CHAPTER 5

AN OVERVIEW OF THE PREVENTION OF CORRUPTION ACT, 1988
About sixty years since independence, even today, in the year 2007, our former Head of the State, President APJ Abdul Kalam is compelled to state corruption as one of the most “dreadful maladies” afflicting our society; to describe corruption as the concern of our society, our youth and the Government.”

Corruption is viewed today as canker which is anti-growth, anti-national, anti-development, anti-poor, anti-investment. It increases poverty, subverts the financial system and undermines the legitimacy of the State. Sixty years ago, the existence of this evil was felt with considerable consciousness by our legislative members and an attempt was made to check it, to take some effective measures to control it. On 3rd February 1947, the spread of this evil was well in the contemplation of the Members of the Parliament. During the legislative assembly debates on the Prevention of Corruption Bill of 1947, they expressed their awareness of the fact that mere establishment of the special police for the investigation of this kind of crimes was not enough. A dire need for adequate measures for tightening up the existing machinery to deal with offences of this kind was felt. Any moves in the past had met with criticism that:

There was laxity, that no rigorous action or measures have been taken to eradicate this evil which corrupts the public administration and that the crime more often goes unpunished.2

---

* www.freerepublic.com/~/paulross/-43k

1. Speaking at the inauguration of the 2-day 16th Biennial Conference of the Central Bureau of Investigation (CBI) and the State Anti-corruption Bureau. The Hindu, Friday, November 17, 2006.

These reasons weighed heavily on the mind of the Honourable Sardar Vallabhai Patel, (the then Home Minister), when the bill relating to anti-corruption law, introduced in the preceding session was moved by him for the consideration of the House of Lok Sabha.  

5.1 EVOLUTION OF ANTI-CORRUPTION LAWS IN INDIA

Prior to the outbreak of the Second World War, corruption among public servants was not felt as a social or national problem, though it was moderately confined to the lower ranks of the civil service. In particular corruption was prevalent in considerable measure amongst revenue, police, excise and public works department officials, in the lower grades. The higher ranks were comparatively free from this evil.

The immense war efforts of 1939, which involved annual expenditure of hundred of crores of rupees over all kinds of supplies and contracts created unprecedented opportunities for acquisition of wealth by doubtful means. Control and scarcities generated by war provided ample opportunities for bribery, corruption, nepotism, etc. In the face of the threat faced by the country, all out efforts were concentrated on war. Prompt attention was not paid towards the looming social danger that was destined to grow to gigantic dimensions and persist as a permanent problem in the decades ahead.

Corruption, at the initial stage, 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. As mentioned earlier, as a consequence of the wars, the shortage of various goods necessitated the imposition of controls and extensive schemes of post-war reconstruction. This meant 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. However, the Government for long could not

3. Ibid.
ignore the emerging virus in its administration. To arrest the spreading cancer of corruption among its servants, the then Government, by an executive order created the Special Police Establishment in the year 1941 under the War Department. As the exercise of investigative powers of the Special Police Establishment was challenged before courts, the Government to remedy the situation promulgated Ordinance XXII of 1943 to confer legal status and authority to the Special Police Establishment. When this ordinance lapsed, a new ordinance (Ordinance 22 of 46) took its place. Finally, the Government in 1946 passed the Delhi Special Police Establishment Act.4

The objects, clauses of the Act specify the purpose of the Act as “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 said offences.”

The Act extends to the whole of India. The superintendence of the Delhi Special Police Establishment vested with the Central Government. In terms of order of the Supreme Court of India5 it is now transferred and vests with the Central Vigilance Commission since 1998. The jurisdiction extends all over India. But the SPE has to exercise its jurisdiction in any area of a State (other than Union Territories) only with the consent of the Government of that State.

Thus by this time, corruption had become a topic which had to be dealt with separately from other crimes. In February 1947, Honourable Sardar Vallabhbhai Patel expressed the need for moving the Anti-Corruption Bill for consideration of the House even before the birth of an Independent India.

Herein lay the seeds of the Prevention of Corruption Act 1988. Watering of seeds was done in 1947 when the Prevention of Corruption Act, 1947 for the most effective prevention of bribery and corruption was enacted. The country attained

5. Vineet Narain and others, v. Union Of India and another 1998 CrLJ 208 SC.
independence in August 1947. The Government which assumed office after
independence showed considerable concern to weed out the evil of corruption. In
1949, the Tek Chand Committee was appointed to review the working of the
Prevention of Corruption Act, 1947. In 1951, the committee was also requested
to assess the working of the SPE and its efficacy in combating corruption. All
India Services (Discipline and Appeal) Rules, 1955 were formulated.

On 8th February 1952, The Minister of Home Affairs and Law, Dr. Katju moved the
Prevention of Corruption (Amendment) Bill in the Lok Sabha to amend the
Prevention of Corruption Act 1947. The Act passed in 1947 was to be in force for
a period of three years. By amending Act in 1950, the life of the Act was
extended by another two years, i.e. up to the end of March 1952, and before that
in February 1952, the House considered the Prevention of Corruption
(Amendment) Bill seeking to extend or prolong the life of the 1947 Act by another
five years.

A question was put before the House on 8th February 1952 as to how far India
had benefited by the promulgation of the Prevention of Corruption Act 1947
during the years since 1947, and how far had corruption been prevented as a
result of that Act. It was observed by the Members of the House in agreement
with all, that corruption had become more rampant in the period from 1947
onwards than it was before, in every department, especially the Supply
department or the Rationing department. On the working of 1947 Act, Shri
Naziruddin Ahmad (West Bengal) said:

It was anticipated that within five years the criminal propensities of
public servants would be entirely dissipated by overfeeding. It is
now found again that five years would not do and that a period of
ten years is necessary.6

Thus it was observed in a dismay tone, that although the 1947 Act was passed to
check corruption, it was found that corruption was only gaining momentum. It
was felt that if the life of the Act was extended by ten years instead of five years,

then too the results would be the same as they had already seen, that is, “an increase in corruption.”

The failure of the 1947 Act to check corruption was attributed to two reasons:

(i) that the provisions of the Act were not sufficiently drastic.

(ii) that the Act had not been utilized sufficiently for the purpose of removing corruption. Especially where public servants were seen having accumulations or possessions which appeared disproportionate to their income, the Government did not probe nor made use of the Act nor carried out any investigation to find they really were.

It was suggested that there should be no mercy for a man who is found to be corrupt. It was also suggested by one of the members, that there was no need to go through the formalities of the law to the extent as it was in other offences. It was desired that under the Prevention of Corruption Act, one should have the power to uproot corruption even at the cost of setting aside the formalities of law. A strong suggestion was to make the Act more drastic and the definition of ‘criminal misconduct’ be made wider.

The shortcomings in the 1947 Act which were observed and pointed out were –

a) Although there were extreme penalties, there was little executive drive behind the Act. What was needed was not mere legislation alone, but the executive drive.

b) The will to implement the law was lacking.

c) Some sort of skill and cleverness on the part of the public servants who were able to get round the law, could not be ruled out in turning down the successful working of the Act of 1947.

d) Serious allegations were leveled (by Shri Shiv Charan Lal) against the police officers in charge of the anti-corruption department for bribery. He remarked:

7. *Id.* at p-126.
Some people are caught. The Anti-Corruption Department catches hold of some people, but after some time the cases against them are dropped. Why? Because the anti-corruption officers are bribed.\(^8\)

(He even suggested that the Department must be placed under the charge of judicial officers or high executive officers whose character throughout has been unblemished or other public men).\(^9\)

e) That corruption cannot be checked merely by enacting laws. While enacting laws, human nature, human psychology and the entire set up under which the country is administered, must be taken into consideration.

Attributing the failure of checking corruption to such reasons, it was strongly felt that the enacting of legislation would not help much and that the welfare of the country and the society lay in the purification of our administration. It was felt that the Government itself seemed to be the most corrupt. Babu Ramnarayan Singh stated\(^10\):

\[
\text{That person is most guilty who possesses brain and does something with his brain. What I meant is that the Government themselves seems to be the most corrupt.}
\]

The Criminal Law (Amendment) Act, 1952, was passed as a result of the recommendations made by the Committee of Members of Parliament under the Chairmanship of Dr. Bakshi Tek Chand, set up to review the working of the Special Police Establishment and to suggest improvements of the laws relating to bribery and corruption.

The preamble of the Criminal Law (Amendment) Act, 1952, shows that it was passed with a view to amend the Indian Penal Code and the Code of Criminal Procedure, 1898, and to provide for a more speedy trial of certain offences. A higher punishment was prescribed for an offence under Section 165, IPC and a new Section 165-A was introduced in the IPC. Similarly, abetment of offences

\(^{8}\) Ibid, at p-135.
\(^{9}\) Ibid.
\(^{10}\) Id. at p-165.
under Sections 161 or 165 were made substantive offences. Section 164 and 337, CrPC were also amended. The State Governments was invested with the power to appoint Special Judges such as may be necessary and for such areas or areas as may be specified by a notification to try certain offences. Section 8 of this Act laid down the procedure and powers of Special Judge who could tender a pardon to any person supposed to have been directly or indirectly concerned in, or privy to, an offence on condition of his making a full and true disclosure of the whole circumstances within his knowledge relating to the offence. In the matter of appeals and revisions to the High Court, Court of the Special Judge was to be treated as the Court of Sessions.

On 28 March 1957 was passed the Prevention of Corruption (Amendment) Bill repealing the Prevention of Corruption (Amendment) Ordinance, debating and accepting Section 5 relating to criminal misconduct to continue for all time to come as long as the Prevention of Corruption Act survived.

In June 1962, the Government of India announced the appointment of a committee under Shri K. Santhanam, M.P., with a wide list of references to examine the problem and all attendant matters in their complete perspective to recommend comprehensive solutions. The Committee, which came to be popularly identified now as the Santhanam Committee, submitted its report on 31.3.1964. This report marked a high watermark in the crusade against corruption. The broad contours of the anti-corruption framework that exists even today is inherited from its recommendations. The committee suggested various reforms, which were accepted by the Government. Some of the follow-up measures carried out were as under:

1. The Anti-Corruption Laws (Amendment) Act 1964 was enacted with a view to make the anti-corruption laws more effective and to ensure speedy trial of cases.
2. Central Vigilance Commission came into being in 1964.
3. Vigilance Organizations in Railways and other Ministries were revamped.
4. Conduct Rules of public servants were reviewed and loopholes plugged. The Central Civil Services (Classification, Control and Appeal) Rules came into force from 1st December 1965, modifying the existing Rules framed in 1957.

5. Central Civil Services (Conduct) Rules 1964 and All India Services (Conduct) Rules 1968 updated these regulations based on Articles 309, 310 and 311 of the Constitution of India. It was followed by All India Services (Discipline and Appeal) Rules 1969.

But evidently over the years desired results could not be achieved. The dishonest and corrupt public servants could escape punishment by taking advantage of the legal flaws and technicalities. A too much adherence to the procedural quibbling and techniques by the courts in the trial of corrupt public servants and the resultant acquittals of such persons apparently led to the belief that the anti-corruption laws needed further amendments and improvements.

There cannot be two opinions that corruption in all walks of life is sapping the very foundations of our society. This menace has to be fought on war footing and the evil nipped in the bud with a strong hand. Not only the people at large are to be made conscious of the social disease but told to voluntarily and willingly extend their co-operation to the anti-corruption authorities to expose and bring to book the corrupt elements.

On May 7, 1987, at 12.21 hrs. – the Minister of State in the Ministry of Personnel, Public Grievances and Pensions and Minister of State in the Ministry of Home Affairs, Shri P. Chidambaram, moved the bill for consideration of the Lok Sabha to consolidate and amend the law relating to the prevention of corruption and for matters connected therewith.

At the time of introduction of the Bill of 1987, were existing the following anti-corruption provisions, viz.: The Prevention of Corruption Act 1947, the Criminal Law Amendment Act of 1952, several sections (from 161 to 165) of the Indian Penal Code dealing with corruption offences amongst public servants, and an old law which remained forgotten for quite some time,- the Criminal Law Amendment...
Ordinance, 1944. The Bill of 1987 proposed was an attempt to consolidate all these aforementioned provisions in one enactment. Taking strong note of the recent pronouncements by the courts and the forty years experience gained in the working of the PCA, 1947, was born the Act of 1988 expected to be a better, wiser, an improvement over the earlier anti-corruption laws.

In the drive against corruption, the implementation of previous anti-corruption laws faced certain practical difficulties which arose as a result of certain legal provisions and certain administrative constraints. An attempt to remove them was made in the PCA, 1988. It was realized that the already activated three instruments of the Central Government viz., the Ministry of Personnel having an Administrative Vigilance Division, the Central Vigilance Commission, and the ‘sword arm’ of the Government - the Central Bureau of Investigation, needed to be fuelled with more energy in order to intensify the drive against corruption.

In the Gazette of India, dated 23rd November, 1946, Part V, Statement of objects and reasons which led to the enactment of the Prevention of Corruption Act, 1947 (Act no. II of 1947) were stated as follows:

The scope for bribery and corruption of public servants had been enormously increased by war conditions and though the war is now over, opportunities for corrupt practices will remain for considerable time to come. Contracts are being terminated; large amounts of Government surplus stores are being disposed of; there will for years be shortage of various kinds requiring imposition of controls, and extensive schemes of post-war re-construction, involving the disbursement of very large sums of Government money. All these activities offer wide scope of corrupt practices and seriousness of the evil and possibility of its continuance or extension in future are such as to justify immediate and drastic action to stamp it out.

The idea underlying was to enact more effective legislation for the prevention of bribery and corruption. It appears that the working of the PCA, 1947, showed that it required further improvements and amendments. Accordingly, Criminal Law
(Amendment) Act, 1952, (Act XLVI of 1952) was brought on the Statute Book, which received the assent of the President on 28th July, 1952. In 1964, the Anti-Corruption Laws (Amendment) Act, 1964, (Act No. 40 of 1964) was passed. It aimed at further amending the Indian Penal Code, 1860, the Criminal Law Amendment Ordinance, 1944, the Delhi Special Police Establishment Act, 1946, the Prevention of Corruption Act, 1947 and the Criminal Law (Amendment) Act, 1952. As a result thereof a number of amendments were made in the laws pertaining to corruption and bribery with a view to make it more effective and result-oriented.

5.2 THE INNOVATIONS MADE IN THE PREVENTION OF CORRUPTION ACT, 1988

The Prevention of Corruption Act, 1988 is an anti-Corruption law, a penal law that creates offences. It specifies penalties. It does no more. It can do no more.11 The law is not intended to be a law which deals with every aspect of administration and corruption. Being a penal law it can only do this much. It can only create offences and specify penalties. It has to be supplemented with other laws.

5.2.1 A comprehensive definition of the term public servant

Section 2 of the PCA, 1947, had adopted the definition of "public servant" as defined in Section 21 of the IPC (45 of 1860), for the purposes of the Prevention of Corruption Act 1947. The Prevention of Corruption Act, 1988 has made a departure from the Act of 1947 and adopted a wider and more comprehensive definition of the term 'public servant' in Section 2(c) for the purposes of the Act of 1988. It now includes office bearers of registered cooperative societies which receive or have received financial aid from the Centre or the State Governments; it includes official and employees of the universities and examiners appointed by universities or other public authorities for conducting examinations; it also now includes office bearers or employees of educational, scientific, social, cultural

and other institutions established, founded or aided by the Central or State Governments. The enlarged definition of ‘public servant’ now given in Section 2(c) of the Prevention of Corruption Act, 1988 includes more categories of persons than those covered by the Act of 1947. All the persons who are public servants as defined in Section 21 of the IPC continue to be public servants under Section 2(c) of the Act of 1988 also, though some of them have now been grouped together by definitions which are briefer.

5.2.2 A new term ‘public duty’ under Section 2, clause (b) has been inserted

Defined as a duty in discharge of which the state, the public or the community at large has an interest this term did not exist and had not been defined in the PCA, 1947. The framers have left to the courts to interpret the public duties. There are a number of decisions which have interpreted ‘public duty’ dealing with Article 226, dealing with Article 112 and dealing with other situations. It was the intention of the framers to hold a person as public servant who is called upon to perform a public duty. It was understood that if he is discharging a public duty he has to observe a code of conduct which is acceptable to the people of this country.

The word “public” is itself not specifically defined in the Act of 1947. The legal meaning of this word was to be sought from elsewhere. Section 12 of the IPC defines the word ‘public’ as including any class of the public or any community. In Talem Steam Navigation Company ltd. v. Inland Revenue Commissioner\(^{12}\) it was held, ‘public’ is a term of uncertain import; it must be limited in every case by the context in which it is used. It does not generally mean the inhabitants of the world or even the inhabitants of this country. In any specific context, it may mean for practical purposes only the inhabitants of a village or such members of the Community as would be interested in any particular matter, professional, political, social, artistic or local.

\(^{12}\) 1941 2KB 194.
It therefore appears that the term ‘public’ does not mean all the citizens of the country or even a State. It would be applied to inhabitants of a specific area or locality and even specific groups.

5.2.3 Central Government empowered to appoint Special Judges

Serious administrative constraints had been witnessed in this area. Shri P. Chidambaram on May 7, 1987 pointed out that the pendency of cases was very high in various States and as on 30th September, 1986, the CBI had 687 cases pending trial for more than five years and 2003 cases were pending trial for one to five years.13 Thus the Act 1988 empowered the Central Government to appoint Special Judges without derogation to the power of the State Government to appoint Special Judges with the purpose to do the bulk of cases relating to corruption.

By amending the Criminal Law Amendment Ordinance 1944 and introducing a provision in the Act 1988, the Special Judge was empowered to exercise all the power of District Judge under the Criminal Law Amendment Ordinance – an Ordinance which was a very powerful instrument to control corruption. From this Ordinance flows the power to attach the ill-gotten wealth and the ill-gotten property, to freeze money, cash, property seized during searches and raids.

5.2.4 Sections 161 To 165 (A) of the Indian Penal Code repealed

Sections 161 To 165 (A) of the IPC were repealed, introducing corresponding provisions in the present Act of 1988. These sections were reproduced in the 1988 Act under Sections 7 and 13 of the Act, with a difference that the minimum punishment under them was enhanced. Before the enactment of the PCA, 1988, there was no minimum punishment under the existing provisions of the IPC. The punishment was either imprisonment or fine. And where a minimum punishment had been prescribed in certain sections, a proviso was there stating that the court

13. Here it would be relevant to mention that 8181 court cases investigated by the CBI were pending trial in the year 2006. This is evident from the figures shown on page 169–Chapter VI, pointing towards the fact that even the PCA 1988, has not been able to remove those administrative constraints which were intended to be removed from the Act.
may, for reasons to be recorded, not award the minimum punishment. The Act of 1988 changed the whole system. In every case of corruption, in every offence falling under Sections 7 to 15, if there is a conviction, there shall be a minimum punishment of imprisonment. The Courts would have no discretion to award a punishment other than the punishment of imprisonment. Thus, anybody who is found guilty of corruption would necessarily have to go to jail.\textsuperscript{14}

5.2.5 Expression “known sources of income” defined

The expression ‘known sources of income’ was finally defined in the new Act of 1988. This phrase had given rise to all kinds of litigation. The Courts were not very unkind towards the corrupt people and many corrupt people got off scot-free on account of interpretation by the courts. In the new Act of 1988, the term ‘known sources of income’ is explained as the income which the public servant obtains through lawful and legal means and which he has disclosed to the appropriate or competent authorities, under relevant laws, i.e. the Income Tax Act, the Wealth Tax Act.

5.2.6 Section 19(4) removes lacuna in sanction provision

It was realized that many cases were tied down in courts for a long number of years. This delay was due to the challenge to the sanction on the ground of some alleged technical lacuna. The cases were repeatedly taken up in revision and appeal against interlocutory orders. The present Act of 1988 tightened up these provisions\textsuperscript{15} by requiring that the sanction order must be challenged, if at all, at the earliest opportunity.

5.2.7 Trials to be held on day to day basis

The single factor which has come in the way of our fight against corruption is the delay. It does not matter that few people are acquitted. But what matters is that the guilty must be punished swiftly.... It is only swift and deterrent punishment

\textsuperscript{14} Shri P. Chidambaram May 7, 1987, Lok Sabha Debates, p-425.
\textsuperscript{15} Section 19(4) of the PCA, 1988.
that will clamp down corruption in this country. Thus in order to remove this hurdle in the fight against corruption, the Act of 1988, by virtue of Section 4(4), states that the trial shall be held on a day to day basis. This would ensure that trials go smooth and unobstructed. The lawyers have been some times instrumental in delaying the legal proceedings on many occasions. Now with the introduction of this provision in the 1988 Act, the trial on day to day basis may be ground of inconvenience to lawyers, but it shall not tie the hands of the Courts in proceeding further with the trial of the case. It was suggested by Sh Haroobhai Mehta - In the absence of the lawyers, the Court can proceed with the trial. Even if the accused is not present, the Court can proceed with the trial.

This is a provision of vital importance. It is normally the delay in prosecuting the culprits which results in the denial of justice. The longer the time taken for trial, the greater the scope and opportunity of tampering with evidence. Besides, from the point of view of the aggrieved person, justice delayed is justice denied. It is this crucial importance of procedure which made Sir Henry Maine say that - justice is secreted in the intricacies of procedure.

5.3 THE BIRTH OF THE PREVENTION OF CORRUPTION ACT 1988

On May 7, 1987, (Vaisakha 17, 1909 (Saka)) at 12.2.1 hours the Prevention of Corruption Bill 1987, to consolidate and amend the law relating to the prevention of corruption and for matters connected therewith, was referred to a Joint Committee of the Houses consisting of 22 members (15 from the Lok Sabha), namely:

1. Shri P. Chidambaram
2. Prof. Madhu Dandavate
3. Shri Amal Dutta

16. Id. at p-351.
and 7 from the Rajya Sabha

and, on that day, May 7, 1987, was moved, amended and passed at 5.25 p.m.
There was born the Prevention of Corruption Act, 1988, with the objective to
prevent bribery and corruption among public servants.

5.4 THE SUMMARY OF THE PREVENTION OF CORRUPTION
ACT, 1988

The preamble of the Act says that it is aimed at to consolidate and amend the
law relating to the Prevention of Corruption and for matters connected therewith.
The Act has introduced drastic and far-reaching amendments with a view to
broaden its base and to come over certain legal loopholes which were
considered advantageous to the accused facing corruption charges.

The Prevention of Corruption Act, 1947 and the Criminal Law (Amendment) Act,
1952, have been repealed (S.30 (i) of the new Act). Sections 161 to 165-A (both
inclusive) of the Indian Penal Code have been omitted and vide Section 31 of the Act, Section 6 of the General Clauses Act, 1897, shall apply to such omission as if the said section had been repealed by a Central Act.

The Act has come in force on 9-9-1988 as it received the assent of the President of India on the said date in view of the Section 5 of the General Clause Act, 1897.

The Act is a four-in-one piece of legislation because it not only contains important provisions of the repealed PCA, 1947, the Criminal Law (Amendment) Act, 1952, but also Sections 161 to 165-A of the Indian Penal Code and of the Criminal Law (Amendment) Ordinance, 1944.

The new Act has introduced a new concept of public duty to fight the menace of corruption effectively. Section 2(b) defines "public duty" a duty in the discharge of which the state, the public or the community at large has an interest.

Prior to the enactment of the Act it would be observed that the definition of 'Public Servant' as contained in Section 21 of the IPC had been made applicable for purposes of the repealed PCA, 1947. Section 21 of the IPC does not give the definition of the term 'public servant' but only enumerates the various categories of persons who can be designated as public servants. The result was that many persons who were paid from the state exchequer in one form or another or to perform public duty did not qualify to be termed as 'public servants' in the legal parlance and consequently could not be prosecuted under the repealed PCA, 1947.

With a view to overcome this difficulty and to bring many more categories of persons under the purview of the Act, Section 2(c) has been inserted. The definition incorporated therein is much more comprehensive and covers a large number of persons who hitherto did not fall within the definition of 'Public Servant' as contained in Section 21 of the IPC. Though some of the sub-sections of Section 2(c) of the Act correspond to the provisions of Section 21, IPC it would, however, be noticed that the definition of 'Public Servant' as embodied in the Act has been greatly enlarged. Now employees and office bearers of registered co-
operative societies 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 body owned or controlled or aided by the Government or a Government Company as public servants for the purposes of the Act.

Further, Section 2(c) (x) brings under its purview 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. Thus it is evident that the definition of the term ‘Public Servant’ has been widened even to include clearly and specifically Chairman, members of Public Service Commissions, of Electricity Boards as also members of any selection committee constituted by such Commissions or Boards.

Again, Section 2(c) (xi) defines that 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 examination to be a public servant. Thus an invigilator appointed to supervise an examination conducted by a university would come within the definition of a ‘public servant’. Prior to the Act, employees of the universities, professors, and readers etc. were not covered within the definition of public servant contained in Section 21 of the IPC. This is primarily intended to fight corruption prevalent in the Universities.

Section 3 of the new Act now empowers the Central Government to appoint Special Judges. Previously only a State Government had such power vide Section 6 of the 1952 Criminal Law (Amendment) Act. Now a Special Judge can be appointed by the Central or State Government to try any case or a group of cases. This is a significant departure from the earlier law.
With a view to expedite the trial of corruption cases, Section 4 has been introduced in the Act. The Special Judge is now required to hold the trial of a corruption case on day to day basis.

Now vide sub-section (6) of Section 5 of the Act, a Special Judge has been empowered to exercise all the powers and functions which previously could be exercised by a District Judge under the Criminal Law Amendment Ordinance, 1944. This would simplify the procedure of attachment of any property or money which is believed to have been obtained by an accused as a result of the commission of an offence under the Act.

Section 7, 8, 9, 10, 11 of the Act by and large correspond to Sections 161, 162, 163, 164, 165 and 165-A of the IPC respectively. A minimum sentence of six months has been prescribed for offences punishable under Sections 7 and 10 of the Act respectively.

Section 13 of the Act replaces Section 5 of the old Act. It deals with the subject of criminal misconduct by a public servant. A reading of Clauses (a) to (c) of sub-section (1) of Section 13 of the new Act shows that the legislature did not make any change in the Clauses (a) to (c) of Section 5 of the PCA, 1947. However, significant changes have been made in Section 13(1) (d) and 13(1) (e) of the new Act which clauses corresponded to Section 5(1) (d) and Section 5(1) (e) of the repealed Act.

Section 5(1) (d) in the form of Section 13(1) (d) as amended reads as under:-

*“A public servant is said to commit the offence of criminal misconduct, 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;*
It will be observed that word “otherwise” occurring in the Section 5(1)(d) of the old Act has been omitted intentionally because of the fact that some judicial pronouncements were of the view that element of dishonesty must be shown by the prosecution in the case where a public servant obtained for himself or caused pecuniary advantage to any other person by otherwise abusing his position as public servant. Now proof of mere abuse by a public servant of his position for this purpose would be sufficient to bring home the charge under Section 13(d)(ii) of the new Act against a corrupt public servant. Further, Section 13(d)(iii) has further widened the scope of the concept of criminal misconduct by a public servant. This covers the cases of those public servants who while holding office intentionally and deliberately contravene administrative instructions or guidelines to cause pecuniary advantage to their co-conspirators. It appears that by introducing Sections 13(1)(d)(ii) and 13(1)(d)(iii) the legislature wanted to do away with the elements of dishonesty in which circumstance was considered to be a necessary ingredient by the courts.

The term “known sources of income” have been explained by introducing explanation to Section 13(1)(e) which reads as under:

“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.”

Previously, words, “known sources of income” had not a clear-cut concept. It was held in some cases that the expression “known sources of income” must have reference to sources known to the prosecution on a thorough investigation of the case. This created confusion. However, now it is for an accused to show that he has received income from any lawful source and that he had intimated such receipt to the competent authority as required under any law, rules or orders.

The PCA, 1947 Vide Section 5(2) gave discretion to the Special Judge to impose a sentence of imprisonment of less than one year for any special reason, but the new Act Section 13(2) has omitted this provision. This means that it will be now
mandatory for the Special Judge to impose a sentence of imprisonment for not less than one year. The sentence may extend to seven years and fine is required to be imposed along with the sentence.

Sections 5(3), 5(3-A) and 5(3-B) of the PCA, 1947, have been incorporated in the new Act as Sections 14, 15 and 16 respectively. There appears to be no material change except that minimum sentence of 2 years has been made compulsory for an offence under Section 14.

Section 5-A(1) and 5-A(2) of the old Act correspond with Section 17 and 18 of the new Act. These sections deal with investigation of the cases registered under the PCA, 1988. The legislature thought that these provisions have withstood the test of times and judicial scrutiny well, therefore, thought it proper not to effect any change.

Section 19 of the new Act takes the place of Section 6 of the PCA, 1947. No substantial change has been made in Sections 6(1) and 6(2) and the same have been taken as Sections 19(1) and 19(2) in the new Act. Section 19(1) reads as under:

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

(a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;

(b) in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;

(c) in the case of any other person, of the authority competent to remove him from his office.

Sub-section (3) of Section 19 of the new Act has newly been incorporated deliberately presumably with a view to cut delays in the disposal of corruption
cases arising out of the dilatory tactics adopted by the accused persons. Now no
finding, sentence or order passed by a Special Judge can be revised 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)
of Section 19, unless in the opinion of that court, a failure of justice has in fact
been occasioned thereby.

Similarly, no court is required to stay the proceedings under the 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. Further, it has been provided that the proceedings under
the Act shall not be stayed on any other ground and no court shall exercise the
powers of a revision in relation to any interlocutory orders passed in any inquiry,
trial appeal or other proceedings.

It is thus evident that sanction accorded by a competent authority for the
prosecution of a public servant under the Act cannot be challenged or the
proceedings stayed unless the court is satisfied that error, omission of irregularity
has resulted in a failure of justice. Proceedings under the Act are now not
required to be stayed on any other ground and there will be almost complete
embargo for filing revisions in relation to any interlocutory order as is the ambit of
Section 379(2), CrPC.

Section 4 of the repealed Act of 1947 has been retained in the shape of Section
20 of the new Act, which deals with raising of presumption where a public servant
faces a trial of an offence punishable under Section 7 or Section 11 or Clause (a)
or Clause (b) of sub-section (1) of Section 13.

In order to meet transitional period suitable legal safeguards have been
provided in the new Act. It needs no comments that the investigations being
conducted under the repealed Act of 1947, and prosecutions launched under
it would continue to be done under that Act and it is only in the cases
registered and investigated after 9-9-1988, that the provisions of the new Act
would come into play and it is earnestly hoped that such provisions would go
long way to achieve the desired results as also would stand the judicial test in the times to come to prevent bribery and corruption among public servants.

5.5. THE SUCCESS OR FAILURE OF THE ACT TO COMBAT CORRUPTION

How far has India, during the last nineteen years benefited by the promulgation of the Prevention of Corruption Act, 1988, is a self-answered question. Corruption has become a hot topic today. It has permeated all levels of the society and polity, and it has steadily gained momentum. From the top levels of bureaucrats, politicians and high profile persons indulging in scams, involving crores of rupees to the lowest level of the society, involving illegal gratification to a meager ten rupees, it has spread like cancer. The 'global phenomenon' has become a way of life and no weapon acts as a deterrent to its steady rise. A comprehensive legal framework is supposed to act as a deterrent for corruption and it is with this objective that the Prevention of Corruption Act, 1988 was framed and enacted.

But has this legal framework been successful in combating or even containing this evil? In fact, corruption has become a complex problem having roots and ramifications in society as a whole. If there is one thing of which we have had very regular and sensational instances, it's been the dishonest and the corrupt in our midst. There have been ministers charged with corrupt activities, there have been MPs and there have been top bureaucrats. There have been politicians and high profile persons. There are the big ones - the ones whose activities may have caused some of us some surprise. But we also know that many police constables take bribes as do telephone linemen, officials at various levels in municipal corporations and in the income tax departments. We’ve all seen these duly reported in the media, shaken our heads and carried on doing whatever we do.

We can see how corruption has trickled down to the lowest level of our society. It has even transcended the national barriers and become international. (Bofors
case; Food for Oil scam are examples). Why is this evil growing? Is this evil not subjected to any punishment? Is the punishment not deterrent enough to control it? The answer is both yes and no. Yes, punishment is there but only on the statute. A peep at the corruption cases before the courts clearly exposes the sentencing pattern inclined towards minimum conviction. Not only that the sentence awarded is the minimum prescribed by the statute and not the maximum or near maximum. This has no deterrence impact on the offender or the potential offender. Even the quantum of punishment imposed on the offender is not commensurate with the amount involved in the offence. Amongst other reasons are the lacunae existing in whole machinery of criminal justice system which lend a helping hand in the spread of this cancer called corruption. These lacunae exist in the statutory anti-corruption law, the procedural machinery and the judicial process. These are gaping loopholes which prove beneficial to the accused, the corrupt offender, who escapes the punishment by seeping through these holes, making the anti-corruption law ineffective. We have numerous examples\(^{18}\) where the corrupt, charged with this offence or tried of this offence or sentenced of this offence have proved that there are umpteen loopholes in the system because of which the corrupt have not only walked in the open with their heads high, but have in fact been acclaimed as popular personalities with an impressive halo around their heads like demi-gods, nearly worshipped by the public. It is because of these lacunae that either they have been charged of the corruption crime, but not yet tried, or they have been tried but not convicted, and these lacunae continue to offer a protective shield to these ‘could be convicted’ offenders. Apart from the loopholes existing in the system, there are numerous obstacles, difficulties, which come in the way to bring the offenders to book. In the ultimate, if loopholes serve as lending hands and difficulties appear as big

---

\(^{18}\) The JMM Bribery Case, Narasimha Rao v. State 1998, the case for Query Scam 2005; The Bihar Fodder Scam involving present Union Minister for Railways, Sh. Lalu Prasad Yadav; The Taj Corridor Heritage case, involving the Minister Ms. Mayawati (175 crore project); The Disproportionate Assets case of former Haryana CM, Sh. Om Prakash Chautala; The rupees 75 crore charge of disproportionate assets of present CM of Punjab State S. Prakash Singh Badal; The recent charge of corruption in the City Center Scam involving the Ex-CM of Punjab, Capt. Amarinder Singh.
stones difficult to move we cannot expect any kind of sentencing in corruption cases. As a result, this evil which has already taken over the society like a hydra will be impossible to control.

The following account is an endeavour to dig out the lacunae in the criminal justice system and the obstacles in the way of combating corruption. After assessing the loopholes and hurdles, an effort shall be made to make suggestions to plug these loopholes and to overcome these difficulties.

5.6 EXISTING LACUNAE AND PRACTICAL OBSTACLES IN THE PROSECUTION OF CORRUPTION CASES: STATUTORY, PROCEDURAL, LEGAL

Prosecution of corruption is a particularly difficult endeavour and successes in this field are too rare. The detection rate is often low because of lack of verifiable information that is received from public servants or other citizens. Particular difficulties arise when an investigation involves prominent politicians and other wealthy public servants, or when it involves international bribery cases that require assistance from foreign jurisdiction in collecting evidence. Shortcomings that are at the root of these problems can be found at the legislative level. In addition, many law enforcement agencies are technically not up to dealing with complex crimes such as corruption in an appropriate manner.

While the opportunities for corruption abound, the application of the PCA, 1988 apparently leaves much to be desired. Corruption flourishes certainly because of the knowledge of lax enforcement of anti-corruption laws. As is the case with any criminal offence, there are two phases in dealing with corruption of public officials in general: investigation of crime and the subsequent provisions. The institutions which are established to do the first in India, come under severe criticism in that they do not do a proper job or do not at all do the job, in certain cases, depending

19. Like the Bofors case which involved investigation agencies to collect information from Swedish accounts. This took a lot many years.
upon the person who was accused/charged. There are a number of cases where investigation has been going on for years together and the usual excuses which are put forward by the investigating agencies are that the documents were not available, that all the concerned files have not been examined, that the concerned officials were not making these documents and files available, inability to go into the intricacies of audit and the like.

But before this stage of investigation, one cannot overlook the difficulty/obstacle which is at the threshold of the system. This relates to - the detection of corruption crime.

5.6.1 Detection of corruption

Despite the reporting obligations, provisions protecting those reporting acts of corruption, and even the establishment of vigilance institutions, reporting on a corruption is at a very low scale. There is a general lack of awareness about the fight against corruption in a regular manner. Then there is lack of convenience of reporting petty corruption, such as a website or a voice recording machine. This problem has partly been rectified in some places, as in Mumbai, where internet sites such as Praja (municipal problems) or reporting corruption to the Anti-Corruption Bureau have been set up. But these sites have to be publicized and are not known. The procedures involved in reporting corruption are cumbersome and exhausting. The time and energy put in by the complainant are not considered at all. The complainant is treated very poorly and his turning hostile later is conveniently reported against him though the fault lies with the authorities in maintaining a non-friendly system.

Another factor which holds back a person from reporting against a corrupt officer is the fear factor. In Government offices, in workshops, in factories, in depots, whosoever dares to make a complaint, he is so badly dealt that either he is sacked or transferred. If the reporter knows that the corrupt person is an IPS or an IAS officer or a high profile person, he will never dare to make any charge against him to anybody. Some provision is needed in the Act to safeguard them,

to ensure that they will not be sacked. Otherwise, no one will come forward to make a complaint. In fact such reporters should be rewarded. Interestingly, Shri Narayan Choubey, in this context, illustrates this situation in the following way:

......But what happens is, suppose a man informs me on corruption regarding some officers, regarding corruption of big officers to an MP and that MP writes, then the enquiry is made not on the corruption of the corrupt officer but enquiry is made from where from this MP got this information. This is practical. The enquiry is not made what corruption has been made by the corrupt officer or Minister. But the enquiry is made where from this poor MP or MLA who informed the high officer, Minister, wherefrom that man has got information. This kind of system breeds corruption. People who fight this system must be encouraged. The system has to be changed. Those who are terrorizing workers and peasants—the ones who fight corruption, are supported by the high profile persons.

Thus the system lacks the protection provisions. Here one cannot omit to cite the glaring example of this lacunae of non-protection to a whistleblower in corruption. That day of 27th November 2003, has been written in our history as the Anti-Corruption Day to commemorate the memory of a whistleblower Satyendra K. Dubey. Satyendra was an honest and upright engineer working on the Golden Quadrilateral Highway Project. Outraged by the corruption he encountered, he took on the construction mafia pulling up contractors for shoddy work and notifying superiors. Frustrated with inaction, he finally wrote to the Prime Minister urging action. Requesting confidentially, he detailed the ‘loot of public money’ and ‘poor implementation’

The letter was forwarded down the bureaucratic chain. Dubeji, as his IIT mates fondly called him, received numerous threats from those he blew the whistle on. A chain of events, currently being investigated by the CBI, led to Dubeji’s murder in the early hours of November 27, 2003, in Gaya.

A person in seeking to uncover instances of bribery may also fear the vengeance of the accused especially when his or her reporting leads to the launching of an investigation and possibly the conviction of the criminal.

5.6.1.1 The secret nature of the offence-- a big barrier in detection

The clandestine nature of corruption and the absence of an individual victim that could trigger an investigation, render the detection of corruption particularly difficult. Perpetrators, especially very senior officials, politicians and executives, are often able to employ powerful methods of camouflaging their illicit activities or obstructing investigations.

India has adopted several ways to try to overcome the lack of information impeding the launching of otherwise often successful criminal proceedings. The country has tried to cope with problem by introducing a number of reporting obligations both for public servants and the public at large to raise the detection rate. In addition, decentralized sources of information have been institutionalized, creating a vast net of vigilance institutions at different levels of public administration. Vigilance Officers and Commissions at all levels of administrative departments monitor and survey potentially corrupt actions and identify corruption-prone procedures and areas. These Vigilance Officers and Commissions cooperate with the CBI, India’s federal prosecuting agency. Experience shows that these mechanisms have, however somewhat failed to live up to the expectations because potential reporters of corruption seemingly do not feel sufficiently protected against harassment on the job caused by their blowing the whistle on corruption. In addition, a lack of confidence that law enforcement agencies will take up the complaint and investigate the reported matter, further discourages citizens from taking the risk of exposing themselves by blowing the whistle. Due to similar reasons, in practice, Section 39 of the CrPC has very

http://www.skdubeyfoundation.org/index.php

23. Reporting obligations, addressed to public servants as well as other citizens, and punitive measures for failure to comply with these obligations, are defined in Section 39 of CrPC, 1973, which makes it mandatory for any person, regardless of occupation or professional status, to report to a magistrate or officer of the law any alleged corrupt offence by a public servant, or else face the possibility of prosecution.
rarely been invoked. Reporting obligations have not lived up to the expectations and have done little to encourage citizens or public servants to come forward with information about corrupt acts that they might have come across in their daily or professional life.

5.6.1.2 Suggestions

Existing provisions intended to protect whistleblowers or those who uncover corruption, unfortunately, do not significantly improve this situation. Under the Indian Evidence Act, any information involving corruption provided to relevant public authorities must be treated with the strictest confidence. However, considering the inability of these provisions in recent years to encourage citizens to come forward with such information, there seems to be a clear and pressing need for legislation protecting whistleblowers to strengthen the provisions under the Evidence Act.

Thus, a trust that reporters will be protected, anti-corruption education, are fundamental preconditions of success in the fight against corruption. Together with that, proof of the capacity and will of relevant law enforcement agencies and political leaders not to let corruption go unpunished can go a long way in combating corruption.

5.6.2 Investigation and prosecution of corruption - major lacunae and obstacles

Laws and penal codes are only as effective as their enforcement. Consequently, law enforcement agencies equipped with sufficient means to detect, investigate and prosecute corruption are a crucial precondition to effect criminalization.

5.6.2.1 Law Enforcement Agencies

The success or failure of law enforcement agencies depends on three key factors:

1. the competence and skills of their staff;
2. their independence and ability to resist undue interference and influence; and
3. the efficient cooperation of all actors and agencies involved in the proceedings;

Statutes, procedures and institutions are usually tailored to the efficient prosecution of average and petty corruption. They do not take into account the particularities of high-level corruption, especially the sophisticated means which the criminals involved in such schemes employ to commit and disguise their illicit activities.

5.6.2.1 (i) Lack of adequate training of the law enforcement agencies

Recent developments in corporate law and the rapid evolution of international economic operation and transactions, as well as advanced technological breakthroughs, open new possibilities not only for doing business but also for criminal activities. Corruption takes advantage of these developments. High level corruption mobilizes extensive resources to camouflage “levies”, “commissions”, and “kickbacks” and to transfer the acquired assets to safe financial havens. The sophistication and complexity of these crimes contrast with the broad lack of sufficient capacity and appropriate training of many law enforcement agencies. This is particularly true of cases involving public funds or insider trading. There is a clear and pressing need for more specialized training, covering especially forensic accounting.

5.6.2.1 (ii) Interference from Government Bureaus

In addition, when investigating high-level corruption cases, law enforcement agencies often face interference from Government Bureaus. Rather than being able to conduct their investigation as they themselves see fit, they are often obliged to follow orders from superiors who are close to the political power structure and might try to influence the course of prosecution. The powerful role of law enforcement agencies renders them particularly vulnerable to undue influence. Independence of prosecution and effective protection against political or administrative interference are preconditions to successful conviction of high profile corrupt persons. In India basic administrative constraints exist which interfere with the investigation and prosecution agencies. Firstly, the heads of the
Central Bureau of Investigation, CBI and the Anti-Corruption Bureau, ACB, are appointed by the Prime Minister or the Chief Minister as the case may be. There is no functional autonomy. There is no financial autonomy too. The organizations are under-staffed. There is limited talent in the investigating team. A major portion of the officers are drawn on deputation from the civil police of the State concerned. It cannot cover even 10 per cent of the prevalent corruption.

5.6.2.1 (iii) Political pressure on the agencies

There are serious limitations in proceeding against the big fish in administration and public life. What happened in 1999 explains as a good example of political pressure on the agencies.

MK Bezbaruah, a civil servant heading the ED, the Enforcement Directorate, was pursuing a number of very sensitive cases regarding violation of the 1973 Foreign Exchange Regulation Act (FERA). The accused included—a very highly visible politicians, their associates such as Sasikala Natrajan, a close friend of Ms. Jayalalitha Jayaraman, Chief Minister and leader of AIADMK in Tamil Nadu, and a coalition partner of the NDA Government at the Center. Jayalalitha, who herself was being tried by three Special Judges in a slew of corruption charges, was alleged to have demanded the transfer of Bezbaruah under the threat that she would withdraw her support knowing fully well it was essential for the survival of the BJP led Government (As it was, she did withdraw her support in late April 1999, and the BJP led government fell). Now, despite the Supreme Court orders\(^\text{24}\) on December 8, 1997 with a directive which insisted that officials dealing with sensitive cases should not be transferred, the Director Bezbaruah was abruptly transferred and the Special Prosecutor, K. Kumar, who was leading the investigations, was sacked in 1998. The Government argued that the Delhi Administration (to whose cadre Bezbaruah belonged) wanted him back as the Transport Secretary.\(^\text{25}\)

\(^{24}\) Supra note 5 otherwise known as the “hawala” case.

\(^{25}\) It should, however, be noted that the Delhi Government belonged to the BJP and that in 1995 it was the same Chief Minister of Delhi that successfully had moved Bezbaruah out of Delhi Administration. It may also be noted that the government later claimed before the
The fact that the CBI while investigating corruption charges against high level public officials is in fact subjected to many political pressures becomes more clear when the CBI could not get a single politician involved in the “hawala” case convicted. In 2005, the Indian Express carried an article which too exposed this agency as degenerated into a convenient tool for politicians to settle scores with their opponents.26 Being accountable to Parliament, it is a familiar pattern of the CBI that, the moment a Government changes hands, the CBI is busy making out charge-sheets against key players in the earlier regime. And when the first regime returns to power, the CBI is equally adept at covering its tracks and giving a clean chit to the very people it had dubbed guilty earlier. Not so long ago, the CBI had registered case against Mayawati in the Taj Corridor Case, Satish Sharma for petrol pump allotments, Shibu Soren for taking a bribe and Tehelka for violating the Official Secrets Act. Then in 2006, the CBI was busy providing disingenuous reasons why these very same cases should be wound up.27 Why are such tactics employed by the CBI Director? Such acts on the part of the Director are an indication of influence of the political parties, the ruling party. Herein, lies the deep lacuna. When the CBI has to listen to the ruling Government, has to move in the direction of the whims and designs of the political leaders, then how can we expect such high rated corruption cases be brought to book? To please their political masers, the CBI officers have mastered the art of appearing to be busy in political investigations while actually dragging

---

27. It was against the closure report submitted by the CBI which on November 27, 2006, the Supreme Court took strong exception to and quashed it, asking the CBI to charge-sheet Ms. Mayawati in the Taj Corridor Case. The CBI Director, Vijay Shanker had preferred to refer the matter of Ms. Mayawati to Attorney General Milon K. Banerji for his opinion despite the entire investigating team favouring prosecution of the Bahujan Samaj Party (BSP) supremo, Ms. Mayawati.
their feet. The best example of this is the Bofors case, in which the investigations have waned and waved for seventeen years. Significantly, all major breakthroughs in the case have come from leaks to journalists and not due to the effort of our premier investigating agency, which the authorities in Switzerland and Sweden are clearly skeptical about. The Bofors case was buried in 2003. But the CBI in 2007 is again active in the same buried case, on receiving the news of the arrest of the Italian businessman Ottavio Quattrocchi, a key accused in the Bofors payoffs case in Argentina. A team of the CBI flew down to Buenos Aires to secure extradition of this gentleman to India. The extradition could not be secured and this action of the CBI has brought to light the plight of other cases where the CBI has sought the extradition of 40 other fugitives from various other countries. In the decade old case of Turkish nationals Cihan Karanci and Tunkay Alankus, extradited in 1997 from Switzerland, and Brazalian Agnaldo Pinto, extradited from the U.K. in 1999, all the three were accused in the Rs 133 crore Urea Scam which surfaced in 1995 during the Narasimha Rao regime. The present position is that they are lodged in the Tihar jail in New Delhi and trial is yet to be concluded, a fact that only diminishes the image of India's criminal justice delivery system.28

5.6.2.2 Other limitations of the law enforcement agencies

No head of the CBI or ACB (Anti-Corruption Bureau in the State) can proceed against the Prime Minister or a Chief Minister except under court orders. The CBI cannot proceed to ‘enquire’ against the Chief Minister of a State or a member of his Cabinet, even if the Prime Minister wishes to. Under Section 6 of the DSPE Act, 1946, prior consent of the State concerned is necessary if the CBI wants to step in their jurisdiction.29 Such provisions only create hurdles in the smooth

28. Quattraochi apart, CBI awaits extradition of 40 : News item ; The Hindu: Sat, March 10, 2007 p-12
29. On March 28, 2007, the Supreme Court’s orders of March 1, 2007, ordering a probe, a preliminary enquiry by the CBI into the assets of the UP Chief Minister came under challenge due to this provision in the statute of DSPE Act, 1946. Taking advantage of statutory provision, that contemplates prior consent of the State government concerned before a CBI probe is ordered, the Supreme Court’s order was strongly opposed by a senior counsel Harish Salve. But the Bench on being told that it did not have the power to
functioning of the law enforcement agencies. If taken away, a corrupt offender would be exposed, condemned and punished hastily. This is how a statutory provision is given twist and turns and utilized according to existing need of the Government. Earlier too, the CBI on the basis of the Patna High Court orders had probed the corruption charges against the high and mighty, the then Bihar Chief Minister Lalu Prasad Yadav.

5.6.3 Executive instructions of prior permission to investigate, defeat the purpose of the Act of 1988

The ‘decision-making officers’, the higher administrators have protective armour. The Single Directive which the Supreme Court thought was inhibiting the prosecution of higher administrators on corruption charges, and hence was quashed, was brought back in the Ordinance passed by the then Government in September 1998, when it required that the permission of the CVC is required to prosecute any official of Joint Secretary and above level and other officials of Government Corporations and Companies appointed by the Government. The executive instructions which exist both at the Centre and in the States is that CBI and the Anti-Corruption Bureau are required to take prior permission of the Government to even start the investigation against the high level officials. So much so, no serious enquiry is possible against the creamy layer of bureaucracy. This strikes at the root of the matter. The preamble of the Prevention of Corruption Act, of 1988 as well as its predecessor, the Prevention of Corruption Act of 1947, states that the legislation is meant to eradicate corruption more

---

30. On 4th April 2007, the Supreme Court orders of March 1 [ibid] of the CBI probe into alleged disproportionate assets of the UP Chief Minister Mulayam Singh Yadav and his family members was finally defended by the Centre. The Additional Solicitor General explained that the prior consent of the State was applicable only when the Centre was handing over a State case to the CBI and such restriction on the Central Government would not come in the way of Supreme Court passing orders under Article 142 of the Constitution. This explanation was sought in response to the petitioner’s criticism of the Supreme Court’s orders directing the CBI to submit Status of its preliminary inquiry to the Centre.
effectively. But the executive instructions defeat that purpose. This is nothing but a pointer to the fact that the heads of the governments will protect senior officers from enquiries by the CBI/ACB and they will in turn cover up the dishonest motives/acts of the political executives while building the files in a way that gives no scope for the political executive to write an embarrassing order/decision. So much so, the courts cannot infer mensrea on the part of the political executive in a charge of ‘abuse of office’. This arrangement keeps both safe and above the reach of law. That is the reason why we find so many cases against political executives having been discharged without even framing charges, not to speak of conviction, for want of evidence. As the social laws become innovative, so also the ingenuity of its violators.31 Granting that there has been permission from the Government to enquire against a particular senior official, such enquiry reports have to be approved by the Government for the registration of FIR and for further investigation. Furthermore, the Government has the final authority in taking a decision on the investigation reports of CBI/ACB. Here the Government can modify a recommendation to prosecute, either for departmental action or even drop further action.

5.6.4 Government’s power of withdrawal of cases for ‘public purposes’

The Government has the power of withdrawal of criminal case under the relevant provisions of CrPC of 1973, even though they are in the final stages of hearing in a court of law on grounds of ‘public purposes’. What is the ‘public purpose’ that the state advances in withdrawing corruption case is left an open question.

5.6.4.1 Government – The final arbiter

Thus, the Government is the final arbiter not only in the matter of enquiry and investigation but also in the case of prosecution and termination of trial of the case. While the power permitting or not permitting prosecutions and the termination of trial by way of withdrawal of prosecution, though selectively abused, is derived from the relevant provisions of the Prevention of Corruption

Act, 1988 and the Code of Criminal Procedure, the power of withholding enquiry and investigation is not derived from any legal provision.

Understanding this subtle distinction is vital. The whole of anti-corruption work is frustrated by the iron-curtain of enquiry and investigation, a function illegally exercised by the Government.

5.6.5 Cooperation between law enforcement agencies

Irrespective of the institutional set up a country has chosen, effective cooperation of the involved actors determines whether prosecution is successful. Legal provisions not only require following demanding procedural rules, but also assign certain steps of the procedures to different agencies. These agencies must ensure that their actions are coordinated to acquire evidence and must seek mutual advice to ensure the admissibility of the evidence when the case is tried in court.

5.6.6 International legal assistance

In foreign bribery cases, international legal assistance covering notably the collecting of evidence, repatriation of proceeds, and extradition is a key to the successful prosecution and deterrence of corrupt practices.

Yet, today borders still constitute significant barriers for prosecutors. Not so for criminals, who actually make use of them to flee from detection and prosecution and to conceal the evidence and profits of their crimes. Investigating monetary transactions is a very arduous and time-consuming task and without legal assistance from concerned foreign jurisdictions, it can be a hopeless endeavour.

5.6.7 Impact of influential defendants and their entourage on the proceedings

Institutional and psychological pressures pose a big challenge to the prosecution of high–profile corrupt individuals. Leading figures often owe their political or financial success to their personal skills: intelligence, charisma, popularity, and vast networks. They might try to employ these during the investigation as a powerful tool to influence the procedure and its outcome. Such defendants do not
tend to back away from conflict; on the contrary, they have the support of skilled lawyers and utilize lengthy appeals, processes and other stalling tactics to wear down public opinion, which tends to demand results quicker than sound judicial systems can deliver. In some cases, the power of leading figures under judicial scrutiny enables them to intentionally weaken a sound legislative framework even during sometimes lengthy investigations. The prominence of the defendant comes into play even during the trial, especially when the case is heard before a judge. Many citizens display seemingly ‘instinctive’ tendencies to be pro-defendant and are often especially sympathetic towards the well-dressed, well spoken, and politically or economically successful defendants who are likely to be involved in a high profile case.

5.6.8 Hindrances at a more personal level

It is obviously very difficult to request individuals conducting inquiries never to put concerns about their professional careers first. Prosecutors do not act in a political or social vacuum. The more prominent and powerful the figures investigated, the stronger the constraints. Those with an interest in undermining prosecutors’ efficacy or credibility often look to the prosecutors’ colleagues or subordinates, seeking the opportunity to appeal to their personal priorities.32

5.6.9 Statutory loopholes

Laws against bribery must clearly define the scope of the offence, identify the actors punishable for its perpetuation and set forth the consequences for violation. All endorsing countries have criminalized active and passive bribery of domestic publics officials and most countries have clearly defined the constitutional elements of the offence.33 India too, by virtue of the special statute, the PCA, 1988, has criminalized bribery, committed by public servants as defined in Section 2(c) clauses (i) to (xii) and has set forth the consequences for its violation in its various sections.

33. Singapore, Hongkong, China are among the few jurisdictions that have penalized active and passive bribery of Members of Parliament also.
The PCA, 1988 widened the definition of the expression ‘public servant’. The rationale behind the expansion of the expression ‘public servant’ is unclear. The investigating agencies and the prosecuting agencies were not able to meet the fringe of the problem with regard to corruption that was prevalent among the public servants as defined previously under section 21 of the IPC. Then where was the necessity to expand it? Did it mean that on account of this non-expansion, on account of the original definition prevailing previously, the agencies were prevented or were unable to get at the roots of corruption? On one hand there is expansion of the term ‘public servant’, on the other, not enough thought has been bestowed on the other provisions of the Act, especially the one relating to the provisions of the previous sanction for prosecution—under Section 19 of the PCA, 1988.

5.6.10 Sanction provision in the statute creates impediments

Any legal system, based on the rule of law which claims impartiality and efficacy must fulfill four conditions. It must, first and foremost, enable any citizen to set in motion the machinery of the law, civil and criminal, without any impediment and quite regardless of the wishes of the men in power. In Britain, for instance, any citizen can prosecute even the highest in office except in cases such as breach of the Official Secrets Act where the Attorney General’s consent is required. In India, prior sanction of the Government itself is required in order to prosecute its Ministers and officials under Section 197 of the CrPC, 1973, and under Section 19 of the PCA, 1988.

Coming to the second condition, even if the citizen surmount this hurdle, his success will depend on the integrity and efficiency of the investigating agencies, the State Police or the CBI, and the third condition i.e., the independence and competence of the prosecutor. Lastly, of course, as the great jurist Ehrlich said:

There is no guarantee of justice except the personality of the judge.

"With us every official from the Prime Minister down to a constable or collector of taxes, is under the same legal responsibility for every act done without legal justification as any other citizen. The Law Reports abound with cases in which
officials have been brought before the courts and made, in their personal capacity, liable to punishment or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial Governor, a Secretary of State, a Military Officer and all subordinates though carrying out the commands of their official superiors are as responsible for any act which the law does not authorize as is any private and unofficial person.” Dicey cited cases in support of his reference to each of these high officials in his classic on the Laws of The British Constitution. In the United States, Judge John J. Sirica could comfortably stretch the arm of the law to reach a President in office, Richard Nixon, in the Watergate affair.

It is the second condition, the hurdle of previous sanction to prosecute which is under challenge. It is a well recognized principle of criminal jurisprudence that anyone can set or put the criminal law into motion except where the statute enacting or creating an offence indicates to the contrary.34 The Act of 1988 provides sweeping exception to this above principle of criminal jurisprudence under Section 19. Eyebrows are raised, arguments are taken up, unnecessary delays result hanging up the case in perpetuity on the issue of the grant of sanction. Common issues regarding it revolve around the court’s jurisdiction in trial on the basis of valid or invalid sanction; the question regarding the competency of the authority according the sanction; this in turn opens up the pandora box of various other questions, like—who is the appointing and the removal authority; whether or not the authority accorded the sanction with due application of mind; whether there was at all any need of granting or withholding the grant of sanction to the public servant charge-sheeted by the investigative agency. Such a provision only becomes a source of manipulation for the culprit who uses it to protract the trial proceedings. Prakash Singh Badal and Anr v. State of Punjab and ors 35 is a recent example, which along with others, could make use of provision in the Act and could protract the commencing of trial for all these years. (Cases of corruption had been registered against him and his family

35. 2007 (1) RCR (Criminal) 1; 2007(1) SCC 1.
members since 2003). Having the trial stayed for so long, it was only in December (6.12.2006) that the Supreme Court removed all doubts about the grant and non-grant of sanction and ordered for the progress of the case without the necessity of sanction.36

The provision under Section 19 of the Prevention of Corruption Act, 1988 proves to be a big hurdle in prosecution of corruption cases and in fact a protective shield to the delinquent officials. The Punjab State Vigilance Commission’s Report states about the sanction provision of the Act in the following words:

*The manner in which provisions of the Prevention of Corruption Act are being at present implemented in Punjab appears to be more “protective of the delinquent officials”, rather than proving a deterrent to their indulging in corrupt practices. As to the provision of sanction contained in the Act, the report points to the delays in prosecution sanction which in the ultimate hold up the case for many years, which has a great impact on the final sentence status of the case.*37

Longtime of the Courts is taken to decide question of sanction. The Supreme Court ruled in *State of Maharashtra v. Ramdas S. Nayak and others*38, that in case of a Chief Minister, it is the Governor who is competent to accord the sanction; not on the advice of his Council of Ministers, but in his discretion. In 1998, in *P.V. Narasimha Rao v. State*39 The Supreme Court declared MPs and MLAs as public servants but could not locate in the statute of PCA, 1988 nor anywhere else, the person competent to remove them. Without previous sanction the Act prohibits prosecution, so who could be the sanctioning authority in case

---

36. The appellant Prakash Singh Badal was the fulcrum around which the entire corruption was woven by the members of his family and others and it was his office of Chief Ministership which had been abused.
37. The report of Punjab State Vigilance Commission 2006 says- in 181 cases the requests for sanction had not been decided by 32 administrative departments. It is only after the Commission took up the matter with them that 20 cases of sanctions were decided, while the departments are yet to decide 169 cases of sanction till date. “While out of these 181 cases, 54 had been pending for more than two years, the oldest case pending for grant of sanction pertains to 2002.
38. 1982 (2) SCC 463.
of MPs/MLAs? It is because of this sanction provision that many corrupt have not been brought to book. They have easily escaped from the clutches of law as they exercise some influence on the sanctioning authority due to their status, they being high-profile or a highly placed politician. This glaring weakness is brought to light in another corruption case.

A case of criminal conspiracy and criminal breach of trust by a public servant under the IPC and the PCA was registered against a senior Congress leader Satish Sharma in January 1996. The case pertained to alleged irregularities in allotment of petrol pumps and gas agencies during his tenure as the Petroleum Minister between 1993 and 1996. Despite the CBI on investigating the case against Sharma, which started in the year 1996, had found ‘prima-facie evidence against him in the case’, the Centre, that is the Home Ministry refused/declined to grant sanction for Satish Sharma’s prosecution. On November 22, 2005, the Delhi High Court accepted the CBI’s plea to close all 15 cases against Satish Sharma and thus got the case buried never to start again. Again, had it not been for the sanction provision in the Act of 1988, a corrupt leader could have been tried and punished for his corrupt-deeds. But alas! as long as we have this protective shield of Section 19 of the PCA, 1988, no one dare touch any politician/leader.

It is time that the sanction provisions are challenged in and struck down by the court as being violative of Article 14 of the Constitution which embodies the fundamental right to “equality before the law or the equal protection of the laws”. This is not a case of reasonable classification which bears a reasonable relation to the object to be achieved. It is palpably unreasonable in both respects. The Courts have ample power to punish vexatious or frivolous complaints. The need to protect honest public servants will surely weigh with courts. As against this is the impediment it creates and the violation of the basics of “criminal jurisprudence” which the Supreme Court noticed. Nor can the court which hears the challenge overlook the fact that no other democracy has sanction provisions.

40. Id.
5.6.11 Statute of 1988 makes punishment more severe serves no purpose

Enhancement of sentence or merely by making the sentence more severe, no purpose is served. The more relevant necessities are overlooked. Firstly, the sentencing patterns and annexure [chart-A in Ch-VI] showing the quantum of punishment in various cases under survey of a particular period (January 2006 to March 2007) exposes this weakness of the implementation of the provision. Minimum and not the maximum punishment is awarded to the culprits. Not only that, in some cases, punishment even below the statutory bare minimum is awarded to the convict. As if this was not all, some cases have ended up in convicting the accused with a sentence reduced to a payment of fine without having going to jail at all. Thus such cases defeat the total sanctity of law. The purpose for which the provisions had been framed is totally defeated. Thus merely enhancement of the punishment could not fulfill the purpose of the Act. There is however one attendant risk that often occurs when a minimum sentence is prescribed and discretion to impose lesser sentence is not given to the court. When a court is inclined to be sympathetic to the accused (under the PCA, 1947) he is convicted but a lesser sentence is imposed giving some reason or the other. When a court is similarly sympathetic in future, the court could pick unwarranted holes in the prosecution case and even acquit the accused thus denying to the prosecution at least the satisfaction of getting a conviction in a good case. Only time would tell as to how the courts would react to the withdrawal of this discretion which had been vested invested in them earlier.

5.6.12 Specific statutory provisions regarding methodology of reporting is absent

This is an area which is weak in the Act. No individual citizen would come and give report of any corruption, because he knows the implications of giving a

41. Under the existing provisions of the IPC there was no minimum punishment. The punishment was either imprisonment or fine. The Act of 1988 changed the whole system of punishment. By virtue of this Act, in every case of corruption, in every offence falling under sections 7 to 15, if there is a conviction, there shall be minimum punishment of imprisonment and courts have no discretion to award a punishment other than the punishment of imprisonment.
report. More often than not, he will render himself to be attracted by the persons against whom he reports. Moreover, in the Governmental level, and in the departmental level, departmental patriotism prevails. Therefore, any official coming here and finding irregularities, notices it and merely puts it under the carpet and makes his exit from it. Thus specific statutory provision with regard to methodology of reporting is absent in the Act.

5.6.13 Lacuna contained in Section 5(6) of the Prevention of Corruption Act, 1988

5.6.13.1 Special Judges and their powers under Section 5(6)

One aspect of relevance to an investigating officer in chapter II relating to Special Judges is section 5(6) of the Prevention of Corruption Act 1988 which is reproduced as:

Section 5(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 (Ordinance 38 of 1944).

It would be observed that the Special Judge acquires this power only after the charge-sheet is filed and he takes cognizance of the offence as he starts “trying” the case only at that stage. Even this is doubtful till framing of charge as it has been held in Manoj Majumumdar v. State of West Bengal⁴² that trial commences only when the charges are framed by the court. In any event, during investigation stage, application for attachment will continue to be filed before the District Judge. This appears to have come about due to oversight during drafting the Bill as the intention apparently was to bestow this power on the Special Judge during the investigation stage also. Section 5(6) therefore needs an amendment to bring this about. The words “while trying an offence punishable under the Act”, needs to be deleted in Section 5(6).

⁴² 1984 CrLJ 28 SC
5.6.13.2 Special Judge also acts as Additional Sessions Courts, thus overburdened

Whereas Section 3 of the Prevention of Corruption Act, empowers both the Central Government and the State Government to appoint Special Judges, sub-section (2) of Section 4 authorizes only the Central Government to specify, where there are more Special judges than one for an area, by which Special Judge the offence shall be tried. It may be noted that the Special Judge is not a Sessions Judge, Additional Sessions Judge or an Assistant Sessions Judge under the CrPC though no person can be appointed as a Special Judge unless he is or has been either a Sessions Judge or an Additional Sessions Judge or an Assistant Sessions Judge. The court of Special Judge also acts as Additional Sessions Court and is thus overburdened with the ordinary criminal cases also.

The Special Judges provision was introduced by virtue of Section 8 of the Criminal Law (Amendment) Act, 1952 with the purpose of introducing the concept of speedier trial of corruption cases. That Act was repealed by the Prevention of Corruption Act, 1988 and whole concept of Special Courts was introduced that Act as Chapter II. A peep at the Annexure to Chapter VI\(^{43}\) shows the long number of years corruption cases have been taking for their disposal. Setting up of Special courts was with an avowed purpose. Despite that, corruption cases are not being disposed of soon nor the clause (4) of Section 2 of the Act is being followed, that is of, holding the trial of corruption offences on day to day basis. If by setting up of Special courts, day to day trial is not being conducted the offenders take benefit of the delay and protract the proceedings. **(In Maharashtra, the trial in anti-corruption cases proceeds on day to day basis once the case is taken up for trial like Sessions court proceedings)** The very purpose of the setting up of Special courts is defeated. Due to backlog of cases and due to overburden on the Special Judges who are burdened not only with corruption cases but also with other criminal cases, the disposal of corruption cases is not swift nor with full application of mind and time.

\(^{43}\) Chart B refer page no. 350-358
If the Special Judges could be appointed exclusively to try corruption cases, then trials of such cases will be expected to see quick and better results.

5.6.14 ‘Misconduct’ under section 13 of the Prevention of Corruption Act does not include every type of corruption

As expressed by Shri Ataur Rehaman another type of corruption is not covered by the PCA, 1988. There are delays committed by the clerks and officers in the day to day administration. There is a system of Confidential Character Roll on every officer and clerk. On the basis of these rolls a case for habitual misconduct can be framed. Can we not make better use of these confidential records for a case of misconduct and preventive detention? Delay that is caused by the clerks and officers does not come as ‘misconduct’. Another omission which has not been taken into account is the non-payment of income tax and concealment of income by doctors, lawyers and show business people. Even incidents like populous marriages are not covered anywhere in the Act. Another thing not taken into account is preventive detention in the matter of hoarding, concealment and diversion of stocks of cement, steel and foodstuff. This is normally committed by railway employees in league with the merchants who deal in these articles.

5.6.15 Kickbacks and corruption by Public Sector bosses not included in the act

Kickbacks taken by company people and company bosses are not covered by the Act. Another form of corruption is by the public sector bosses. They either go on foreign tour themselves with the families or they send their favourite junior officers who go on foreign tour and missions, but without achieving anything for the purpose for which they are sent.

---

44. Lok Sabha Debates May 7, 1987 p-399.
5.6.16 No provision for disqualifying offenders from holding office in the public service

Once convicted, declared an offender, there must be some provision existing as complimentary sanctions to fine and imprisonment. There is no such provision disqualifying offenders from holding office in the public service.45

5.6.17 No provision for confiscation of the proceeds of the crime

The Act of 1988 does not contain any provision for confiscation of the proceeds of the crime of corruption, which would definitely constitute an important additional deterrent that often has a greater impact than fines or prison terms. Threatening confiscation also entails preventive effects, as it makes committing the crime less attractive.46 The authority to freeze assets during the investigation phase compliments these provisions in most countries. The implementation of this provision, however, is rendered difficult when the bribe has been converted or consists in an intangible advantage, such as the appointment to an important post.47

5.6.18 Act is silent on money from donations

Lot of money in the form of donations is collected in our country given by foreigners. These are not covered under the provisions of Foreign Contribution Regulations Act, 1976. There are a number of such organizations of foreign communities, socio-economic, political, etc., and a lot of money is brought to this

45. Fiji Islands, Korea, Malaysia, Mongolia, Papua, New Guinea, Pakistan, Vanuatu, Kazakhstan is also working towards establishing such regulations. In Korea, for instance a person who resigns or is dismissed from office for act of corruption in connection with his duties is disqualified from taking up a job in any public institution and even some private businesses, for five years.... http://www.adb.org/Documents/Books/Anti Corruption/Policies/Chap 2.pdf “Sanctioning and Prosecuting Corruption and Related offences”

46. Ibid., China, Indonesia, Japan, Korea, Malaysia, Nepal, Pakistan, The Philippines, Singapore allow or require confiscation of the bribe or other relevant proceeds.

47. Countries apply different solutions to this problem: Korea allows the Judge to order the confiscation of property equivalent in value of the bribe has been converted. Japan, by contrast, limits confiscation to the bribe.
country in this way. This money instead of being used for the good cause of the people is rather misused. The Act is silent on this account.

5.6.19 Lacunae in judicial system relating to corruption cases

*Rule of law* is the cornerstone for building a transparent and accountable society. We believe an effective judiciary is a key element for establishing and protecting the *rule of law*. Our fight against corruption relates to judiciary in two ways: *One*, it is an essential element of any integrity system to protect society against corruption and *second*, that the judiciary is vulnerable and it has to be protected against corruption itself. With the enactment of the PCA, 1988 there is a widespread sadistic expectation that at long last guilty public servants will be punished. Actually, there is every possibility that they will escape. The reason for such a statement can be stated thus: proof of guilt is difficult to obtain, there are many loopholes in the law, witnesses are unreliable, files vanish, and justice takes time months after the scandals break out, trial do not even begin.

If lawyers could draft laws that prevent corrupt behaviour there could be no problem with corruption. To a large degree, the present crisis stems from the fact that laws and legal institutions have failed. This failure has been in part due to the weakness already present in the judicial system and is part from the lack of will to strengthen the system as a result of the interplay of actors who have a vested interest of one kind or another in the status quo.

Lacunae in judicial system abound which need immediate rectification. It is on the pillars of strong judiciary that the state of corruption cases rests. The whole labour of detection, investigation and prosecution comes to nothing if the trial in a court of law is unsuccessful. Generally it is seen that problems associated with judiciary involved certain factors. These are:
5.6.19.1 Resources available to Trial Courts

5.6.19.1 (i) Manpower resources

(a) Excessive caseload

Although the cases in corruption which the Special Courts are to handle are on the increase, there is no commensurate increase in the number of Judges to deal with these cases. Thus, the number of cases they have to try outweighs their efficient operational ability. The result is that many cases are fixed for hearing on any given date, which subsequently lead to frequent adjournments. Moreover, Judges are left with little time to write judgments or even to prepare adequately for court hearings.

(b) Inexperience Of Trial Judges

Incompetence and ignorance of the law and lack of experience of some Judges is judged as a contributory factor for delay in trial. This class of Judges often fail to take proper control of proceedings during court sittings to such an extent that valuable time is lost on unnecessary cross-examination and arguments.

(c) Unskilled Court assistants

Another major source of delay in trial is the lack of competent and skilled court administrative personnel. These courts rely on unqualified court registrars, secretaries and bailiffs to assist the Judge.

5.6.19.1 (ii) Material Resources

(a) Equipment: In some places court proceedings are manually recorded by the Judge as the office equipment necessary for fast reproduction of court proceedings, such as word processors or photocopies, are also lacking.

(b) Finance: Another problem facing the judiciary is to deal with lean budgetary provisions. Salary and conditions of service of Judges and ancillary staff leaves much to be desired. This tends to imbue
low morale in the system. Financial inadequacy sometimes also hinders, or even stalls, the smooth running of the courts, thereby delaying trial.

5.6.19.2 Prosecution problems

5.6.19.2 (i) Burden of Proof

One of the tasks encountered in criminal trials is for the prosecution to prove the guilt of the accused. This task poses a problem in corruption cases where the prosecution is required to prove the receipt of the illegal gratification, despite the peculiar circumstances of the crime. In Pakistan and in India the anti-corruption law shifts the onus of proof of innocence to the accused, when the prosecution has otherwise proved that such an accused is in possession of assets well beyond visible earnings. But in trap cases, and other offences, heavy burden lies on the prosecutors to prove the guilt of the accused and this contributes to the delay in trials.

5.6.19.2 (ii) Report of experts

Expert reports takes a long time to be obtained because there are few recognized experts. These reports may be laboratory reports needed for corruption cases, used to obtain evidence [for example the phenolphthalein powder test in trap cases], or the report of an expert handwriting analyst for disputed documents. Thus trials are sometimes adjourned awaiting the receipt of an expert opinion.

5.6.19.2 (iii) Lack of preparation

Sometimes the prosecutors are few compared to the numbers of cases they have to deal with. These prosecutors do not have enough time to prepare their cases, and coupled with inexperience, they are often inclined to seek adjournments to enable them to prepare to handle the issues raised by the defence.
5.6.19.3 Witnesses

5.6.19.3 (i) Non-attendance

Another contributing factor to delay in trial of corruption offences is the failure of witnesses to attend court sessions when required. This situation arises especially in cases where the prosecution may be transferred to a different location and may not be summoned in time. However, the situation is worse where there is no adequate compensation for witness’s expenses.

5.6.19.3 (ii) Witness protection

This is a major lacuna in our judicial system that there is no protection scheme for trial witnesses in corruption cases. Moreover, it is difficult to secure direct witnesses in corruption cases, except those who may have participated in the crime.

5.6.19.4 Defence

Defence Attorneys are in the habit of prolonging trial time through unnecessarily lengthy cross-examination, disputation of exhibits being tendered by the prosecution, requests for adjournments and absence from trial on flimsy excuses. This perhaps is the chief cause of delay, especially when the accused person had been granted bail.

5.6.19.5 Sentencing patterns

The pattern of sentencing for the same offence often varies in different courts in the country. This practice may be caused by the differing disposition of Judges and is considered inefficient, if not unjust. The variance in sentencing is even more pronounced as one views the sentencing patterns by trial Courts and those by the High Courts.

5.6.20 Other lacunae

5.6.20.1 Justice delayed is justice denied

To punish corrupt people we have two options before us. One option is departmental action or inquiry and the other is prosecution. The prosecution
depends on judiciary. There are enormous delays in disposal of the cases. What is more, if a person is corrupt, he can engage the best legal brains and quibble his way to freedom. We have seen at different levels how people who are known to be corrupt, who have been caught with crores of rupees in their possession are still not punished because the due process of law has to be taken. The standard excuse of all those people who are caught is that the ‘law will take its own course’. In India, I think, it is a long time consuming course.48

5.6.21 Corruption in judiciary- a serious loophole in the criminal justice system

And lastly, we cannot look away from the truth laid bare by the present Chief Justice of India on February 8, 2007. The Chief Justice of India, K.G. Balakrishnan, on former Chief Justice S.P. Bharucha’s estimate that 20 percent of the Judges could be corrupt and on the public perception of corruption in the judiciary, he .....said “if people perceive the judiciary as the whole system consisting of the Judges, the members of the supporting staff, members of the High Court staff, the Supreme Court staff, the advocates, the advocates’ clerks, all those involved in the system, in that way there may be some corruption [but] I don’t agree that there is so much percentage of corruption amongst the sitting judges.”49

The behaviour of our Judges should not only be irreproachable but seems to be so. Even our former Chief Justice of India, Mr. Y.K. Sabharwal although does not come heavily on judicial corruption admits that “we must be tough in dealing with corruption in all institutions including the judiciary.” Even the judiciary has not to forget that it like Cesar’s wife should be above suspicion!

5.6.22 Conclusion/Suggestions on judicial lacunae

The need of the hour is to bring following innovations in judiciary relating to its dealing with corruption cases:

5.6.22.1 Corruption cases be subjected to summary trials analogous to a court martial

Unless corruption cases are subjected to summary trial analogous to a court martial, and are brought to conclusion within a mandatory time limit, they will be not more than an eye wash and a farce and, in the bargain, will bring the entire judicial system into disrepute.50

It will be well worthwhile for the civil society to mount pressure on the Government, by seeking, if necessary, the help of the Supreme Court with a public interest petition, to amend the procedures for the trial of corruption cases on the following lines:

(i) The trial should proceed from day to day basis on a continuing basis and should be brought to a conclusion within a period of six months.

(ii) The onus in every trial for the corruption to prove their innocence should be on the accused.

(iii) Throughout the trial period, the accused should be in custody and not let on bail.

(iv) No adjournments should be granted except on manifestly compelling grounds such as the grave illness of a witness or the accused.

(v) There should be no appeal permitted to the higher court on the finding of facts by the trial court. Only one appeal should be allowed to a higher court confined to important and substantive grounds of law.


266
Conclusion

The foregoing discussion in this chapter shows that a nation may have all the institutional arrangements and laws in place, but so long as these measures are wanting in proper working and implementation, corruption would continue unabated. About the Prevention of Corruption Act, 1988 we can conclude with H.L. Mansukhani’s words\(^5\) that the Prevention of Corruption Act turned out to be a “puerile piece of legislation”. It only more meticulously recognized several forms of bribes and corruption, but did not prevent them; According to him, it created a new branch of evidentiary law whose objectives are neither moderate nor practical. Similarly, both constitutional and legal provisions are being continuously flouted and/or tampered with for personal, political and partisan reasons of raising further legal and constitutional issues. Not only is the sanctity of the Constitution undermined but Rule of Law is also negated. Such a failure is attributed to several reasons:

First, the emphasis mostly is not so much on correcting the reasons for corruption as is the effort to deal with the practices and outcomes of corruption.

Second, is poor leadership and lack of decent role models, both administrative and political.

Third, an influential civil servant can always look for the helping and interfering hand of a political master and feel secure, just as influential politicians can take shelter behind their powerful masters. Worse is the collusion between the political master and the civil servant either in sharing the ill-earned income, or when the former protects the latter who confers favours.

Fourth, the very laws, rules and regularities to curb corruption are themselves corrupted insofar as they are not followed strictly in their spirit often, or in fact in the letter on occasion. If at all they are applied selectively and in some places as a matter of show, but not generally carried through to their logical conclusion.

Fifthly, sometimes the very rule of law and the various rights guaranteed to the
civil servants in the name of assuring neutrality, may also contribute to the
difficulty in prosecuting corrupt cases, as paradoxical as it might sound for
example Article 311 of the Constitution of India provides that no civil servant can
be “dismissed or removed by an authority subordinate to that by which he is
appointed.” And the appointing authority at the Centre of course is the President
of India. Thus, the only weapon left for the subordinate political authority is to
transfer the person in question as often as possible. This practice is followed of
course with impunity, with the mistaken notion that it is not a form of punishment,
but oblivious to the travails of the family in the process being chased from pillar to
post. All this leads to low morale, while working as an inducement to tow the line
of the political master to avoid moving often from position to position.

There is much to be done. Many loopholes have to be plugged and many
obstacles have to be overcome. It is a clear writing on the wall that although we
have political institutions firmly entrenched that itself is not enough while the spirit
is lacking. Our former Prime Minister Shri Atal Bihari Vajpayee himself confessed
thus: The outer shell of democracy is no doubt intact, but it appears to be moth-
eaten from inside.52

It is this inside which we have to cure and not let degenerate. Big corruption
scams have rocked the nation. People just sit back and watch with raised
eyebrows, watch the system drain into ruins. We enacted the Prevention of
Corruption Act, 1988 with certain objectives and goals to be achieved.
Paradoxically all the scams involving crores of rupees unearthed have sprouted
after 1988. Does this mean our anti-corruption law is absolutely ineffective? Or
can we still say and hope that the shortcomings which are not only in the
statutory part, but also in the procedural (both investigative and prosecution) part,
can be and will be rectified? Some remedies which may be considered are:

5.6.23 Remedies at legislative and international level

Some of the obstacles mentioned in the afore-going pages, to the successful prosecution of corrupt individuals in high positions have to be solved at the legislative or even international level. More specifically, regional and international instruments and networks may provide mechanisms to strengthen and facilitate international cooperation. At the national level, barring convicted corrupt officials from reentering elected politics and strengthening the independence of law enforcement agencies may be useful tools.

Finally, the fostering of cooperation and loyalty within law enforcement agencies by corresponding institutional structures and mechanisms is important.

Some Practical Tips

5.6.23.1 "Follow the Money"—seize it

Drafting and amending legislation is a lengthy procedure. The following tips could be made use of by the prosecutors and law enforcement agencies to investigate such corruption cases more successfully—keeping in mind that even a single top conviction could send the right message: that there is no longer impunity for high profile criminals.

One, it is vital to focus on all possible financial angles in corruption cases, especially when it comes to eventually being able to confiscate ill-gotten money, property or other assets. The fact that corrupt individuals are often more afraid of losing the fruits of their crimes than of serving in jail can work to a prosecutor’s great advantage.53

5.6.23.2 Follow the Scandinavian example

Prosecutor should also consistently take full advantage of whatever beneficial transparency laws are at their disposal. In some Scandanavian countries, for example, the earnings of public officials are freely disclosed to the public. This provides the prosecutor with an invaluable tool for determining an individual’s demonstrable network if there are reasons to believe the suspect to have the

---

53. Some countries e.g., Ireland and the UK are under certain circumstances, legally entitled to seize such assets without being obliged to fully prove these were gained through crime if the defendant is unable to explain the origin of such assets.
other, illegally obtained assets to support him or her. In Norway, those convicted of serious crimes such as drug trafficking or bribery must be able to demonstrate the source of their assets. Otherwise, prosecutors may ask the court to seize properties from the convicted felons and declare them as public property.

5.6.23.3 Prosecutor must avoid risky situations

Ambiguous situations, for example, conducting interrogations in prison or calling witnesses whose integrity might be called into question by the defence, can constitute a risk and weaken the case. Prosecutors should always anticipate likely consequences when deciding on the strategy for the investigation.

Thus it is seen that the lack of success in prosecuting influential public officials and politicians is to a large extent due to an unsuitable institutional framework, the influence that these individuals and their entourage have on the proceedings and hindrances arising from institutional and psychological pressures. Loopholes or ambiguous regulations continue to impede efforts to prosecute bribery effectively. Reforms have to be propelled in this sector as various lacunae in anti-corruption legislation remain. Reforms with respect to law enforcement focusing on the establishment of centralized and specialized institutions responsible for tackling corruption, reforms of existing procedural and institutional provisions is urgently needed. Reform efforts to ensure that laws and regulations are as concise and comprehensive as possible therefore remain crucial to the efficient deterrence of corruption.

5.6.24 The Act is silent about the Lokpal And Ombudsman

The Act of 1988 is conspicuously silent about the Lokpal, the Ombudsman. Had the provision regarding it been introduced in the Act, there would have been more hands, more teeth in the drive against corruption. Due to its non-inclusion, the issue of Lokpal has remained with the Government since so many years and the anti-corruption Act has been managed without it since 1947. Expected to be
incorporated in the PCA, 1988, its absence only shows that there has been an unholy haste in bringing about the particular Bill."\textsuperscript{54}

The frustration over its incorporation in the legal system was expressed on 29.11.99 by N. Vittal in the following words: The Lokpal Bill has been pending for thirty years and I wont be surprised if it is kept pending for another fifty years.\textsuperscript{55}

In countries like South Korea, Japan and elsewhere even the top political leaders and officials are being held guilty of corruption because of these institutions operating in their system. But in India, such developments are nowhere to be seen. In fact when we look at the people who are punished in India, it appears that our system is like spider’s web in which only small fly or insects may be caught and big bumble bees can breeze through.

---o---

\textsuperscript{54} As spoken by Shri Ataur Rehman on May 7, 1987, Lok Sabha Debates on Prevention of Corruption Bill 1987, p-397.


271