of witnesses or documents;

(f) such other matters as may be prescribed.

(3) The Competent Authority shall be deemed to be a Civil Court for the purpose of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973, and every proceeding before the Competent Authority shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 and for the purposes of section 196 of the Indian Penal Code. 2 of 1974. 45 of 1860.

(4) Subject to the provisions of section 8, no obligation to maintain secrecy or other restriction upon the disclosure of information obtained by or furnished to the Government or any public servant, whether imposed by the Official Secrets Act, 1923 or any other law for the time being in force, shall be claimed by any public servant in the proceedings before the Competent Authority or any person or agency authorised by it in writing and the Government 19 of 1923.

or any public servant shall not be entitled in relation to any such inquiry, to any such privilege in respect of the production of documents or the giving of evidence as is allowed by any enactment or by any rules made thereunder:

Provided that the Competent Authority, while exercising such powers of the Civil Court, shall take steps as necessary to ensure that the identity of the person making complaint has not been revealed or compromised.

Certain matters exempt from disclosure.

8. *(1)* No person shall be required or be authorised by virtue of provisions contained in this Act to furnish any such information or answer any such question or produce any document or information or render any other assistance in the inquiry under this Act if such question or document or information is likely to prejudicially affect the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign State, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence,—

(a) as might involve the disclosure of proceedings of the Cabinet of the Union Government or any Committee of the Cabinet;

(b) as might involve the disclosure of proceedings of the Cabinet of the State Government or any Committee of that Cabinet,

and for the purpose of this sub-section, a certificate issued by the Secretary to the Government of India or the Secretary to the State Government, as the case may be, or, any authority so authorised by the Central or State Government certifying that any information, answer or portion of a document is of the nature specified in clause *(a)* or clause *(b),* shall be binding and conclusive.

(2) Subject to the provisions of sub-section *(1),* no person shall be compelled for the purposes of inquiry under this Act to give any evidence or produce any document which he could not be compelled to give or produce in proceedings before a court.

Superintendence of Competent Authority over appropriate machinery.

9. *(1)* Every public authority shall, for the purposes of dealing or inquiry into the disclosures sent to it under sub-section *(3)* of section 5, create an appropriate machinery for the said purpose.

(2) The Competent Authority shall exercise superintendence over the working of machinery created under sub-section *(1)* for the purposes of dealing or inquiry into the disclosures and give such directions for its proper functioning, from time to time, as it may consider necessary.

Competent Authority to take assistance of police authorities, etc., in certain cases.

10. For the purpose of making discreet inquiry or obtaining information from the organisation concerned, the Competent Authority shall be authorised to take assistance of the Delhi Special Police Establishment or the police authorities, or any other authority as may be considered necessary, to render all assistance to complete the inquiry within the prescribed time pursuant to the disclosure received by the Competent Authority.

CHAPTER V

PROTECTION TO THE PERSONS MAKING DISCLOSURE

Safeguards against victimisation.

11. *(1)* The Central Government shall ensure that no person or a public servant who has made a disclosure under this Act is victimised by initiation of any proceedings or otherwise merely on the ground that such person or a public servant had made a disclosure or rendered assistance in inquiry under this Act.

(2) If any person is being victimised or likely to be victimised on the ground that he had filed a complaint or made disclosure or rendered assistance in inquiry under this Act, he may file an application before the Competent Authority seeking redress in the matter, and such authority shall take such action, as deemed fit and may give suitable directions to the concerned public servant or the public authority, as the case may be, to protect such person from being victimised or avoid his victimisation:

Provided that the Competent Authority shall, before giving any such direction to the public authority or public servant, give an opportunity of hearing to the complainant and the public authority or public servant, as the case may be:

Provided further that in any such hearing, the burden of proof that the alleged action on the part of the public authority is not victimisation, shall lie on the public authority.

(3) Every direction given under sub-section *(2)* by the Competent Authority shall be binding upon the public servant or the public authority against whom the allegation of victimisation has been proved.

(*4*) Notwithstanding anything contained in any other law for the time being in force, the power to give directions under sub-section (*2*), in relation to a public servant, shall include the power to direct the restoration of the public servant making the disclosure, to the status *quo ante*.

(*5*) Any person who wilfully does not comply with the direction of the Competent Authority under sub-section (*2*), shall be liable to a penalty which may extend up to thirty thousand rupees.

Protection of witnesses and other persons.

12. If the Competent Authority either on the application of the complainant, or witnesses, or on the basis of information gathered, is of the opinion that either the complainant or public servant or the witnesses or any person rendering assistance for inquiry under this Act need protection, the Competent Authority shall issue appropriate directions to the concerned Government authorities (including police) which shall take necessary steps, through its agencies, to protect such complainant or public servant or persons concerned.

Protection of identity of complainant.

13. The Competent Authority shall, notwithstanding any law for the time being in force, conceal, as required under this Act, the identity of the complainant and the documents or information furnished by him, for the purposes of enquiry under this Act, unless so decided otherwise by the Competent Authority itself or it became necessary to reveal or produce the same by virtue of the order of the court.

Power to pass interim orders.

14. The Competent Authority, at any time after the making of disclosure by the complainant or public servant, if it is of the opinion that any corrupt practice required to be stopped during the continuation of any inquiry for the said purpose may pass such interim orders as it may deem fit, to prevent the immediate stoppage of such practice.

CHAPTER VI

OFFENCES AND PENALTIES

Penalty for furnishing incomplete or incorrect or misleading comments or explanation or report.

15. Where the Competent Authority, at the time of examining the report or explanations or report referred to in sub-section (*3*) of section 5 on the complaint submitted by organisation or official concerned, is of the opinion that the organisation or official concerned, without any reasonable cause, has not furnished the report within the specified time or *mala fidely* refused to submit the report or knowingly given incomplete, incorrect or misleading or false report or destroyed record or information which was the subject of the disclosure or obstructed in any manner in furnishing the report, it shall impose—

(*a*) where the organisation or official concerned, without any reasonable cause, has not furnished the report within the specified time or *mala fidely* refused to submit the report, a penalty which may extend to two hundred fifty rupees for each day till report is furnished, so, however, the total amount of such penalty shall not exceed fifty thousand rupees;

(*b*) where the organisation or official concerned, has knowingly given incomplete, incorrect or misleading or false report or destroyed record or information which was the subject of the disclosure or obstructed in any manner the furnishing of the report, a penalty which may extend to fifty thousand rupees:

Provided that no penalty shall be imposed against any person unless he has been given an opportunity of being heard.

Penalty for revealing identity of complainant.

16. Any person, who negligently or *mala fidely* reveals the identity of a complainant shall, without prejudice to the other provisions of this Act, be punishable with imprisonment for a term which may extend up to three years and also to fine which may extend up to fifty thousand rupees.

Punishment for false or frivolous disclosure.

17. Any person who makes any disclosure *mala fidely* and knowingly that it was incorrect or false or misleading shall be punishable with imprisonment for a term which may extend up to two years and also to fine which may extend up to thirty thousand rupees.

Punishment to Head of Department in certain cases.

18. (*1*) Where an offence under this Act has been committed by any Department of Government, the Head of the Department shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly unless he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(*2*) Notwithstanding anything contained in sub-section (*1*), where an offence under this Act has been committed by a Department of Government and it is proved that the offence has been committed with the consent or connivance of, or is attributable, such officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Offences by companies.

19. (*1*) Where an offence under this Act has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he has exercised all due diligence to prevent the commission of such offence.

(*2*) Notwithstanding anything contained in sub-section (*1*), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section,—

(*a*) "company" means any body corporate and includes a firm or other association of individuals; and

(*b*) "director", in relation to a firm, means a partner in the firm.

Appeal to High Court.

20. Any person aggrieved by any order of the Competent Authority relating to imposition of penalty under section 14 or section 15 or section 16 may prefer an appeal to the High Court within a period of sixty days from the date of the order appealed against:

Provided that the High Court may entertain the appeal after the expiry of the said period of sixty days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

Explanation.—For the purposes of this section, the "High Court" means the High Court within whose jurisdiction the cause of action arose.

Bar of jurisdiction.

21. No Civil Court shall have jurisdiction in respect of any matter which the Competent Authority is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

Court to take cognizance.

22. (*1*) No court shall take cognizance of any offence punishable under this Act or the rules or regulations made thereunder, save on a complaint made by the Competent Authority or any officer or person authorised by it.

(*2*) No court inferior to that of a Chief Metropolitan Magistrate or a Chief Judicial Magistrate shall try any offence punishable under this Act.

CHAPTER VII

MISCELLANEOUS

Report on disclosures.

23. (*1*) The Competent Authority shall prepare a consolidated annual report of the performance of its activities in such form as may be prescribed and forward it to the Central Government or State Government, as the case may be.

(*2*) On receipt of the annual report under sub-section (*1*), the Central Government or State Government, as the case may be, shall cause a copy thereof to be laid before each House of Parliament, or the State Legislature, as the case may be:

Provided that where any other law for the time being in force provides preparing of such annual report by the Competent Authority, then the said annual report shall contain a separate part on the performance of activities under this Act by the Competent Authority.

Protection of action taken in good faith.

24. No suit, prosecution or other legal proceedings shall lie against the Competent Authority or against any officer, employees, agency or person acting on its behalf, in respect of anything which is in good faith done or intended to be done under this Act.

Power of Central Government to make rules.

25. (*1*) The Central Government may, by notification in the official Gazette, make rules for the purpose of carrying out the provisions of this Act.

(*2*) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(*a*) the procedure for disclosure by writing or appropriate electronic means under sub-section (*4*) of section 4;

(*b*) the manner in which and the time within which the discreet inquiry shall be made by the Competent Authority under sub-section (*2*) of section 5;

(*c*) the additional matter in respect of which the Competent Authority may exercise the powers of a Civil Court under clause (*f*) of sub-section (*2*) of section 7;

(*d*) the form of annual report under sub-section (*1*) of section 23;

(*e*) any other matter which is required to be, or may be, prescribed.

Power of State Government to make rules.

26. The State Government may, by notification in the Official Gazette, make rules for the purpose of carrying out the provisions of this Act.

Power to make regulations.

27. The Competent Authority may, with the previous approval of the Central Government or the State Government, as the case may be, by notification in the Official Gazette, make regulations not inconsistent with the provisions of the Act and the rules made thereunder to provide for all matters for which provision is expedient for the purposes of giving effect to the provisions of this Act.

Notification and rules to be laid before Parliament.

28. Every notification issued and every rule made by the Central Government and every regulation made by the Competent Authority under this Act shall be laid, as soon as may be after it is issued or made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the notification or the rule or the regulation, or both Houses agree that the notification or the rule or the regulation should not be made, the notification or the rule or the regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that notification or rule or regulation.

Notification issued and rules made by State Government to be laid before State Legislature.

29. Every notification issued by a State Government and every rule made by a State Government and every regulation made by the Competent Authority under this Act shall be laid, as soon as may be after it is issued, before the State Legislature.

Power to remove difficulties.

30. (*1*) If any difficulty arises in giving effect to the provisions of the Act, the Central Government may, by order, not inconsistent with the provisions of this Act, remove the difficulty:

Provided that no such order shall be made after the expiry of a period of three years from the date of the commencement of this Act.

(*2*) Every order made under this section shall, as soon as may be after it is made, be laid before each House of Parliament.

Repeal and savings.

31. (*1*) The Government of India, Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training) Resolution No. 371/12/2002-AVD-III dated the 21st April, 2004 as amended *vide* Resolution of even number, dated the 29th April, 2004 is hereby repealed.

(*2*) Notwithstanding such repeal, anything done or any action taken under the said Resolution be deemed to have been done or taken under this Act.

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DR. SANJAY SINGH,
Additional Secretary to the Govt. of India.

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CORRIGENDUM

In the Pension Fund Regulatory and Development Authority Act, 2013 (23 of 2013), as published in a Gazette of India, Extraordinary, Part II, Session 1, issue No. 33, dated the 19th September, 2013, at page 3, line 35, *for* "preson", *read* "person".

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