THE MULTIDIMENSIONAL NATURE OF CORRUPTION: EXPLORATIONS THROUGH LAW, ECONOMICS AND BEHAVIOURAL SCIENCES

Thesis to be submitted to Jawaharlal Nehru University in the fulfillment of the requirement for the award of the degree of

DOCTOR OF PHILOSOPHY

ANIRUDDHA PRATAP

Centre for the Study of Law and Governance

Jawaharlal Nehru University

New Delhi – 110067

2017

JAWAHARLAL NEHRU UNIVERSITY
Centre for the Study of Law & Governance
NEW DELHI-110067, INDIA

Date : 29.08.17

DECLARATION

I Aniruddha Pratap, declare that this thesis titled **"THE MULTIDIMENSIONAL NATURE OF CORRUPTION: EXPLORATIONS THROUGH LAW, ECONOMICS AND BEHAVIOURAL SCIENCES"** submitted for the award of degree of Doctor of Philosophy (Ph.D.) from the Centre for Study of Law and Governance, Jawaharlal Nehru University is a faithful record of my research work carried out by me under the guidance of my Supervisor. This work is original and has not been submitted for the award of any other degree or diploma in this University or any other University. The assistance received from various sources during the course of the study has been duly acknowledged.

ANIRUDDHA PRATAP

CERTIFICATE

We recommend that this dissertation be placed before the examiner for evaluation.

Prof. Amita Singh
(Chairperson)

प्रो. अमिता सिंह/Prof. Amita Singh
अध्यक्ष/Chairperson
विधि एवं अभिशासन अध्ययन केन्द्र
Centre for the Study of Law and Governance
जवाहरलाल नेहरु विश्वविद्यालय
Jawaharlal Nehru University
नई दिल्ली/New Delhi-110067

Prof. Jaivir Singh
(Supervisor)

पर्यवेक्षक/Supervisor
विधि एवं अभिशासन अध्ययन केन्द्र
Centre for the Study of Law and Governance
जवाहरलाल नेहरु विश्वविद्यालय
Jawaharlal Nehru University
नई दिल्ली/New Delhi-110067

ACKNOWLEDGEMENT

I would like to express my very great appreciation and sincere thanks to my supervisor Dr. Jaivir Singh for helping me to actualize and consummate this work. I am beholden to him not only for his constructive suggestions (which gave coherence and clarity to this work) but also for his beneficence and emotional support. Association with him has been an acutely enriching experience. I feel extremely lucky to have the unending love and support of Beena Chaudhary, my mother, and Kumud Singh, my sister, who have been my strength during this phase. I thank Yeshey Namgyal for being there for me, especially in difficult times, as an emotional as well as intellectual anchor. I thank my friends Abhishek Dubey, Abhishek Yadav, Sujeet Kumar, Binod Kumar, Pankaj Choudhary, Siddhartha Fuller, Abhinav Prakash, Mark Gideon, Shailendra Mani Pradhan, Susanta Kumar Mallick, Tashi Dhondup, Jigme Dorjee, Shariq Abbasi, Tariq Abbasi, Kaleem Chaudhary and Abhijeet Dwivedi for their help during this work and otherwise.

CONTENTS

CHAPTER 1
INTRODUCTION

The word corruption is derived from Latin word *corrumpere* and its cognates which means to pervert, destroy, deprave or infect. But the common use of the term corruption implies corruption by public officials or of public office which involves a transaction in which public office is misused for sake of personal gains, monetary or otherwise. In general understanding corruption is simply equated with bribery, but may include other transactions of like nature such as embezzlement, facilitation payment, collusion etc. As will be evident in discussions in this work that corruption has many dimensions and the objective of this study is to capture the meanings of corruption crosswise such dimensions to collate a better informed view on corruption. This work intends to make an inter-disciplinary study of corruption involving primarily streams of Law, Economics, Behavioural Sciences but also incidentally traverses through streams of History, Political Science, Sociology etc. A multi-disciplinary study of corruption is important for identifying the missing pieces of information which disciplines individually do not offer. A study from the angle of Law is necessary as corruption as an act is included in the category of criminal wrongs and penal provisions have been legislated to punish those who commit corrupt acts. This necessitates discussions around the legislative definitions of corruption, the associative legal provisions, the procedural laws for prosecution of corrupt actors, judicial interpretations surrounding such legislative framework etc. Primarily corruption is regarded as a transactional evil in which money changes hands therefore it becomes imperative to make an economic study of the phenomena of corruption. This requires a discussion around the costs associated with corruption. Also, stream of law and economics regards law as a tool of incentivizing and dis-incentivising human behaviour. Law should incentivize socially desirable human behaviour and dis-incentivise socially undesirable behaviour. This relation is important to analyse vis-à-vis the phenomena of corruption. Since corruption is considered as socially undesirable behaviour therefore a behavioural analysis of corruption becomes necessary. This will involve a study of various phenomena associated bounded rationality which demonstrate how rationality assumption of economics can be flawed

and human actors are not as rational as they are assumed to be. Human beings have seriously flawed memories and they rely on mental shortcuts rather than actual statistical evidence in making decisions because of this the hypothesized human behaviour in economic models is different from actual human behaviour. This needs to be appreciated in the light of the phenomena of corruption.

Chapter 2 will explore different definitions of corruption floating not just crosswise disciplines but times and will also focus on more deleterious forms of corruption like abuse of constitution for partisan interests, subversion of regimes, bypassing of democratic processes etc. which have been hugely overlooked. It will also refer to the context or culture specific difficulties faced in devising a definition of corruption due to discord between Western and indigenous specifications. Also it analyses the repercussions of corruption on human rights.

Chapter 3 will study the legal dimension of corruption with regard to corruption laws in India since it is not possible to make a study of the corruption laws all over the world. This chapter will discuss the development of corruption laws in India since independence and how successive amendments and a series of case law has altered, modified or expanded the meanings associated with term corruption. It will also make an endeavour to assess the performance of such laws in context of conviction rates and perceptions among the people.

Chapter 4 will study the economic analysis of corruption with respect to the idea of moral costs, as economic approach focuses primarily on minimization of costs while overlooking the moral costs that may be involved in the process. The chapter will also assay those costs which have often been overlooked by the scholars in their economic analysis on corruption.

Chapter 5 will make behavioural analysis of the phenomena of corruption offering a critique of the tradition law and economics insights not just generally but also in context of corruption. Human beings have flawed memories and to deal we the same human actors rely on mental shortcut or rules of thumb which generate various biases and bounds on the rationality of a human actor. This chapter makes a study of such biases and bounds with respect to the phenomenon of corruption. The chapter

concludes with a media content analysis of the reporting of corruption and tries to juxtapose the results of such analysis with insights gathered in this work.

Chapter 6 will articulate the conclusion of this work which will try to make sense of the insights gathered as a result of this work.

OBJECTIVE OF THE STUDY

Objective of this study is to capture the phenomenon of corruption crosswise dimensions of Law, Economics and Behavioural Science to collate a better-informed view on corruption. It has been articulated above why the study from these three angles needs to be undertaken.

RESEARCH QUESTION

Whether a multi-disciplinary study of corruption from the dimensions of Law, Economics and Behavioural Sciences offers a better-informed view of corruption?

METHODOLOGY

I have used mixed methods research for this work which employs both qualitative as well as quantitative tools with the aim of providing a more informed view. This involves not just the survey of the existing literature but also of the concerned legislation and the case law alongwith the content analysis of media reporting around the problem in hand. In content analysis itself both quantitative as well as qualitative study has been conducted.

CHAPTER 2: DEFINING CORRUPTION

"HIERONIMO

Art a painter? Canst paint me a tear, or a wound, a groan, or a sigh? Canst paint me such a tree as this?....Canst paint a doleful cry?"

Thomas Kyd, *The Spanish Tragedy*

Hieronimo, one of the principle characters in Thomas Kyd's Spanish Tragedy, asks the aforementioned from the painter. Perhaps he could have also asked, 'canst paint corruption?' for our purposes to make evident the predicament of defining a term as perplexing as 'corruption'. The chore of studying the phenomenon of corruption is fraught with limitations, the foremost being the definitional. There have been abounding endeavors to conceive a definition of corruption, but difficulties have been faced in working out an inclusive definition due to variety of reasons. Mulgan argues that beyond an array of representative examples such as bribery, nepotism and favouritism it becomes difficult to define corruption in general terms.[1] Blau, on the other hand, believes that, in general, corruption will imply something moving from better to worse and since we disagree on what is better and what is worse therefore the exact meaning of the term will vary.[2] Euben evinces that the rudimentary idea of corruption, which still holds much ground, is related to identification of some debasing impurity, decay or degeneration that has obstructed something from its natural development. He points out that of various meanings given in the *Oxford English Dictionary* the common theme appears as "having to do with decay, degeneration, disintegration, and debasement. Corruption implies decay, where the original or natural condition of something becomes infected."[3] This appears to be too broad a delineation for practical purposes of defining corruption. Philip[4] believes that

[1] R. Mulgan, 'Aristotle on Legality and Corruption', in M. Barcham, B. Hindess, and P. Lamour, (eds.), *Corruption: Expanding The Focus*, Canberra, ANU E Press, 2012
[2] A. Blau, 'Hobbes on corruption', *History of Political Thought*, vol. 30, no. 4, 2009, 596-616.
[3] J. P. Euben, 'Corruption' in T. Ball, J. Farr & R. L. Hanson (Eds), *Political Innovation and Conceptual Change*, Cambridge, Cambridge University Press, 1989, p. 221
[4] M. Philp, 'Defining Political Corruption' in P. Heywood (Ed.), *Political corruption,* Oxford, Blackwell, 1997, pp. 20-46

despite disagreements on definitional aspects of corruption there seems to an agreement on the meaning of the word. According to him the meaning 'is rooted in the sense of a thing being changed from its naturally sound condition, into something unsound, impure, debased, infected'[5]. He argues that problem appears to be not with the task of defining corruption but with actual application of this meaning to political corruption, and this is because there is lack of consensus regarding 'naturally sound' political condition that makes it difficult to determine as to what should be considered as a deviation from such condition.

The word corruption is derived from Latin word *corrumpere* and its cognates, which implies to 'pervert, destroy, deprave or infect'. Among the contemporary definitions the most oft used is the World Bank's definition: "the abuse of public office for private gain."[6] Other popular definitions include: "abuse of entrusted power for private gain" (Transparency International)[7]; "the abuse of public power and influence for private ends" (Waterbury)[8]; "sale by government officials of government property for personal gains" (Shelifer and Vishny)[9]; "Corruption may be represented as following a simple formula: C = M + D - A. Corruption equals Monopoly plus Discretion minus Accountability" (Klitgaard)[10]; "behaviour that deviates from the formal duties of a public role (elective or appointive) because of private-regarding (personal, close family, private clique) wealth or status gains" (Nye)[11]; "efforts to secure wealth or power through illegal means – private gain at public expense" (Lispet and Lenz)[12]. Interestingly the United Nations Convention against Corruption (UNCC) and Council of Europe Conventions do not provide a definition of corruption, but do mention various forms of corruption such as bribery; fraud; extortion; embezzlement; obstruction of justice; facilitation payment; illicit enrichment; collusion; money laundering etc.

---

[5] Ibid. p. 29

[6] World Bank, World Development Report 1997: The State in a Changing World, World Bank, Washington DC, (1997), p. 102

[7] http://www.transparency.org/news_room/faq/corruption_faq (accessed on June 17, 2013)

[8] J. Waterbury, 'Endemic and Planned Corruption in a Monarchical Regime', *World Politics*, vol. 25, no. 4, 1973, p. 533

[9] A. Shleifer, and R. W. Vishny, 'Corruption' in *The Quarterly Journal of Economics*, Vol. 108, No. 3, 1993, at p. 599

[10] R. Klitgaard, 'Gifts and Bribes', in Zeckhauser, R. (ed.), *Strategy and Choice*, Cambridge, MA, MIT Press, 1991

[11] J. S. Nye, 'Corruption and Political Development: A Cost Benefit Analysis', *American Political Science Review*, vol. 61, no. 2, 1967, p. 419

[12] S. M. Lipset, and G. S. Lenz, 'Corruption, Culture, and Markets' in L. E. Harrison and S. P. Huntington (eds.) *Culture Matters*, New York, Basic Books, 2000 at p. 112

One of the difficulties of defining corruption is probably its multidimensional nature. The dictionary meaning of the term corruption implies to pervert, deprave, destroy, or distort; while common understanding of the concept has to do with transactions like bribery, nepotism, embezzlement etc., on the other hand most working (modern) definitions consider it as 'abuse of public office for private gains'. One can see a common thread connecting all of the above mentioned as corruption can be some kind of perversion or depravity of the agent who takes to transactions like bribery, nepotism etc. which results in the abuse or distortion of the public office or institution. Modern definitions by making use of public/private distinction try to encompass all corrupt acts as they work on the assumption that in every transaction capable of being reduced as a corrupt one there will always be abuse or misuse of the public office for private gains or advantages. And one would agree that if we take into account just the 'transaction part' of corruption where money or other gains changes hands then such a definition qualifies to be a useful working definition. But corruption is not just about the transaction part, in a democracy or a society which strives to be just corruption can have far reaching consequences on the concerns of justice, equality, democratic processes, fairness, representation, subversion of constitutional machinery etc. (as I shall discuss later). For example in an institutional set up where guiding principle is equality before law, i.e. like should be treated alike or all of those who are similarly placed in a society should be treated in a similar manner, if a person who pays bribe is treated more favorably, or more equally to use an Orwellian phrase, then this is not just abuse of the public office but also of the principles of equality, justice etc. Similarly in a Rawlsian setup a person's ability or inability to pay bribe is a morally arbitrary factor and if distribution of benefits or disadvantages in a society is made on such criteria then clearly violates the standards of fairness and justice. Also, there can be abuse or misuse of public office for arbitrary considerations, which do not exactly qualify private gains but may raise the concerns equality, justice, representation etc. Consider a situation in which a public official, who is entrusted with appointment of a person to a particular post on the basis of pre-defined criteria and qualifications, appoints a less meritorious person because, let us say, he happens to be better looking than the others or merely out of pity. In such a situation it is hard to comprehend (alongwith difficulty of detection of such subjective satisfaction) how such an appointment personally benefits the person entrusted with such a responsibility, but it is clearly an abuse of public office that

distorts the fabric of constitutional principles of equality, justice, fairness etc. Because of the ability of the corruption to not only distort or pervert the public offices or agents but also to have such far-reaching repercussions on justice, equality, democratic processes, fairness standards, representation processes, constitutional machinery etc., it also should be considered something which perverts the 'body politic' as well.

Hindess[13] points out that more recent discussions surrounding corruption involve "a blurring of the distinction between public and private"[14] whereas in the streams of political thought of the Western classical antiquity the aforementioned context was not invoked to refer to corruption. Hindess further argues that, "in the political thought of Western classical antiquity and late medieval Europe, corruption was commonly understood, as we believe it should be understood, *as a condition of the body politic*. Since the late eighteenth century this has not been the prevalent view held in the West and amongst the international agencies that the West dominates. In the past two centuries the term 'corruption' has been increasingly used to designate problematic behaviour on the part of one or more individuals, or behaviour that is often seen as a matter of using one's public office for the purposes of illicit private gain". [15] Thus, historically we have moved from corruption being treated as a condition of the body politic to corruption as behaviour of individual or individuals using public office for illegal private gains. To have a better and more informed picture of such evolution we need to assay such historical development that took place over centuries.

Saxonhouse[16] disserts that "authors from ancient Athens not so enmeshed in the public/private dichotomy also understood corruption as the dissolution of an institution or practice or way of living distant from what might be seen as its 'natural' form. For Plato there was the corruption of the form—that which exists by nature and not by art or craft, and that which exists in an unchanging world of being. When brought into the world of daily experience and change, the form is corrupted and loses

[13] B. Hindess, 'Introduction: How Should We Think About Corruption' in M. Barcham, B. Hindess, and P. Lamour, (eds.), *Corruption: Expanding The Focus*, Canberra, ANU E Press, 2012
[14] Ibid. p. 3
[15] Ibid. p. 5
[16] A. W. Saxonhouse, 'To Corrupt: The Ambiguity of the Language of Corruption in Ancient Athenes' in M. Barcham, B. Hindess, and P. Lamour, (eds.), *Corruption: Expanding The Focus*, Canberra, ANU E Press, 2012

its perfection. For Thucydides, there were the perfection and imagined eternity of the Periclean city described in Pericles' funeral oration, which dissolved with Pericles' death, the pressures of war and, most importantly, the embodiment of the city in the actual lives of its citizens. From such a perspective, these authors offer a very different sense of corruption, one that takes it out of the public/ private dichotomies so prevalent today. They place the concept into a much more ambiguous but (I will suggest) richer theoretical world."[17] Many of us give credence to the fact of insufficiency of the modern definitions of corruption which gyrate around 'abuse of public office for private gain' discourse, which though not incorrect, addresses only a part of the problem, whereas the ancient treatment of the subject proffers a deeper philosophical examination, but it would be wrong to argue that the later divorced itself with the public/ private dichotomy as Philip[18] has adverted (and as we will see later) that there existed concerns of the abuse of public office among the Greeks. Warren calls attention to the fact that "classical distinctions between, say, monarchy and tyranny turned on the contrast between the public responsibility of kings and their private gains. Still, it would be anachronism to define for example, the sale of public offices in early modern absolutist monarchies as corruption; this was simply the way these regimes did their business and they did not pretend to do otherwise. It was not, of course, that the concept of corruption did not exist, but rather that the most recognizable lineages, handed down from Plato treated corruption in ways that were broadly cosmological, and so served less as guides for institutional reform than as moral indictments of individuals, peoples, and cultures."[19] Thus, ancients were dealing with corruption on a philosophical level rather than just consider it in terms of wealth and power. Spence[20] presents an interesting reading of Plato in which he discusses the Myth of Gyges from a dialogue between Glaucon and Socrates in the Book II of Plato's Republic. According to the myth Gyges, a shepherd from Lydia, discovers a ring, which he later finds out, has power to make him invisible. A few days later he visits the palace of the King with a delegation of shepherds. By making himself invisible in the palace he seduces the Queen and kills the King and

[17] Ibid. at pp. 37-38

[18] M. Philp, 'Conceptualizing Political Corruption' in A. J. Heidenheimer and M. Johnston (eds.) *Political Corruption: Concepts and Contexts*, New Brunswick, NJ: Transaction Publishers, 2002, p. 48

[19] M. Warren, 'What Does Corruption Mean in a Democracy', *American Journal of Political Science*, Vol. 48, No. 2, 2004, p. 329

[20] E. H. Spence, 'Plato's Ring of Corruption' in E. Close, M. Tsianikas and G. Couvalis (eds.) *Greek Research in Australia: Proceedings of the Sixth Biennial International Conference of Greek Studies, Flinders University June 2005*, Adelaide, Flinders University Department of Languages - Modern Greek, 2007

consequently usurps the throne and assumes total power. Through this story and these characters Plato is trying to ask a simple question viz. in a situation like this what possible reason would a Gyges like person have to act ethically when he has the ability to keep his unethical conduct invisible as this ability to remain invisible provides him with total impunity from social sanction or punishment of any kind? Glaucon regards this as the highest reach of injustice as it allows one to appear just when one is not; he calls it 'most perfect injustice'. Spence points out that "Plato, through the character of Socrates, argues that neither absolute power nor invisibility exempts anyone from acting ethically towards others. Apart from harming others through one's unethical conduct, Plato thinks that in acting unethically one also harms oneself. He argues that unethical conduct is self-defeating for it corrupts the character of the person that acts unethically and causes internal disharmony that prevents the perpetrator of wrong deeds from being truly happy. Plato believes that behaving ethically provides the best means of living a good and happy life and it is only through ignorance that people act unethically since everyone wishes to be happy. Plato identifies happiness with virtuous activity and the possession of an ethical character which together are necessary for internal harmony and integrity both for the individual citizen as well as the State. In parallel fashion, Plato also argues that corporate or institutional injustice can create disharmony and conflict within the State that can ultimately threaten civil authority and the very stability of the State itself."[21] Thus, from Spence's reading of Plato it appears that he is addressing the predicament of corruption both at an individual as well as institutional level. At an individual level Plato finds acting ethically as a means to live a good and happy life in form of an incentive, unlike Kant, who would say that in such a situation a person should act autonomously i.e. to be totally free from any extraneous factors of any personal benefit in doing her duty, or Bentham, who would want to employ hedonistic calculus for finding greatest good of the greatest number. Spence argues that "integrity of character is the indemnity against the *moral jeopardy of inner conflict that might be caused by emotional and cognitive dissonance*. It is for this reason that integrity is morally important. It has the dual function of protecting a person from psychological dissonance, as well as providing personal motivation for avoiding corrupt conduct, even under favourable Gygean conditions of perfect injustice. Plato is right to make

[21] Ibid. p. 37

integrity of character the glue that bonds individual self-regarding prudential integrity with social other-regarding morality. The underlying factor is avoidance of harm and generation of good not only to others but also for one self. Our moral social inter-relation with each other is closely related to our moral intra-relation to our own individual characters and thus renders ethical conduct both socially as well as personally beneficial and desirable."[22] Thus, Plato finds a link between 'self-regarding prudential integrity' and 'social other-regarding morality', as well as between 'moral social inter-relation with each other' and 'moral intra-relation to one's own individual characters'. At institutional level he believes that corporate or institutional injustices, due to corruption at individual level, can result in conflicts which may consequently endanger the civil authority and stability of the state. Spencer also mentions "five essential features that emerge from the discussion of the Myth of Gyges by Glaucon in Plato's *Republic*, that seem, at least initially, to characterize corruption, are the *possession of power*, a *disposition* to exercise that power, an *opportunity* to exercise that power, *invisibility* or *concealment*, and *self-regarding gain*."[23] But he considers these to be insufficient as if they were sufficient then even a burglar or a professional bank robber would be deemed corrupt, which they are not considered to be. He argues that "the actions of the house burglar and bank robber are not what we would normally describe as corrupt. The missing sufficient condition is a socially pre-established fiduciary relationship of trust between the corrupt person or group and the person or persons or group who are harmed in some way by the corrupt person's or the corrupt group's actions. The reason why house burglars or bank robbers are not deemed corrupt is because there is an absence of a prior fiduciary relationship of trust between the burglar and the bank robber on the one hand, and those who are harmed by their actions on the other; namely, the household owners, the banks and their customers. By contrast, typical cases of corruption and its sub-species fraud, involve an additional breach of a socially pre-established fiduciary relationship of trust between the corrupt agents and their victims, namely, those wronged by the corrupt agents' actions."[24] Thus, it is the prior fiduciary relationship of trust between the state or public officials, on one hand, and people, on the other, that separates corruption from other robbery, theft etc.

[22] Ibid. p. 41
[23] Ibid. p. 37
[24] Ibid. p. 39

For Aristotle corruption is, among other things, inability of a Constitution to achieve its ideals. Euben mentions that "in book I of *The Politics*, Aristotle sets out the *telos* of a political association. In this 'ideal' picture of the polis, corruption is a constitution's falling short of the final end implicit in its being. But since most (perhaps all) regimes confront practical impediments to this 'natural' growth, Aristotle adopts a less stringent, but still moral definition of corruption. In this second, more historical and pragmatic understanding, political corruption is defined in terms of ideals of a specific regime. When a constitution systematically falls short of paradigms of action, character and justice which give it unity and definition, it is corrupt."[25] Aristotle did not argue that perfectly just regime is achievable, rather that all regimes are more or less corrupt and difference between them is only a matter of degree, therefore, the function of an ideally best constitution was to rather serve a model for inferior regimes.[26] "For both Plato and Aristotle, the key feature that the ideal regimes possess as a result of their wise and virtuous rulers is that they are governed in the common interest. Conversely, the leading characteristic that distinguishes deviant regimes from the ideal is that their rulers rule in their own interest rather than the common interest. In *The Republic*, the guardians' training and communal living lead them totally to suppress any notion of self-interest and to find their personal fulfilment in the happiness of the whole … Rule in the common interest rather than in the interest of the rulers remains the touchstone of a correct regime. Aristotle's account of political deviance thus resonates again with modern analyses of political corruption: both establish a nexus between political deviance and the rulers' pursuit of their own private interest against the common interest. However, despite this conceptual parallel, the ancient and modern views of political corruption exhibit important differences. One such difference concerns the practicality of achieving non-corrupt politics. In the modern conception, corruption is seen as remediable, at least at the systemic level; the best existing regimes, such as those at the top of the Transparency International (TI) table, are considered to be largely free of corruption. Though corruption, like crime, will never be totally stamped out, it can be relegated to the margins as it has been in many present-day polities."[27] Two things are worth noting here, first that Aristotle is not that optimistic about achievability of totally

[25] Euben, p. 227
[26] Mulgan, *Corruption: Expanding the Focus*, pp. 25-37
[27] Ibid. pp. 29-30

corruption free regime whereas in modern understanding we do perceive certain regimes to be largely corruption free. Secondly, modern notions of corruption do not stress on complete dedication to common interest by government and citizens but rather on balancing of private and common interest. Mulgan mentions that "modern notions of corruption, as already noted, concentrate on the *illegitimate* pursuit of self-interest in preference to the common interest. In this respect, they establish a balance between the pursuit of public and private interests and do not require governments (or citizens) to be completely dedicated to the common interest. By contrast, Aristotle, like Plato before him, did require such complete dedication. Ideal, non-corrupt states are governed by ideally virtuous rulers who are wholly focused on the common interest and would never consider pursuing their own interests at the expense of the good of the community. Aristotle's ruling aristocrats had their own private lives and personal interests, but insofar as they acted politically they would be wholly devoted to the good of the *polis*. In this respect, the ancient accounts, though more utopian, may be said to be more in tune with the moral absoluteness implicit in the concept of pure, non-corrupt government."[28] Therefore in Aristotle's scheme corruption free regimes are something which is beyond reach whereas total devotion and non-corruptibility of rulers is something which is achievable. "For Aristotle, as for Plato, the fact that all existing regimes are deviant because all are governed in the interest of the rulers does not mean that all are equally deviant. Such a categorical conclusion may have been drawn by the more radical anti-political philosophers, such as the Cynics and Stoics. But both Plato and Aristotle, and particularly the latter, were interested in distinguishing between varying degrees of deviance in everyday politics. That is, the model of the ideal, correct state was used not only to criticize all everyday regimes as fundamentally flawed but also to provide a standard against which everyday regimes could be assessed and found more or less deviant."[29] What is then the standard which measures the deviance of a regime or which makes on regime less corrupt from the other? Aristotle's answer is 'rule of law'. All rulers may be self-interested but if they are constrained by 'rule of law' then there is less likelihood of the deviance of such regimes when compared with rulers who do not face such restraints. In his discussion the most important point which Mulgan brings forward is this: "Aristotle's insistence on the importance of law—any law—in reducing the

[28] Ibid. p. 31
[29] Ibid.

incidence of political corruption does not provide a defining mark for corruption. Nonetheless, it may be instructive for modern debates about corruption. It resonates, at least, with the practical focus in much anti-corruption work on the importance of preventing government officials from breaking actual laws for personal gain. Most anti-corruption campaigns are concerned with breaches of actual laws and regulations, regardless of the actual content of the laws and regulations in question and regardless of whether such laws and regulations are justified. True, this point begs the broader and more fundamental question about what types of self-interested activity should be treated as corrupt and therefore made the subject of anti-corruption laws and regulations. But for the most part, laws and regulations are taken as given and the task is simply to make sure that those in positions of power and responsibility uphold the law as it stands and are not tempted into breaking it for their own private benefit. Indeed, it is for this reason that many modern accounts of corruption adopt illegality as a defining feature of corruption. Thus, both ancient and modern perspectives agree on the importance of rulers ruling within the law, whatever the law may be. The ancients viewed this more as a task of reducing the inevitable corruption or deviance of all governments, whereas in the modern view the issue of legality marks the difference between corrupt and non-corrupt governments."[30] In response to a question about what self-interested activity should be designated as corruption, the answer seems to be that the self-interested activity which breaks the actual laws should be deemed to be corrupt.

In this discussion we have mentioned earlier the problem of far reaching repercussions of corruption on concerns of equality, justice, fairness, representation etc. In Aristotle's scheme if a constitution fails to achieve its ideals, which can very well be equality, justice etc., then it is considered as corruption of regime or the body politic. It certainly helps in dealing with the problem of conceptualizing corruption when you include both 'public/private' discussion as well as 'condition of body politic' discourse as it better informs our idea of corruption, but on a practical level the latter comes with problems of quantifying. It becomes difficult to develop a calculus of moral costs of corruption when it infringes upon social values like justice, equality, fairness, debate etc. On the other hand individual acts of corruption where public office is abused can be fairly detected and are less problematic to judge.

[30] Ibid. p. 34

Mulgan also concludes that "judgments of individual corruption therefore appear less problematic than those made of whole governments, particularly insofar as they take existing standards and general compliance with such standards for granted. Of course, collective assessments of corruption can be made in terms of the amount of individual corruption that occurs. Country A may be less corrupt than Country B, not because its government is more concerned with the common good, but because fewer politicians and officials are on the take. Indeed, most collective assessments, such as those conducted by TI, seem to be of that type. It is for this reason also that definitions of corruption so often concentrate on actual illegality or the duties of an actual office—definitions that fit the individual case much more than the collective."[31] This probably hints at why the contemporary definitions revolve around 'abuse of public office for private gain' discourse. Leaving out the discussion around the problem of corruption as a condition of body politic has consequences of its own viz., firstly, it dilutes the efforts to delineate a more informed picture of corruption for the purposes of common understanding of the concept, and, secondly, by stressing on the transaction part of the corruption, where it is perceived as something where just money is changing hands, we distort the seriousness of the criminality of offence of corruption and its consequential effects on social and constitutional values. Apart from this the inclusion of the 'condition of the body politic' discourse can revive the link between 'self-regarding prudential integrity' and 'social other-regarding morality', as well as between 'moral social inter-relation with each other' and 'moral intra-relation to one's own individual characters'; also we can explore the significance of such better informed and more inclusive picture of corruption vis-à-vis the inner conflict caused by emotional and cognitive dissonance of corrupt actors.

Blau in his discussion about Hobbes on corruption concludes that "for Hobbes, corruption in legal settings involves failing to reason and/or act impartially, especially due to emotions like greed and pity. The immediate result may be inequitable rulings, and in the longer term, a return to the state of nature."[32] Hobbes distinguishes between political and cognitive corruption and as Blau points out that the former refers to actions whereas the later refers to antecedent psychological processes such as reasoning, emotions, appetites etc. Human actors may be cognitively corrupt but that

[31] Ibid. p. 35
[32] Blau, p. 611

may or may not result into acts of political corruption. Blau focuses on the distinction between real and apparent goods echoed in the works of Hobbes: "Reason can uncover our real good, notes Hobbes, and the greatest real good is self-preservation. But our appetites lead us to underplay long-term consequences, so we often prefer *apparent* goods – things that are good in the short term but bad in the long term."[33] Thus, one's appetite and emotions cloud the real goods which are beneficial in the long term or have long-term consequences and lead us in the direction of apparent goods which may offer short-term benefits at the cost of long term losses, and it is by use of right reasoning one can be cognizant of the real goods. Any human actor making use of right reason will have proclivity to prioritize his real self-interest over short-term benefits.

Hobbes sets a very demanding standard of self-interest when he considers a Counsellor, an important public official in 16th and 17th Centuries, who for political ambitions gives good advice as corrupt. The reason that he ascribes for branding such conduct as corrupt is the Counsellor's self-interested motivation as the driving force or consideration behind such advice. Also, for Hobbes it is not just greed which may be the cause of cognitive corruption but also factors likes pity, empathy etc. and compares judges who pity a guilty defendant with corrupt counsellors acting for self-seeking motivations. Blau argues that "Hobbes's account of corruption overlaps with the dominant idea of corruption today – the misuse of public office for private gain. But Hobbes's conception is broader in three respects. In terms of what can be corrupt, Hobbes includes mental processes as well as actions; most writers now talk only of the latter. In terms of who can be corrupt, most writers now talk only of public officials as corrupt; Hobbes includes citizens, as did civic republicans like Machiavelli. This difference partly reflects a change in the notion of public 'office', which once included duties. Finally, in terms of which cognitive triggers can corrupt, most commentators see personal gain as the main motivation, but Hobbes includes opinions about the merit of democracy, dispositions such as hostility to monarchy, and emotions like fear, pity and vainglory. Yet Hobbes's account of corruption is narrower in one key respect. Most writers now see corruption in terms of private gain; Hobbes only addresses *misjudged* private gain – thinking or acting in terms of one's apparent rather than real self-interest. Corrupt citizens ignore their higher-order

[33] Ibid. p. 605

interest in self-preservation, prioritizing interests that are lower-order and shorter-term, such as disobeying laws that they dislike. Corrupt counsellors do not advise impartially, which is in everyone's long-term interest, and instead advise out of self-interest, using rhetorical tools which deter listeners from calculating what is in the common good. Corrupt judges decide cases not through equity but through greed, pity or friendship, ignoring the encouragement that this gives to further law-breaking."[34] Blau makes an interesting point claiming that in terms of private gains Hobbes is only concerned with misjudged private gains and in this way he approves of any other gains which are not misjudged. I disagree with such reading of Hobbes, as it is quite apparent from the material Blau produces before us that a 'reasoned private gain' is something that is in common good, a fact corroborated by the standard that Hobbes sets for the Counsellors discarding acts which are done for self-seeking motivations. Blau contends this by saying that reason may fail to make those real goods apparent or it may even fail to withstand short-term desires. Perhaps he is hinting at the role which emotions and appetites may play as corrupting factors which is an important observation for our purposes, but as far as Hobbes views on the aforesaid are concerned it is quite clear that he believed in reason's ability to withstand frequent disruptions by emotions and appetites. Hobbes is important to our discussion because he treats corruption, not only as a transaction which abuses or distorts the public office, but also, as a depravity which corrupts the mental processes which further limit the ability of a human actor to comprehend his real self-interest, which is common good of the society, over his short-term self interest which may be harmful to him in the long run. In other words, *Hobbes disputes the very idea of private gain prevalent in the common understanding of the term*. What seems as a private benefit is not the real good but is injurious in the long run and what is real benefit is something that furthers common good, and that can only be uncovered by employing reason. Thus, corruption is abuse of public office for misjudged private benefits. Quite contrary to this Mulgan argues that "uncorrupt politics implies that personal or private interests do not illegitimately override the public interest. At the same time, though the public interest should prevail, private interests are not necessarily ruled out altogether, especially in a liberal pluralist polity. Liberal democratic politics, which provides the moral standard against which corruption is typically characterised in present-day

[34] Ibid. p. 612

discourse, is based on the legitimate pursuit of self- interest, both by individuals and by sections of the community. True, the rituals of political discourse demand that deliberation about public policy be cast in the language of the public good and that individual or sectional self-interest be suppressed as a reason for acting. At the same time, no-one doubts both the actuality and the legitimacy of political self-interest in liberal democratic politics. To outlaw all self-interested politics would rule out much of the electioneering, lobbying, pork-barrelling and log-rolling on which democratic pluralist politics is premised."[35] He further disserts that "any realistic notion of corruption applicable in present-day liberal democratic politics has to recognise that politicians (and citizens) cannot reasonably be expected to be motivated solely by concern for the common good or public interest. Instead, the concept of the public interest is institutionalised more as a set of minimal side constraints—to adopt Nozick's (1974) useful term—on the pursuit of private interests. A condition of sound—that is, non-corrupt—politics is not a polity where everyone pursues the public interest but one where the pursuit of private interests is not allowed to transgress certain minimal public-interest limits. Where public-interest constraints kick in and force private interests to give way is a matter of dispute. As already noted, the boundary between the legitimate and the illegitimate pursuit of private interests is blurred and contested. More fundamentally, however, the judgment is essentially a balance struck between competing values: the pursuit of individual or sectional interests on the one hand, and concern for the common good on the other."[36] This is why Hobbesian notion of private benefit becomes important because, despite this realism manifested by Mulgan, most of us are not comfortable with the ease with which processes like lobbying, electioneering, pork-barreling etc. are taken as a given in society today. This portrayal of an individual as an isolated actor, cut off from the totality called society, which he constitutes, and allowed to act in self-interest, impinges upon the seriousness of the popular perceptions of corruption. The most prevalent definitions on corruption tend to treat it as an isolated act by a human actor, and the utility of doing so as discussed earlier is not denied. Earlier thinkers, on the other hand, in their account manifest that individual acts of corruption are not only damaging to the public office but also to the body politic and individual who is

[35] Mulgan, p. 26
[36] Ibid. p. 27

constitutive of that body politic. Such acts of corruption not only distort the public offices but also the interests of those who take to them and of the society as a whole.

This brings us to a discussion on the possible repercussions that corrupt acts my have on society in variety of ways by impinging upon an array of social values and institutions and it is important to talk about these repercussions not in terms of any cause-effect relationship but due to the fact that such effects are themselves corruption in Aristotelian sense of the term. Many argue that corruption is not merely a class of illegal practices but it is a phenomenon that subverts the institutions and constitutional machinery of the state. Also, others regard it as a phenomenon that not only subverts institutions and constitutional machinery but also values to which people are committed. As Parry has observed "Corruption has seemed to get worse and worse not (only) because it has, but also because it subverts a set of values to which people are increasingly committed."[37] Thus, defining corruption may not be as simple as to say that it is abuse of public office for personal gains but it should altogether take into consideration the effect which it ensues on the institutions and value systems and such effect is material because it is itself corruption in Aristotelian sense of the term. As Thompson has pointed out "corruption is bad not because money and benefits change hands, and not because of motives of participants, but because it privatizes valuable aspects of public life, bypassing processes of representation, debate and choice."[38] If we try to locate corruption in our common understanding of the concept then it is the former part of the above lines which we are most likely to refer to and the latter part is normally neglected. And if we have a look at most definitions of our time we can easily appreciate that how often this later part has been overlooked. As discussed above also the prevalent definitions focus on transaction part of the corruption and puts it into the class of illegal practice, what it completely misses is the repercussions which this phenomenon has on the constitution machinery, values among people and (as observed by Thompson) processes of representation, debate and choice. This is nothing but undermining the pillars on which modern democratic state rests. It is perhaps one of the reasons that whenever we hear those definitions we are hardly amused and we know that there is more to it.

[37] J. Parry, 'The Crisis of Corruption and the Idea of India - a Worm's Eye View', in I. Pardo (ed.) *Morals of Legitimacy: Between Agency and System*, Oxford, Berghahn Books, 2000

[38] D. F. Thompson, 'Mediated Corruption: The Case of Keating Five' in *American Political Science Review*, vol. 87, no. 2, 1993, pp. 369-381

Tummala points out that "corruption is conventionally viewed as a transactional evil where money changes hands either in anticipation of favours, or favours already conferred. Thus, the most pernicious form of corruption, which is subversion of a regime, or abusing the Constitution for political and/or partisan gain, has been neglected by scholars."[39] And this form has not only been missed by the scholarly circles in most cases but also by legislative processes in many countries. The most definitions of corruption which we have today are not well arrayed to encompass these non-transactional forms and because of which they seem to be incomplete or inchoate. Warren observes that "corruption, it is incresingly noted, breaks the link between collective decision making and people's power to influence collective decisions through speaking and voting, the very link that defines democracy. Corruption reduces the effective domain of public action, and thus the reach of democracy, by reducing public agencies of collective action to instruments of private benefit. Corruption creates inefficiencies in deliveries of public services, not only in form of a tax on public expenditures, but by shifting public activities towards those sectors in which it is possible for those engaged in corrupt exchanges to benefit. And when public officials put prices on routine government transactions, then the rights and protections citizens should be able to enjoy become favours, to be repaid in kind. Moreover, corruption undermines the culture of democracy. When people lose confidence that public decision are taken for reasons that are publically available and justifiable, they often become cynical about public speech and deliberation. People come to expect duplicity in public speech, and the expectation tarnishes all public officials, whether or not they are corrupt. And when people are mistrustful of government, they are also cynical about their own capacities to act on public goods and purposes and will prefer to attend to narrow domains of self-interest they can control. Corruption in this way diminishes the horizons of collective actions and in so doing shrinks the domain of democracy. Finally, corruption undermines democratic capacities of association within civil society by generalizing suspicion and eroding trust and reciprocity."[40] Thus, corruption undermines the ideals of democracy, creates inefficiencies in delivery of public services, limits the scope of collective decision making and erodes social trust.

[39] K. K.Tummala, 'Corruption in India: Control Measures and Consequences', in *Asian Journal of Political Science*, vol. 10, no. 2, 2002, p. 43
[40] Warren, pp. 328-29

In a institutional setup where the 'equality before law' and 'equal protection of laws' are the guiding principles corruption cannot just be an isloated criminal offence divorced from the concerns of equality and human rights. 'Equality before law' promises to citizens that in the eyes of law all, either an ordinary citizen or an imortant public official, will be treated equally and there will be absence of special privileges in favour of anyone. Thus, if a person due to his ability to pay bribe gets treated more favorably or gets special privileges then it is not only the negation of principle of equlity before law but also the infringement of right to equality of the citizens. 'Equal protection of laws' implies that for all those who are similarly cicumstanced or placed in the society laws will apply equally, or that like should be treated alike and not that alike should be treated equally. In other words, equal treatment is taken to be a general rule, but inequality may be allowed if it is for the advantage of the worse off in society i.e. those sections of society who due to historical and other reasons are placed in a disadvantageous position. Ability of an actor to influence collective dicisions by paying bribes to a public official clearly works to the disadvantage of those who are worse off or unable to pay such bribes. It is like accepting inequality to the advantage of the affluent in society which is the negation of equal protection of laws. But another dimension of such a transaction can be justice and fairness standards. In a Rawlsian[41] setup social and economic inequalities should be to the greatest advantage of the least well off members of the society (difference principle). According to Rawls the fact of a person's birth in a particular race, relegion, gender, household (affluent or poor) etc. is a morally arbitrary factor i.e. one cannot control the fact of his being born to a particular race, relegion, gender etc., therefore, in a fair society no one shall be dicriminiated on the basis of such morally arbitrary factors. Rawls argues that naturals endowments of a person are undeserved. The fact of somebody's being born as beautiful or intelligent is a natural lottery and a citizen does not deserve a bigger share of the social product just because of the fact that he/she was in luck to be born with gifts which a society rewards. But this dose not mean that everyone in a society shall have the same rewards, and the fact of citizens being born with different talents and abilities can be used to the advantage of everyone. In a setup where diffrence principle applies the

[41] J. Rawls, *A Theory of Justice*, Cambridge, MA, Harvard University Press, 1971

distribution of natural endowments is considered as an asset that makes everyone better off. Those born with talents and abilities are allowed to use them to their advantage as long as in doing so they also contribute for the benefit of those who are not born with such talents. "In justice as fairness", Rawls points out, "men agree to share one another's fate."[42] Thus, when those with money or political power influence collective decisions to their advantage or to the disadvantage of the worse off in a society, they distort the fairness standards of that society and make it unjust. Inability to pay bribe is a morally arbitrary factor and when citizens are discriminated in exercising their right to make collective decisions on that basis, then, the whole transaction becomes unfair. Some may argue that almost all regimes penalize corruption therefore they cannot be said, atleast in principle, to promote inequality or injustice, which would be a fair comment to make, but, the endeavour here is to paint a more clear or informed picture of corruption for popular understanding which doesn't treat corruption as merely a crime where money or other gains are involved but also a transaction which when actualized also impinges upon social values, rights, constitutional principles, democratic processes, delivery of public services, social trust etc. and such an encroachment on constitutional values and principles is itself a form of corruption which has gradually eroded from the definitional aspect of the corruption.

Let us move further to assay other reasons which make the task of defining corruption precarious. Another and sufficiently talked about wherefore or cause is related to cultural specific imperatives, in other words there can be a strife between the social customs or usages on one hand and the law relating to corruption on the other. As Pardo has argued "…in any given society corruption is a changing phenomena, some of its aspects and received morality are culture specific and its conceptualization is affected by personal interest, cultural values and socio-economic status. In this sense corruption needs to be treated contextually and diachronically."[43] It has also been argued that in third world countries an individual and his personal life are judged by indigenous cultural standards, whereas the appraisal of his official conduct is made on Western standards. Thus, there is a discord between these Western and indigenous

[42] Ibid. p. 102

[43] I. Pardo (ed.), *Between Morality and the Law: Corruption, Anthropology and Comparative Society*, Aldershot, Ashgate, 2004

specifications. "For example, in the Hindu culture while visiting an elder or superior, one is expected to carry a gift (however small or inconsequential it is) as a mark of respect and not as an instrument of corruption." [44] Due to this it becomes problematical to demarcate the former from the latter, and as a follow up of that, scholars do find it to be an arduous undertaking to come up with a universally acceptable description of corruption. As Klitgaard has observed that the line dividing recognition of mutual obligation of support and doing favours in exchange for rewards can be fine one.[45] It is in view of this that some authors have conjectured or even advocated for a definition of corruption which subsumes a wider morality and allow for such transactions. But can widening the morality be a reasonable and sustainable solution? Well it may certainly seem to be true in some conditions but what about the other situations? Moreover even if we try to be sensitive to specific contexts we might notice a lack of homogeneity in practice within that particular context or culture. Thus, such widening of morality may leave enough room for the abuse of process of law. Alschuler[46] has shown that making broad definitions of bribery will only worsen the situation. He states that "when the goal is to root out Aristotelian corruption, the law of bribery, extortion, and fraud looks profoundly under-inclusive. The push of prosecutors, judges, journalists, and reformers to expand this law is easily understood. The thesis of this article, however, is that the push usually should be resisted."[47] He concludes by saying that "broad definitions of bribery not only sweep into their net common and widely accepted behavior. They also invite unjustified inferences and empower prosecutors to pick their targets. Most people, however, took only one horn of the corruption dilemma."[48]

The criticism against any universalistic idea of corruption seems to be that western norms of corruption do not seem to apply to the other regions of the world. This can be disputed on many levels, first being the empirical. Widmalm in his study concludes that, "the more general claim that corruption is more prevalent where it is culturally accepted finds no support here. In general, corruption is not accepted by most people

[44] Ibid. p. 44
[45] R. Klitgaard, 'Gifts and Bribes', in Zeckhauser, R. (ed.), *Strategy and Choice*, Cambridge,MA, MIT Press, 1991
[46] A. W. Alschuler, 'Criminal Corruption: Why Broad Definitions of Bribery Make Things Worse' (University of Chicago Public Law & Legal Theory Working Paper No. 502, 2015).

[47] Ibid. p.3
[48] Ibid. p. 29

in the survey; most respondents favor a rule-governed bureaucracy within a democratic setting, regardless of whether the society is plagued by corruption or not."[49] Rothstein and Torsello[50] in their paper using an array of surveys, empirical data and anthropological studies have argued that "empirical research in this area is not entirely unambiguous, most of it points to the quite surprising result that people in very different cultures seem to have a very similar notion of what should count as corruption."[51] They point out that "the conclusion from these results are that 'ordinary people' in both high and low corrupt countries have the same perceptions and also experience the same level of corruption as the international country experts. In sum, there are both empirical and normative arguments speaking in favor of a universal definition of corruption."[52] They argue that all cultures abhor corruption and the real confusion in the discussion on cultural relativism relating to what should count as corruption emanates from the differing perceptions of 'public goods' among different cultures. "The very nature of a good being 'public' is that it is to be managed and distributed according to a principle that is very different from that of private goods. When this principle for the management and distribution of public goods is broken by those entrusted with the responsibility for handling the public goods, the ones that are victimized see this as corruption. This is why corruption is a concept that is related to the political and not the private sphere. Much of the confusion about cultural relativism in the discussion about what should count as corruption stems from the issue that what should count as 'public goods' differ between different societies and cultures. For example, in an absolutist feudal country where the understanding may be that the central state apparatus is the private property of the lord/king, this state is not seen as a public good. In many indigenous societies with pre-state political systems, local communities have usually produced some forms of public goods, for example for taking care of what Elinor Ostrom (1990) defined as 'common pool resources' which are natural resources that are used by members of the group but that risks depletion if overused. Such resources constantly faced a 'tragedy of the commons' problem and is thus in need of public goods in the form of effective regulations to

[49] S. Widmalm, 'Explaining Corruption at the Village Level and Individual Level in India', *Asian Survey*, vol. XLV, no. 5, 2005, p. 774
[50] B. Rothstein, and D. Torsello, 'Is Corruption Understood Differently in Different Cultures?', Working Paper No. 2013:5, Quality of Government Institute, University of Gonthenburg
[51] Ibid. p. 3
[52] Ibid. p. 6

prevent overuse leading to depletion. Our argument departs from the idea that it is difficult to envision a society without some public goods. The point is that when these public goods are handled or converted into private goods this is universally understood as corruption independently of the culture. A second conclusion is thus that we should not expect, for instance indigenous people to have a moral or ethical understanding corrupt practice that differs from for example what is the dominant view in western organizations like Transparency International and the World Bank or as it is stated in the UN convention against corruption. Instead, what may differ is what is seen as falling under the public goods category."[53] Thus, it may not be the moral understanding of corruption that differs in different societies and cultures; rather the fact that what may be seen as public and private goods varies widely among different cultures. Thus, when goods that are perceived as 'public goods' are used for private use then such phenomena is condemned uniformly among different cultures as morally wrong, but what is itself perceived as a 'public good' differs widely among cultures.

Second argument against cultural relativism in this context relate to our earlier discussion that revolved around the implications and repercussions of corruption in a broader sense. When looked at from the lens of potential effects of corruption on concerns of justice, equality, fairness, collective decision-making, debate, representation etc. it becomes a phenomenon that has far reaching consequences on an array of rights, some of which qualify to be human rights viz. right to equality, freedom from discrimination, right to equality before law, right to participate in government and free elections etc. According to Aristotelian view these aforesaid phenomenon are themselves a form of corruption. Therefore, the seriousness of a phenomenon, which infringes upon human rights which themselves are considered universal and not relative, should not be diluted in the name of cultural relativism. One can argue that corruption is something that is seen differently in different cultures and societies, but there cannot be two views about the fact that the rights that are infringed in the process are universal in nature and are considered as fundamental to every individual crosswise cultures and societies.

[53] Ibid. pp. 7-8

In relation to the link between corruption and human rights Bacio-Terracino argues that "evidence has shown that all human rights can be restricted by corrupt practices, be they economic, social, cultural, civil, or political rights. However, the impact of corruption on human rights will vary in each case. Often corruption will lead to human rights violations but will not itself violate a human right. Corruption in these cases is a factor fueling human rights violations, but it can only be distantly linked to the infringement upon human rights. However, corruption is directly connected to a violation of human rights when the corrupt act is deliberately used as a means to violate the right. For example, a bribe offered to a judge per se affects the independence and impartiality of that judge, and hence the right to a fair trial is violated. In other cases, corruption directly violates a human right by preventing individuals from having access to the right. Conditioning of access to human rights on corrupt payments produces the violation. For example, when an individual must bribe a doctor in order to obtain medical treatment, or bribe a teacher in order to be allowed to attend a class, his right of access to health and education has been infringed by corruption. In other situations, corruption will be considered to violate human rights in an indirect way. When a corrupt practice constitutes an essential contributing factor in a chain of events that eventually leads to a violation of a right, corruption can still be blamed for violating human rights. In this case the right is violated by an act that derives from a corrupt act. But the act of corruption constitutes a necessary condition for the violation. For example, if a corrupt minister allows the illicit dumping of toxic waste in a place close to a residential area, the rights to life and health of the citizens in the area are violated. Yet the rights are violated by the act of allowing the illicit dumping of toxic wastes and not by the bribe received by the corrupt minister. Nevertheless, the act of corruption was a necessary condition for the violation."[54] Similarly, Ngugi also argues that "one can say: corruption is inversely related to human rights. The higher levels of corruption, the lesser degree of human rights protection one is likely to find in a given country. There has been a realization of this, if not an explicit link, for some time … Corruption reduces the capacity of the government to respect, protect, and fulfill its human rights obligations. For example, a government with a corrupt court system cannot ensure access to justice to all. A

[54] J. Bacio-Terracino, 'Linking Corruption and Human Rights', *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 104, March 24-27, 2010, p. 243

corrupt police force cannot ensure security of person and so forth."[55] Also, "corruption can be a direct human rights violation, e.g., if a corrupt government official takes a bribe to decide a case against an individual or a corrupt police officer takes a bribe not to investigate a case. Here corruption directly violates an individual's human rights." [56] One may question the relevance of link between corruption and human right, in answer to which Bacio-Terracino points out that "if corruption is shown to violate human rights, this will influence public attitudes. When people become more aware of the damage that corruption does to public and individual interests, and the harm that even minor corruption can cause, they are more likely to support campaigns and programs to prevent it. Identifying the specific links between corruption and human rights may persuade key actors—public officials, parliamentarians, judges, prosecutors, lawyers, business people, bankers, accountants, the media, and the public in general— to take a stronger stand against corruption."[57] Many now argue for the conceptualization of corruption as a human rights violation. Pearson, for instance disserts that, "it is proposed here that, by examining the human rights cost of corruption, added weight is given to anti-corruption efforts, as well as to human rights protection" [58]; Similarly, Kumar mentions that, "human rights approaches help in exposing violations, and empower victims ... the moment corruption is recognized as a human rights violation, it creates a type of social, political and moral response that is not generated by crime."[59] Bringing human rights into the discourse of corruption may offer benefits of two kinds; firstly, it may make the picture of corruption and associated wrongs clearer in the minds of the public at large, secondly, as the understanding of corruption and its consequential infringements becomes better it may enhance the seriousness with which the wrongs of this category are perceived.

In this discussion I have tried to paint a picture of corruption, though far from being complete, which tries not only to trace its historical evolution but also the potential

[55] J. M. Ngugi, 'Making the Link Between Corruption and Human Rights: Promises and Perils', *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 104, March 24-27, 2010, p. 246
[56] Ibid.
[57] Ibid. p. 245
[58] Z. Pearson, 'An International Human Rights Approach to Corruption' in Lamour, P. and Wolanin, N. (eds.), *Corruption and Anti-Corruption*, Canberra, Asia Pacific Press, 2001, p. 46
[59] C. R. Kumar, 'Corruption and Human Rights in India: Comparative Perspectives on Transparency and Good Governance', Oxford, OUP 2011, p. 43

infringements and associated wrongs which are often hidden from the superficial common understanding of it. It is quite possible that we may never reach consensus on a universally acceptable definition of corruption, or the current definitions may transpire as useful working definitions, but my emphasis is on the fact irrespective whatever definition we may chose for the term corruption, any invocation of the subject in public understanding shall not miss out the parts which we often overlook in our discussions. Thus, common understanding of the subject must admit corruption as not only a matter of dilution of boundaries of public/private but also as a condition of body politic; it shall also be seen as a phenomenon which undermines the ideals of democracy, subverts constitutional machinery, promotes inequality, creates inefficiencies in delivery of public services, limits the scope of collective decision making, erodes social trust, and violates human rights. And it must not be forgotten that ancient view of the corruption included this undermining of constitutional ideals and values as a form of corruption. Rather than stressing on universality of definition of corruption there should be an emphasis on homogenising the idea of what sould be considered as public goods and what as private goods crosswise cultures and societies. There may be differences about the understanding of corruption in different societies but the values and ideals which it infringes are universal and the very act of impinging upon such aforesaid ideals is itself corruption according to Aristotle. Also, the inclusion of the 'condition of the body politic' discourse can revive the link between 'self-regarding prudential integrity' and 'social other-regarding morality', as well as between 'moral social inter-relation with each other' and 'moral intra-relation to one's own individual characters'. Such more informed and inclusive picture of corruption can be appreciated vis-à-vis the inner conflict caused by emotional and cognitive dissonance of corrupt actors. Thus, collectively all the aforesaid pieces when put together may reflect a better informed picture of corruption in the common understanding of society at large, which may enhance the seriousness with which corruption is perceived in society, and this becomes important as we shall see later in discussion on behavioural part that how public perceptions influence the choices and decisions which human actors make.

CHAPTER 3: LEGAL ANALYSIS OF CORRUPTION

> [The King] shall protect trade routes from harassment by Courtiers state officials, thieves and frontier guards....[and] frontier officers shall make good what is lost....just as it is impossible not to taste honey or poison that one may find at the tip of one's tongue, so it is impossible for one dealing with government funds not to taste, at least a little bit, of the King's wealth.
>
> - Kautilya, Arthashastra (Circa 300 B.C. – 150 A.D.)

The above quote is evident of the ancient nature of the problem of corruption in India. The vicissitudes of time and change of rulers and governing devices were unable to clobber or defeat decisively the predicament of corruption that is considered as an idiosyncrasy or a quirk of a human nature. This section intends to analyze the legal dimension of the corruption. Since it is not possible to make a legal study of laws relating to corruption across the world I thereby limit this study to the laws against corruption in India and that too to a particular legislation dealing with corruption. This section will analyze the development and evolution of laws relating to corruption in India since independence and how the meanings associated with corruption have been modified, altered or expanded by successive amendments or case laws and other developments.

The legislative efforts to discomfit corruption in modern times dates back to British period where The Indian Penal Code, 1860, provided for a chapter on 'Offences by Public Servants' under which Sections 161 to 165 postulated the legislative schema to prosecute corrupt public servants. The Indian Government also issued an ordinance for extending the powers granted to the wartime Special Staff in 1942 to accoutre them to handle large-scale corruption, which transpired due to deficiencies created during Second World War. In 1947 the Prevention of Corruption Act was enacted which was the first endeavour to legislate a special law to deal with corruption. This Act made four changes to the existing legal machinery to oversee corrupt transactions in public sphere. Firstly, it provided for shifting of 'burden of proof'[60] to the accused in some cases, where it was proved by the prosecution that public servant had

[60] The obligation to offer evidence that the court or jury could reasonably believe, in support of a contention, failing which the case will be lost.

accepted any gratification. In such a situation the court will presume that such gratification was accepted by the public servant as a motive or reward under Section 161 of the IPC. Secondly, it introduced a new offence named as 'Criminal misconduct in discharge of official duty'. Thirdly, to ensure that honest public officials are not harassed by resort to vexatious or frivolous proceedings by unscrupulous elements the Act provided that no court shall take cognizance of offences mentioned in Sections 161, 164 and 165 until and unless a sanction to do so is provided by an authority competent to remove the accused public servant. Fourthly, it provided immunity to those bribe givers who were willing to depose against the corrupt public servant. It was argued that not providing such a protection to bribe givers would result in making all complainants liable for punishment that will discourage them to make complaints against corrupt public officials.[61] In the year 1964 some of the recommendations of the Committee on Prevention of Corruption (The Santhanam Committee) were implemented. The Amendments in 1964 in pursuance of the recommendations of the committee expanded the definition of 'public servant' in IPC. Also, the amended Section 5 (A) provided State Governments with powers to authorize the investigation of cases to officers of the rank of Inspectors of Police, which ere the amendment was possible done only with the approval of the Magistrate. In the same year in consequence of committee's recommendations the Central Vigilance Commission (discussed later) was also established by the Government of India by a Resolution dated 11.02.1964. The next major change came when The Prevention of corruption Act, 1988 was enacted. The Act declares that it is an Act to consolidate and amend the law relating to the prevention of corruption and for matters connected therewith. It expressly declares that it extends to whole of India (except State of Jammu and Kashmir) and it applies to all citizens of India outside India. The introduction of the Act states that "inspite of the 1947 Act being amended on the recommendations of the Santhanam Committee it was found to be inadequate to deal with the offence of corruption effectively. To make the anti-corruption laws more effective by widening their coverage and by strengthening the provisions the Prevenention of Corruption Bill was introduced in the Parliament."[62] The statement of objects and reasons mentions that the legislation intends to incorporate the provisions of 1964

[61] Second Administrative Reforms Commission, *4th Report: Ethics in Governance*, New Delhi, 2nd ARC, Government of India, 2007, p. 58

[62] The Prevention of Corruption Act, 1988

amendments based on recommendation of Santhanam Committee, provisions of Chapter XI of the IPC and the provisions in the Criminal Law Amendment Ordinance, 1944.

The definition of 'public servant' has undergone addendums and dilations over the period of time. On the recommendations of The Santhanam Committee the definition of 'public servant' was expanded by Amendments in 1964. It was again expanded in 1988 when the present Act was enacted and the definition provided under this Act is broader than what existed in the IPC. The definition is given in section 2 (c) of the Act, it says:

"*S. 2 (c) 'public servant' means, -*

(i) any person in the service or pay of the Government or remunerated by the Government by fees or commission for the performance of any public duty;

(ii) any person in the service or pay of a local authority;

(iii) any person in the service or pay of a corporation established by or under a Central, Provincial or State Act, or an authority or a body owned or controlled or aided by the Government or a Government owned company as defined in section 617 of the Companies Act, 1956 (1 of 1956);

(iv) any Judge, including any person empowered by law to discharge, whether by himself or as a member of any body of persons, any adjudicatory functions;

(v)any person authorised by court by a court of justice to perform any duty, in connection with the administration of justice, including a liquidator, receiver or commissioner appointed by such court;

(vi) any arbitrator or other person to whom any cause or matter has been referred for decision or report by a court of justice or by a competent public authority;

(vii) any person who holds an office by virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election;

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

(ix) any person who is president, secretary or other office-bearer of a registered co-operative society engaged in agriculture, industry, trade or banking, receiving or having received any financial aid from the Central Government or from any corporation established by or under a Central, Provincial or State Act, or any

authority or body owned or controlled or aided by the Government or a Government company as defined in section 617of the Companies Act, 1956 (1 of 1956);

(x) any person who is a chairman, member or employee of any Service Commission or Board, by whatever name called, or a member of any selection committee appointed by such Commission or Board for the conduct of any examination or making any selection on behalf of such Commission or Board;

(xi) any person who is a Vice-Chancellor or member of any governing body, professor, reader, lecturer or any other teacher or employee, by whatever designation called, of any University and any person whose services have been availed of by a University or any other public authority in connection with holding or conducting examinations;

(xii) any person who is an office-bearer or an employee of an educational, scientific, social, cultural or other institution, in whatever manner established, receiving or having received any financial assistance from the Central Government or any State Government, or local or other public authority.

Explanation 1. – Persons falling under any of the above sub-clauses are public servants, whether appointed by the Government or not.

Explanation 2. – Wherever the words "public servant" occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation."[63]

The definition not only defines the term public servant but also illustrates the categories of the functionaries of different organs of the Government who fall within the aforesaid definition. For example, S. 2 (c) (ix) includes 'a person who is president, secretary or other office-bearer of a registered co-operative society' within the meaning of term public servant. Earlier there was a controversy regarding the issue whether the term 'corporation' would bring within its sweep a co-operative society? The question was answered in negative in *S.S. Dhanoa v. Municipal Corporation, Delhi and Ors*.[64], it was held that:

"…the Co-operative Store Limited is not a corporation established by a Central or State Act. The crux of the matter is whether the word "under" occurring in Clause 12th of Section 21 of the Indian Penal Code makes a difference. Does the mere act of

[63] *PCA*, *1988*, S. 2

[64] *S.S. Dhanoa v. Municipal Corporation, Delhi and* Others, 1981 (3) SCC 431

incorporation of a body or society under a Central or a State Act make it a corporation within the meaning of Clause 12th of Section 21. In our opinion, the expression "corporation" must, in the context, mean a corporation created by the Legislature and not a body or society brought into existence by an act of a group of individuals. A co-operative society is therefore, not a corporation established by or under an Act of the Central or State Legislature." Thus, the effect of the above judgment was to exclude officials working in co-operative societies from the definition of 'public servant' and it was because of this anamoly that the words co-operative society were expressly included in the 1988 Act, though the scope of the operation was restricted only to president, secretary and other office bearers. But it applies to only those registered co-operative societies 'engaged in agriculture, industry, trade or banking, receiving or having received any financial aid from the Central Government or from any corporation established by or under a Central, Provincial or State Act, or any authority or body owned or controlled or aided by the Government or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956)'. The Act tries to broaden the definition of 'public servant' to include a range of actors, like persons serving the Government, local authorities, government corporations or companies, Judiciary, Arbitration Tribunal, Election Commission, Co-operative societies, Commissions or Boards, Universities etc. Two things are worth noticing, firstly, Explanation 1 appended to the definition of public servant provides that *persons falling under any of the above sub-clauses are public servants, whether appointed by the Government or not*. The idea behind this was to make all those working in a Governmental Organization liable for graft who by virtue of their not being appointed by the Government claim the benefit or immunity of not being a public servant. Secondly, Explanation 2 to the said provision says that *wherever the words 'public servant' occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation*. This clearly takes note of the situation where holders of public offices by virtue of some legal defect in their right to hold such office may escape the liability for their corrupt transactions. To prevent such an eventuality the explanation clearly equates the actors in actual possession of the situation of a public servant as public servants even though there may be some defect in their right to hold such office. Thus, both the explanations have the effect of further enlarging the scope of the definition to cover those cases which escape the liability merely due to

technicalities. The scope of the term 'public servant' is also broadened by clause (viii) of the aforementioned section which deems any person who holds an office by virute of which he is authorised or required to perform any public duty to be a 'public servant'.

Clause (iv) which is identical in language to the Clause *third* of Section 21 of the IPC declares that any Judge, including any person empowered by law to discharge, whether by himself or as a member of any body of persons, any adjudicatory functions to be a 'public servant'. Some doubts were expressed about the fact whether such a definition will also include members of the higher judiciary. In *K. Veeraswami v. Union of India*[65] one of the questions before the apex court was whether a Judge of Supreme Court or a Judge of High Court is a public servant within the meaning of Section 2 of the Prevention of Corruption Act, 1947? The contention of the appellant was that the Judges of the High Courts and the Supreme Court are outside the purview of the aforesaid Act because of it being a special enactment applicable to public servants in whose case prosecution can start only after saction granted under Section 6 of the said Act whereas such a procedure was alien to the scheme enumerated for the constitutional functionaries like Judges of the High Courts and Supreme Court. What was being argued was that the Judges of Supreme Courts as well as Judges of the High Court are constitutional functionaries appointed under Article 124 and under Article 217 of the Constitution respectively. Clause (2) of the Article 124 states that every Judge of the Supreme Court shall be appointed by the President by a warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years. It also provides that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted. Article 217 provides that every Judge of a High Court shall be appointed by the President by a warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court. Clause (4) of Article 124 further enumerates that a Judge of the Supreme Court shall not be removed from his office except by an order of the

[65] *K. Veeraswami v. Union of India*, (1991) 3 SCC 655

President passed after an adress by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity. Clause (5) states that Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a Judge under clause (4). Article 218 states that provisions of clauses (4) and (5) of Article 124 shall apply in relation to a High Court. In other words without the constituional requirement of an address by the Houses of Parliament or the State Legislature, the President was not empowered to remove the Judges of a Supreme Court or High Court. Therefore the position of the Judges of High Court and Supreme Court was different from other public servants. Negativing the contention of the appellant the Supreme Court held that the Judges of the High Court and Supreme Court were public servants within the meaning of section 2 of the Prevention of Corruption Act. Ray, J. observed: "a Judge of the High Court or of the Supreme Court comes within the definition of public servant and he is liable to be prosecuted under the provisions of Prevention of Corruption Act. It is farthest from ur mind that a Judge of the Supreme court or that of the High Court will be immune from prosecution for criminal offences committed during the tenure of his office under the provisions of the Prevention of Corruption Act."[66] Further Shetty and Venkatachaliah, JJ., pointed out that "the standards of judicial behaviour, both on and off the bench are normally extremely high. For a Judge to deviate from such standards of honesty and impartiality is to betray the trust reposed in him. No excuse or no legal relativity can condone such betrayal. From the standpoint of justice the size of bribe or scope of corruption cannot be scale for measuring a Judge's dishonour. A single dishonest Judge not only dishonours himself and disgraces his office but jeopardizes the integrity of the entire judicial system."[67] However Verma, J. in his dissent observed that: "Our Constitution provides for separation of powers of the three wings of the State with judicial review as one of the essential tenets of the basic structure of the Constitution. It is thus the judiciary which is entrusted with the task of interpretation of the Constitution and ensuring that the other two wings do not overstep the limit delineated for them by the Constitution. With this duty entrusted to the higher

[66] Ibid. para 9, p. 681
[67] Ibid. para 79, p. 717

judiciary, it was natural to expect that the higher judiciary would not require any other agency to keep a watch over it and the internal discipline flowing from the moral sanction of the community itself will be sufficient to keep it on the right track without the requirement of any external check which may have the tendency to interfere with the independence of the judiciary, a necessary concomitant of the proper exercise of its constitutional obligation. It is for this reason that the higher judiciary was treated differently in the Constitution indicating the great care and attention bestowed in prescribing the machinery for making the appointments. It was expected that any deviation from the path of rectitude at that level would be a rare phenomenon and for the exceptional situation the provision for removal in accordance with Clause (4) of Article 124 was made, the difficulty in adopting that course being itself indicative of the rarity with which it was expected to be invoked. It appears that for a rare aberrant at that level, unless he resigned when faced with such a situation, removal from office in accordance with Article 124(4) was envisaged as the only legal sanction. If this was the expectation of the framers of the Constitution and their vision of the moral fibre in the higher echelons of the judiciary in free India, there is nothing surprising in the omission to bring them within the purview of the Prevention of Corruption Act, 1947, or absence of a similar legislation for them alone. Obviously, this position continued even during the deliberations of the Santhanam Committee which clearly mentioned in its Report submitted in 1964 that it has considered the judiciary outside the ambit of its deliberations. Clearly, it was expected that the higher judiciary whose word would be final in the interpretation of all laws including the Constitution, will be comprised of men leading in the spirit of self-sacrifice concerned more with their obligations than rights, so that there would be no occasion for anyone else to sit in judgment over them. If it is considered that the situation has altered requiring scrutiny of the conduct of even Judges at the highest level, and that is a matter for the Parliament to decide, then the remedy lies in enacting suitable legislation for that purpose providing for safeguards to ensure independence of judiciary since the existing law does not provide for that situation. Any attempt to bring the Judges of the High Courts and the Supreme Court within the purview of the Prevention of Corruption Act by a seemingly constructional exercise of the enactment, appears to me, in all humility, an exercise to fit a square peg in a round hole when the two were

never intended to match."[68] However, despite this elaborate dissent the majority held and it is now settled that the members of the Higher Judiciary, viz. the Judges of the High Court and the Supreme Court, are considered as public servants. This opened up the scope of the aforesaid Act by bringing within its realm the members of the higher judiciary as public servants whose actions were now open to prosecution under the said Act.

Another question, which has been taken before the court more than once, is whether a Member of Parliament or Legislative Assembly of a State is a public servant for the purposes of the Act? In *A. R. Antulay v. R. S. Nayak*[69] before court was called upon to take cognizance of the offences alleged to have been committed by the accused he resigned from the post of the Chief Minister and since he ceased to hold that office therefore no sanction was required to prosecute him. But since he was still holding the post of M.L.A. the question arose whether the office he held was an office of a public servant and if so then a sanction to prosecute him will be required. There was no dispute reagrding the fact that the status of Chief Minister was that of a public servant as it was held in *K. M. Karunanidhi v. Union of India*[70]:

"1. That a Minister is appointed or dismissed by the Governor and is, therefore, subordinate to him whatever be the nature and status of his constitutional functions.
2. That a Chief Minister or a Minister gets salary for the public work done or the public duty performed by him.
3. That the said salary is paid to the Chief Minister or the Minister from the Government funds."[71]

Looking into the history and evolution of Section 21 of IPC the Supreme Court observed that, "it is clear that till 1964 MLA could not have been conceivably comprehended in expression 'public servant' and the law did not undergo any change since the amendment. On the contrary, the recommendation of the Santhanam Committee which recommended inclusion of Ministers and Parliamentary Secretaries but not of M.L.A. separately recommended a code of conduct for M.L.A for saving

[68] Ibid. para 129, pp. 754-55
[69] *A. R. Antulay v. R. S. Nayak*, (1984) 2 SCC 183
[70] *K. M. Karunanidhi v. Union of India*, (1979) 3 SCC 431
[71] Ibid. para 57, p. 457

them from the spectre of corruption would clearly and unmistakably show that till 1964 M.L.A. was not comprehended in expression 'public servant' in Sec. 21 IPC and the amendment by Amending Act 40 of 1964 did not bring about the slightest change in this behalf concerning the position of M.L.A. Therefore, apart from anything else, on historical evolution of Sec. 21 adopted as an external aid to construction, one can confidently say that M.L.A. was not and is not a 'public servant' within the meaning of the expression in any of the clauses of Sec. 21 IPC."[72] The court further stated that a person would be considered to be a public servant under clause (12)(a) of Section 21[73] of IPC if he fulfills anyone of these conditions viz. if (i) he is in the service of the Government; or (ii) he is in the pay of the Government; or (iii) he is remunerated by fees or commission for the performance of any public duty by the Government. In para 45 the Court points out that "on behalf of the complainant-appellant, it was contended that in order to make a person a public servant on the ground that he is in the pay of the Government, there must exist a master-servant relationship or a command-obedience relationship, and if these elements are absent even if a person is in the pay of the Government, he would not be a public servant. On behalf of the respondent, it was countered asserting that the concept of master servant relationship or command-obedience relationship is comprehended in the first part of clause (12)(a) which provides that every person in the service of the Government would be a public servant. It was urged that if even for being comprehended in the second part of the clause namely, a person would be a public servant if he is in the pay of the Government, their ought to be a master-servant or command-obedience relationship, the Legislature would be guilty of tautology and the disjunctive 'or' would lose all significance. The use of the expression 'or' in the context in which it is found in clause (12)(a) does appear to be a disjunctive. Read in this manner, there are three independent categories comprehended in clause (12)(a) and if a person falls in any one of them, he would be a public servant. The three categories are as held by the learned special Judge; (i) a person in the service of the Government; (ii) a person in the pay of the Government; and (iii) a person remunerated by fees or commission for the performance of any public duty the Government. One can be in the service of the Government and may be paid for the same. One can be in the pay of the Government without being in the service of the Government in the sense of manifesting master-

[72] *A. R. Antulay v. R. S. Nayak (1984)*, para 42, p. 223
[73] which is the same as clause (c) (i) of Section 2 of Prevention of Corruption Act, 1988

servant or command-obedience relationship. The use of the expression 'or' does appear to us to be a disjunctive as contended on behalf of the respondent. Depending upon the context, 'or' may be read 'and' but the court would not do it unless it is so obliged because 'or' does not generally mean 'and' and 'and' does not generally mean 'or'."[74] In regard to this the court further observed: "There thus is a broad division of functions such as executive, legislative and judicial in our Constitution. The Legislature lays down the broad policy and has the power of purse. The executive executes the policy and spends from the Consolidated Fund of the State what Legislature has sanctioned. The Legislative Assembly enacted the Act enabling to pay to its members salary and allowances. And the members vote the grant and pay themselves. In this background even if there is an officer to disburse this payment or that a pay bill has to be drawn up are not such factors being decisive of the matter. That is merely a mode of payment, but the M.L.A.s by a vote retained the fund earmarked for purposes of disbursal for pay and allowances payable to them under the relevant statute. Therefore, even though M.L.A. receives pay and allowances, he is not in the pay of the State Government because Legislature of a State cannot be comprehended in the expression 'State Government'. This becomes further clear from the provision contained in Art. 12 of the Constitution which provides that 'for purposes of Part III, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India'. The expression 'Government and Legislature', two separate entities, are sought to be included in the expression 'State' which would mean that otherwise they are distinct and separate entities. This conclusion is further reinforced by the fact that the executive sets up its own secretariat, while Art. 187 provides for a secretarial staff of the Legislature under the control of the Speaker, whose terms and conditions of the service will be determined by the Legislature and not by the executive. When all these aspects are pieced together, the expression 'Government' in Sec. 21 (12)(a) clearly denotes the executive and not the Legislature. M.L.A. is certainly not in the pay of the executive. Therefore, the conclusion is inescapable that even though M.L.A. receives pay and allowances, he cannot be said to be in the pay of the Government i.e. the executive. This conclusion would govern

[74] *A. R. Antulay v. R. S. Nayak (1984)*, para 45, p. 224

also the third part of clause (12)(a) i.e. 'remunerated by fees for performance of any public duty by the Government'. In other words, M.L.A. is not remunerated by fees paid by the Government i.e. the executive."[75] Therefore it was held that a Member of Legislative Assembly is not a public servant. But the court thought it unnecessary to examine the question whether M.L.A. is performing a public duty and observed: "It is not necessary to examine this aspect because it would be rather difficult to accept an unduly wide submission that M.L.A. is not performing any public duty. However it is unquestionable that he is not performing any public duty either directed by the Government or for the Government. He no doubt performs public duties cast on him by the Constitution and his electorate. He thus discharges constitutional functions for which he is remunerated by fees under the Constitution and not by the Executive."[76] Four years after this decision the Prevention of Corruption Act, 1988, was enacted which introduced a concept of 'public duty' in the scheme of anti-corruption legislation. Sub-clause (viii) of clause (c) of Section 2 of the said Act deems 'any person who holds an office by virtue of which he is authorized or required to perform any public duty' as a public servant and clause (b) of Section 2 defines 'public duty' as a 'duty in discharge of which the State, the public or the community at large has an interest'. In *Antulay* the court did not think it to be necessary to examine whether M.L.A. was performing a public duty or not but it did incidentally mention that it would have been worth their while if he was performing any public duty directed to him by the Government or for the Government. However, the court agreed that a M.L.A. performs public duties cast on him the Constitution and his electorate. The concept of public duty introduced by Section 2 (b) of the 1988 Act clearly seems wide enough to include duties entrusted by Constitution and the electorate as public duties. In *P. V. Narasimha Rao v. State (CBI/SPE)*[77] one of the questions before the Supreme Court was whether a Member of Parliament is a public servant? The court held: "We think that the view of the Orissa High Court that a member of a Legislative Assembly is a public servant is correct. Judged by the test enunciated by Lord Atkin in Mc. Millan v. Gust and adopted by Sikri, J. in *Kanta Khaturia case*, the position of a Member of Parliament, or of Legislative Assembly, is subsisting, permanent and substantive; it has an independent existence independent of the person who fills it and

[75] Ibid. para 56-57, pp. 233-34
[76] Ibid. para 59, p. 234
[77] *P. V. Narasimha Rao v. State (CBI/SPE)*, (1998) 4 SCC 626

it is filled in succession by successive holders. The seat of each constituency is permanent and substantive. It is filled, ordinarily for the duration of the legislative term, by the successful candidate in the election for the constituency. When the legislative term is over, the seat is filled by the successful candidate in the next election. *There is, therefore, no doubt in our minds that a Member of Parliament, or of a Legislative Assembly, holds an office and he is required and authorized thereby to carry out a public duty. In a word, a Member of Parliament or of a Legislative Assembly is a public servant for the purposes of the said Act*". With regard to 'public duty' the court observed: "Having regard to the object of the 1988 Act as indicated in the Statement of Objects and Reasons, namely, to widen the scope of the definition of the expression 'public servant', which is sought to be achieved by introducing the definition of 'public duty' in Section 2 (b) and the definition of 'public servant' in Section 2 (c) which enlarges the scope of the existing definition of public servant contained in Section 21 IPC, we do not find any justification for restricting the scope of the wide words used in sub-clause (viii) of Section 2 (c) in the 1988 Act on the basis of the statement of the Minister so as to exclude Members of Parliament and Members of the State Legislatures. In our opinion the words used in sub-clause (viii) of Section 2 (c) are clear and unambigous and they cannot be cut down on the basis of the statement made by the Minister while piloting the Bill in Parliament…Having considered the submissions of the learned counsel on the meaning of the expression 'public servant' contained in Section 2 (c) of the 1988 Act, we are of the view that a Member of Parliament is a public servant for the purpose of 1988 Act."[78] Therefore, the legal position is quite settled now that a Member of Parliament or of a Legislative Assembly is a public servant for the purposes of the Prevention of Corruption Act, 1988. In a parliamentary democracy it would have been an anomaly to have a legal scheme where legislators can escape the libility from anti-corruption framework due to mere technicalities. Also, the reasoning forwarded by the court in *Antulay* that MLAs are not in the pay of the government was far from conviencing as any reliance upon Article 12 of the Constitution to argue that Government and Legislature are separate entities and the former primarily refers to executive overlooks the fact that Legislators in their capacity as Ministers as well as MLAs carry out executive functions.

[78] Ibid. paras 82 and 85, pp. 692-93

Moving on, another interesting feature of the Act is the explanation attached to the definition of 'public duty' provided in S. 2 (b) which is as follows:

"Explanation. – In this clause "State" includes a corporation established by or under a Central, Provincial or State Act, or an authority or a body owned or controlled or aided by the Government or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956);"[79]

The intention behind appending the above explanation is to encompass within the definition of 'State' various PSUs or corporations receiving the aid of the Government or which are owned or controlled by the Government. This is done for two reasons; firstly, the explanation being attached to the definition of 'public duty' enlarges the scope of public duty, so that the transactions carried out in such corporations acquire a public character and come within the scope of this Act. Secondly, as a result of this the employees of such corporations who undertake any duty of the nature defined in Section 2 (b) will be included within the definition of 'public servant', even though they may not be in the pay or service of the corporation; as those employees who are in the pay or service of the corporation will be expressly covered by sub-clause (iii) of clause (c) of Section 2 which says 'any person in the service or pay of a corporation established by or under a Central, Provincial or State Act, or an authority or a body owned or controlled or aided by the Government or a Government owned company as defined in section 617 of the Companies Act, 1956 (1 of 1956)' will be a public servant. In other words the above provision intends to check the predicament of corruption in PSUs and Government corporations by expanding the definition of 'State', 'public duty' and consequently 'public servant' so that the employees of such organisations do not escape the legal technicality involved with the definition of public servant. In *Dalco Engineering Private Ltd. V. Shree Satish Prabhakar Padhye*[80]*, Raveendran, J. observed:*

"The words 'a corporation established by or under a Central, Provincial or State Act' is a standard term used in several enactments to denote a statutory corporation

[79] *PCA, 1988*, S. 2
[80] *Dalco Engineering Private Ltd. v. Shree Satish Prabhakar Padhye*, AIR 2010 SC 1576

established or brought into existence by or under statute. For example, it is used in Sub-clause (b) of Clause 12th of section 21 of Indian Penal Code (IPC) and section 2 (c) (iii) of the Prevention of Corruption Act, 1988. Both these statutes provide that a person in the service of a 'Corporation established by or under a Central, Provincial or State Act' is a public servant. The Prevention of Damage to Public Property Act, 1984 defines 'public property' as meaning any property owned by, or in the possession of, or under the control of (i) the Central Government; (ii) any State Government; or (iii) any local authority; or (iv) any corporation established by, or under, a Central, Provincial or State Act; or (v) any company as defined in Section 617 of the Companies Act, 1956; or (vi) any institution, concern or undertaking which the Central Government may, by notification in the Official Gazette, specify in that behalf provided that the Central Government shall not specify any institution, concern or undertaking under that Sub-clause unless such institution, concern or undertaking is financed wholly or substantially by funds provided directly or indirectly by the Central Government or by one or more State Governments, or partly by the Central Government and partly by one or more State Governments. Thus, the term is always used to denote certain categories of authorities which are 'State' as contrasted from non-statutory companies which do not fall under the ambit of 'State'." What Explanation to Section 2 (b) really does is to expand the scope of the terms 'public duty', 'State' and 'public servant' by including even those employees of the corporation who are not in the pay or service of the corporation but undertake any duty which is of the nature of public duty defined in Section 2 (b). This expands the scope of the Act and such a move is not unusual considering the fact that State now relies on a variety of actors to deliver public services which are not known to be free from corrupt transactions.

The definition of 'public duty' makes use of concepts like 'State interest', 'public interest' and 'community interest'. The Act, on the other hand, nowhere defines the expressions 'State interest', 'public interest' or 'community interest'. In Black's Law Dictionary (Sixth Edition) public interest has been defined as: "Something in which the public, the community at large has something pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as the interest of the particular localities, which may be affected by the matters in question. Interest shared by the citizens generally in affair

of local, State or national government…". In *Bihar Public Service Commission v. Saiyed Hussain Abbas Rizwi*[81] the Supreme Court observed that: "In its common parlance the expression 'public interest', like 'public purpose', is not capable of any precise definition. It does not have a rigid meaning, is elastic and takes its colour from the statute in which it occurs, the concept varying with time and state of the society and its needs."[82] It appears that even apex court agrees that expressions like 'public interest' should not be defined as the same may not have a rigid meaning limited by the time and needs of a society, but omission to do so may broaden the content of what can be included in 'public interest'. Examining the scope of 'public duty' the Kerala High Court in *K. Balaji Iyengar v. State of Kerala*[83] clarified: "Under sub clause (viii), any person who holds an office by virtue of which he is authorized or required to perform any public duty is a public servant. Public duty as provided under the sub clause means a duty in the discharge of which the State, the public or the community at large has an interest. As rightly argued by the learned counsel appearing for respondents 2 and 3, the public or the community at large may have some interest in the performance of an act by a private individual. But for the reason that either the public or the community at large has an interest, on that act, it cannot be said that the private individual is a public servant as defined under sub clause (viii) of Section 2 (c). The performance of that public duty must be which, he is either authorized to do or required to perform, as he holds the office. *Even if an act performed by a person is beneficial to the public or to the community at large and therefore the community has an interest on its performance, that by itself will not make the act a public duty or the person a public servant. It must be shown that the person is either required to perform or authorized to perform the same by virtue of the office which he is holding.* The question is whether the duty to be performed by respondents 2 and 3 as Secretary and President of Kerala Cricket Association are public duties and if so, whether they are public servants as defined under sub clause (viii) of clause (c) of Section 2. *In order to attract sub clause (viii), the person must firstly hold an office. Secondly by virtue of that office he should be authorised to do a public duty or required to perform a public duty.* Therefore even if a person is holding an office, but if by virtue of that office he is not authorised or required to perform any

[81] *Bihar Public Service Commission v. Saiyed Hussain Abbas Rizvi*, (2012) 13 SCC 61
[82] Ibid. para 22, p. 73
[83] *K. Balaji Iyengar v. State of Kerala*, (2010) SCC OnLine Ker 4969

public duty, for the reason that he is holding an office, he will not be a public servant as defined under sub clause (viii). *The essence of sub clause (viii) is that the person who holds the office, shall by virtue of that office, either be authorised or required to perform any public duty.* The next question is what is public duty. Only if the public or the State or the community at large has an interest in that duty to be performed, it would be a public duty as provided under clause (b) of Section 2. Therefore if a person has to perform a duty and either the State, the Public or the community at large has an interest in that duty to be discharged by that person, the duty would be public duty as defined under clause (b) of Section 2 of the Act. The question then is what is the duty, in the discharge of which State, public or the community at large has an interest. Word 'duty' is not defined under the Act. Duty is defined in Encyclopedic Law Lexicon by Justice C.K.Thakkur Vol.2 2008 Edn. at page 1586 as follows:-

'The word 'duty' connotes obligation. A Court or individual is said to be under a duty only when such Court or the person concerned is bound to perform the function. The word 'duty' will not be apt in the context of a discretion to do the particular thing. That expression denotes that one cannot refute to perform the act but is bound to do it.' Black's Law Dictionary 7th edn. page 521 gives the following meaning to 'duty'. 'A legal obligation that is owed or due to another and that needs to be satisfied; an obligation for which somebody else has a corresponding right'."[84] The court relied upon *State of Punjab v. Nirmal Kaur*[85] in which Supreme Court held: "Stand of the appellant-State is that in any event by running coaching centre, the respondent was performing public duty. The submission overlooks basic requirement of *clause (viii) of Section 2(c) which is applicable only when a public servant holds an office by which he authorized or required to perform any public duty.* In the instant case it is nobody's case that the respondent was holding an office by virtue of which she was authorized to perform any public duty. That being so there is no merit in this appeal which is accordingly dismissed."[86] Thus, in order to attract sub-clause (viii) the person must hold an office and by virtue of that office he should be authorized or required to undertake a public duty. It seems that courts are cautious not to overplay the concept of public duty by infiltrating the public spheres in the sense that even if a private person carries on an act in which public or community at large is interested he

[84] Ibid. paras 13, 14 and 15
[85] *State of Punjab v. Nirmal Kaur*, (2009) 13 SCC 418
[86] Ibid. para 5, p. 420

does not become a public servant by virtue of that fact, and essential conditions for having that designation are holding of an office and authorization or requirement to perform a public duty by virtue of holding that office.

To try any offence punishable under this Act or any conspiracy, attempt or abatement for such aforesaid offence Section 3 of the Act empowers the Central or the State Government to appoint special Judges. It says:

"*Section 3. Power to appoint special Judges. – (1) The central Government or the State Government may, by notification in the Official Gazette, appoint as many special Judges as may be necessary for such area or areas or for such case or group of cases as may be specified in the notification to try the following offences, namely: -*

(a) any offence punishable under this Act; and

(b) any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in clause (a).

(2) A person shall not be qualified for appointment as a special Judge under this Act unless he is or has been a Sessions Judge or an Additional Sessions Judge or an Assistant Sessions Judge under the Code of Criminal Procedure, 1973 (2 of 1974)."[87]

The section also requires that only a Judge who is of the rank of a Sessions Judge or an Additional Sessions Judge or an Assistant Sessions Judge will be qualified for appointment for the post of special Judge. This eligibility requirement demonstrates the seriousness attached to the post of a special Judge as the holders of the rank of a Sessions Judge or an Additional Sessions Judge or an Assistant Sessions Judge are the Judges who are at the top pyramid in seniority in the hierarchy at the District level, and such seniority is also reflective of the experience these Judges possess by virtue of years in service. Clause (1) of Section 4 states that 'notwithstanding anything contained in the Code of criminal Procedure, 1973 (2 of 1974), or in any other law for the time being in force, the offences specified in sub-section (1) of section 3 shall be tried by special Judges only'. Thus, the section provides exclusive jurisdiction to try the offences mentioned in clause (1) of Section 3 to special Judges. To avert procedural difficulties clause (3) of Section 4 provides that 'while trying any case, a

[87] *PC Act, 1988*, Section 3

special Judge may also try any offence, other than an offence specified in section 3, with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial'. In 2G Scam Case the Central Bureau of Investigation (CBI) registered an FIR for offences of criminal conspiracy and criminal misconduct under Section 120-B of IPC read with Section 13 (2) read with Section 13 (1)(d) of the Prevention of Corruption Act, 1988 against unknown officials of Government of India and unknown private individuals/companies. No allegations were made against the petitioners in the charge sheet and the first supplementary charge sheet filed by the CBI, but in the second supplementary charge sheet offences under Section 420/120-B of IPC were alleged against the petitioners and other accused persons. The special Judge who was undertaking the trial of the 2G Scam Cases also took cognizance of the second supplementary charge sheet. In *Essar Teleholdings Pvt. Ltd. v. Registrar General, Delhi High Court*[88] the petitioners challenged the jurisdiction of the special Judge on the ground that offences under Section 420/120-B can be tried only by a Magistrate. Dismissing the contention of the petitioners the Supreme Court observed: "A mere perusal of Section 3 read with Section 4 of the PC Act clearly mandates that apart from an offence punishable under the PC Act, any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified under the PC Act can also be tried by a Special Judge. Sub-section (3) of Section 4 specifies that when trying any case, a Special Judge can also try any offence, other than an offence specified in Section 3, with which the accused may, under CrPC, be charged at the same trial…admittedly, 2G Scam Case is triable by the Special Judge against the persons accused of offences punishable under the PC Act in view of sub-section (1) of section 4. The Special Judge alone can take the cognizance of the offence specified in sub-section (1) of Section 3, in view of sub-section (3) of Section 4. A Magistrate cannot take cognizance of offence as specified in Section 3 (1) of PC Act. In this background, as the petitioners have been shown as co-accused in second supplementary charge-sheet filed in 2G Scam case, it is open to the Special Judge to take cognizance of the offence under Section 120-B and Section 420 IPC."[89] The court, among other cases, relied upon *Vivek Gupta v. CBI*[90] in which similar question came before the court and the apex court replied that: "the Special

[88] *Essar Teleholdings Pvt. Ltd. v. Registrar General, Delhi High Court*, (2013) 8 SCC 1
[89] Ibid. paras 17 and 29, pp. 9 and 16
[90] *Vivek Gupta v. CBI*, (2003) 8 SCC 628

Judge while trying the co-accused of an offence punishable under the provisions of the Act as also an offence punishable under Section 120-B read with Section 420 IPC has the jurisdiction to try the appellant also for the offence punishable under Section 120-B read with Section 420 IPC applying the principles incorporated in Section 223 of the Code."[91] Code here means Criminal Procedure Code, 1973 (2 of 1974) and clause (a) of Section 223 says 'persons accused of the same offence committed in the course same transaction' may be charged and tried together. Thus, the court stated: "Therefore, it follows that the appellant who is also charged of having committed the same offence in the course of the same transaction may also be tried with them. Otherwise it appears rather incongruous that some of the conspirators charged of having committed the same offence may be tried by the Special Judge while the remaining conspirators who are also charged of the same offence will be tried by another court, because they are not charged of any offence specified in Section 3 of the Act."[92] This move eases a procedural hardship to overcome the predicament of prosecuting offenders separately on the ground of a mere technicality that since some of the offenders were not charged of the offences mentioned in the Section 3 of PC Act, 1988 they cannot be tried with those offenders who also committed the same offence but were charged under the said section. This actually contributes to the smoothing of the prosecution process making the procedure of the Act less burdensome.

Moving further, Section 5 of the PC Act 1988 provides the procedure that a special Judge may follow in taking the cognizance of offences without the accused being committed to him for trial, and in trying the accused persons he shall follow the procedure prescribed for 'warrant cases' by the Magistrates. An issue was raised regarding interpretation of two clauses of S. 5; the issue was whether the Court of special Judge is a Court of Session or a Court of Magistrate? Clause (3) of S. 5 says that for the purposes of the provisions of Code of Criminal Procedure, 1973, the Court of the special Judge shall be deemed to be a 'Court of Session'. Whereas Clause (4) says that Section 326[93] and Section 475[94] of the Code of Criminal Procedure shall apply to the proceedings before a special Judge and for the purposes of the said

[91] Ibid. para 17
[92] Ibid. para 15
[93] Conviction or commitment on evidence partly recoded by one Magistrate and partly by another
[94] Delivery to commanding officers of persons liable to be tried by Court martial

provisions a special Judge shall be deemed to be a 'Magistrate'. The issue was resolved in *A. R. Antulay v. R. S. Nayak*[95]. It was observed by the Supreme Court that: "Whether a Court of special Judge for certain purposes is Court of Magistrate or a Court of Session revolves round a mistaken belief that a Special Judge has to be one or the other and must fit in the slot of a Magistrate or a Court of Session. Such an approach would strangle the functioning of the Court and must be eschewed. Shorn of all embellishments, the Court of a Special Judge is Court of Original Criminal Jurisdiction. As a Court of Original Criminal Jurisdiction in order to make it functionally oriented by the statute setting up the court except those specifically conferred and specifically denied it has to function as a Court of Original Criminal Jurisdiction not being hide-bound by the terminological status description of Magistrate or a Court of Session under the code it will enjoy all powers which a Court of Original Criminal jurisdiction enjoys save and except the ones specifically denied." This again removes the procedural difficulties created by the jurisdictional confusion with regard to corruption cases as there was a doubt as to the powers of a Court of special Judge under the PC Act, 1988.

The 1988 Act nowhere defines the term corruption. In Chapter III of the Act on 'Offences and Penalties' wrongs like 'Public servant taking graticfication other than legal remuneration in respect of an official act', 'Taking gratification, in order, by corrupt or illegal means, to influence public servant', 'Taking graticfication, for exercise of personal influence with public servant', 'Public servant obtaining valuable thing, without consideration from person concerned in proceeding or business transacted by such public servant' and 'Criminal misconduct by a public servant' are mentioned. Section 7 of the Act is reprocduced as below:

"*Section 7. Public servant taking gratification other than legal remuneration in respect of an official act.- Whoever, being, or expecting to be a public servant, accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in exercise of his official functions, favour or*

[95] *A. R. Antulay v. R. S. Nayak (1984)*

disfavour to any person or for rendering or attempting to render any service or disservice to any person, with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of section 2, or with any public servant, whether named or otherwise, shall be punishable with imprisonment which shall be not less than six months but which may extend to five years and shall also be liable to fine.

Explanations.-(a) "Expecting to be a public servant". If a person not expecting to be in office obtains a gratification by deceiving others into a belief that he is about to be in office, and that he will then serve them, he may be guilty of cheating, but he is not guilty of the offence defined in this section.
(b) "Gratification". The word "gratification" is not restricted to pecuniary gratifications or to gratifications estimable in money.
(c) "Legal remuneration". The words "legal remuneration" are not restricted to remuneration which a public servant can lawfully demand, but include all remuneration which he is permitted by the Government or the organisation, which he serves, to accept.
(d) "A motive or reward for doing". A person who receives a gratification as a motive or reward for doing what he does not intend or is not in a position to do, or has not done, comes within this expression.
(e) Where a public servant induces a person erroneously to believe that his influence with the Government has obtained a title for that person and thus induces that person to give the public servant, money or any other gratification as a reward for this service, the public servant has committed an offence under this section."[96]

Two keywords of some importance are 'accept' and 'obtain'. In *A. Subair v. State of Kerala*[97] the Supreme Court state that: "the essential ingredients of Section 7 are:

(i) that the person accepting the graticfication should be a public servant;
(ii) that he should accept the gratification for himself and the gratication should be as a motive or reward for doing or forbearing to do any official

[96] *PCA, 1988*, S. 7
[97] *A. Subair v. State of Kerala*, (2009) 6 SCC 587

act or for showing or forbearing to show, in exercise of his official function, favour or disfavour to any person."[98]

In *C. K. Damodaran Nair v. Government of India*[99] the Supreme Court got a chance to discuss the meaning of words 'accept' and 'obtain' while answering the question whether demand for bribe is an essential ingredient of Section 7 of the Prevention of Corruption Act, 1988. The court observed : "According to *Shorter Oxford Dictionary* 'accept' means to take or receive with a 'consenting mind'. Obviously such a 'consent' can be established not only by leading evidence of prior agreement but also from the circumstances surrounding the transaction itself without proof of such prior agreement. If an acquaintance of a public servant in expectation and with the hope that in future, if need be, he would be able to get some official favour from him, volutarily offers any gratification and if the public servant willingly takes or recieves such gratification it would certainly amount to 'acceptance' within the meaning of Section 161 IPC. It cannot be said, therefore, as an abstract proposition of law, that without a prior demand there cannot be 'acceptance'." Section 161 of the IPC was the provision corresponding to Section 7 of the 1988 Act. Distinguishing 'accept' from 'obtain' the Court further observed : " 'Obtain' means to secure or gain (something) as the result of request or effort (*Shorter Oxford Dictionary*). In case of obtainment the initiative vests in the person who recieves and in that context a demand or request from him will be a primary requisite for an offence under Section 5(1)(d) of the Act unlike an offence under Section 161 IPC, which, as noticed above, can be, established by proof of either 'acceptance' or 'obtainment'." Section 5(1)(d) is the provision of Prevention of Corruption Act, 1947 corresponding to Section 13(1)(d) of Prevention of Corruption Act, 1988 which deals with criminal misconduct by a public servant. Section 5(1)(d) and Section 13(1)(d) both use only 'obtain' unlike Section 7 which uses both 'accept' and 'obtain', therefore a demand for bribery is not an essential ingredient under Section 7 whereas it is a requisite under Section 13(1)(d) of the 1988 Act.

Let us assay the remaining penal provisions of the Chapter III by producing sections 8-13 before us:

[98] Ibid. para 13, p. 591
[99] *C. K. Damodaran Nair v. Government of India*, (1997) 9 SCC 477

"*Section 8. Taking gratification, in order, by corrupt or illegal means, to influence public servant. — Whoever accepts, or obtains, or agrees to accept, or attempts to obtain, from any person, for himself or for any other person, any gratification whatever as a motive or reward for inducing, by corrupt or illegal means, any public servant, whether named or otherwise, to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or such public servant to show favour or disfavour to any person, or to render or attempt to render any service or dis-service to any person with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in Clause (c) of Section 2, or with any public servant, whether named or otherwise, shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine.*

Section 9. Taking gratification for exercise of personal influence with public servant. — Whoever accepts or obtains or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification whatever, as a motive or reward for inducing, by the exercise of personal influence, any public servant whether named or otherwise to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render to attempt to render any service or dis-service to any person with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in Clause (c) of Section 2, or with any public servant, whether named or otherwise, shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine.

Section 10. Punishment for abetment by public servant of offences defined in Section 8 or 9. — Whoever, being a public servant, in respect of whom either of the offences defined in Section 8 or Section 9 is committed, abets the offence, whether or not that offence is committed in consequence of that abetment, shall be punishable with imprisonment for a term which shall be not less than six months but which may extend

to five years and shall also be liable to fine.

Section 11. Public servant obtaining valuable thing, without consideration from person concerned in proceeding or business transacted by such public servant. — Who- ever, being a public servant, accepts or obtains or agrees to accept or attempts to obtain for himself, of or any other person, any valuable thing without consideration, or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine.

Section 12. Punishment for abetment of offences defined in Section 7 or 11. — Whoever abets any offence punishable under Section 7 or Section 11 whether or not that offence is committed in consequence of that abetment, shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine.

Section 13. Criminal misconduct by a public servant.- (1) A public servant is said to commit the offence of criminal misconduct,-

- *(a) if he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person any gratification other than legal remuneration as a motive or reward such as is mentioned in section 7; or*
- *(b) if he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person, any valuable thing without consideration or for a consideration which he knows to be inadequate from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned; or*

(c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do; or

(d) if he,-

(i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest; or

(e) if he or any person on his behalf, is in possession or has, at any time during the

period of his office, been in possession for which the public servant cannot satisfactorily account, of pecuniary resources or properly disproprtionate to his known sources of income.

Explanation.- For the purposes of this section, "known sources of income" means income received from any lawful source and such receipt has been intimated in accordance with the provisions of any law, rules or orders for the time being applicable to a public servant.

(2) Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and shall also be liable to fine."[100]

Examining the scope of provisions of the Chapter III the Supreme Court in *State v. Jitendra Kumar Singh*[101] observed: "Section 7 of the PC Act refers to the offences dealing with public servant taking gratification, other than the legal renumeration in respect of an official act. Section 10 deals with punishment for abetment by a public servant of offences defined in Section 8 and 9. Section 11 of the PC Act refers to an offence by a public servant obtaining valuable thing, without consideration from person concerned in proceeding or business transacted by such public servant. The

[100] *PCA, 1988*, Sections 8-13
[101] *State v. Jitendra Kumar Singh*, (2014) 11SCC 724

offences under Sections 7, 10 and 11 can be committed only by the public servant, though an offence under Section 7 can also be committed by a person expecting to be a public servant. An offence under Section 7 or 11 could also be abetted by a non-public servant, for which punishment has been prescribed under Section 12 of the PC Act. Section 8 deals with the taking of gratification, for exercise of personal influence with public servant. The offences under Sections 8 and 9 can be committed by a person who need not necessarily be a public servant. An offence under Sections 8, 9 or 12 can be committed by a public servant or by a private person or by combination of both. Section 13 deals with the criminal misconduct by a public servant, which is exclusive an offence against the public servant relating to criminal misconduct. An offence under Section 13 is made punishable under Section 15 of the PC Act. The above discussion would indicate that a public servant as well as a non-public servant can commit offences punishable under the PC Act."[102] The Court further stated: "A special Judge appointed under Section 3(1) of the PC Act has got jurisdiction to proceed exclusively against a public servant and exclusively against a non-public servant as well, depending upon the nature of the offence referred to in Chapter III of the PC Act. Junction of a public servant is not a must for the Special Judge to proceed against a non-public servant for any offence alleged to have been committed by him under Chapter III of the PC Act. As already indicated, an offence under Section 8 or 9 can be committed by a non-public servant and he can be proceeded against under the PC Act without joinder of any public servant. For example:

(i) Section 7 of the Act uses the words 'Whoever, being, or expecting to be a public servant…'

(ii) Sections 10 and 11 of the Act use the words 'Whoever, being a public servant…'

(iii) Section 13 uses the words 'A public servant is said to commit…'

Thus, the offences under Sections 7, 10, 11 and 13 of the PC Act can be committed by a public servant though an offnece under Section 7 can be committed by a 'person expecting to be a public servant'. On the other hand:

(i) Section 8 uses the words 'Whoever…', simpliciter, without using any other qualifying words.

(ii) Likewise, Sections 9 and 12 also use the words 'Whoever…' simpliciter.

[102] Ibid. paras 26-27, p. 738

Thus, an offence under Sections 8, 9 or 12 can be committed by any person, who need not necessarily be a public servant. Such an offence can, therefore, be committed by a public servant or by a private person or by a combination of the two. It is thus clear that an offence under the PC Act can be committed by either a public servant or a private person or a combination of both and in view of the mandate of Section 4(1) of the PC Act, read with Section 3(1) thereof, such offneces can be tried only by a Special Judge. For example:

(i) A private person offering a bribe to a public servant commits an offence under Section 12 of the Act. This offence can be tried only by the Special Judge, notwithstanding the fact that only a private person is the accused in the case and that there is no public servant named as an accused in that case.

(ii) A private person can be the only accused person in an offence under Section 8 or Section 9 of the said Act. And it is not necessary that a public servant should also be specifically named as an accused in the same case. Notwithstanding the fact that a private person is the only accused in an offence under Section 8 or Section 9, it can be tried only by a Special Judge."[103]

In *Prakash Singh Badal v. State of Punjab*[104] the question before the Supreme Court was whether appellant who was a Member of Parliament, thus a public servant, can be charged with offences under Section 8 and 9 of the 1988 Act? The contention of the appellant was that since the Section 8, 9, 12, 14 and 24 are applicable to private persons and not to a public servant therefore he cannot be charged under Section 8 and 9. Negativing the contention the Supreme Court observed: "The opening word of Sections 8 and 9 is 'whoever'. The expression is very wide and would also cover public servants accepting gratification as a motive or reward for inducing any other public servant by corrupt or illegal means. Restricting the operation of the expression by curtailing the ambit of Sections 8 and 9 and cofining to private persons would not reflect the actual legislative intention. If Section 8 is analytically dissected then it would read as below:

(i) Whoever

[103] Ibid. paras 28-29, pp. 738-39
[104] *Prakash Singh Badal v. State of Punjab*, (2007) 1 SCC 1

(ii) accepts or obtains gratification from any person

(iii) for inducing any public servant (by corrupt or illegal means)

(iv) to render or attempt to render any services or sisservice (etc.)

(v) with any public pervant (etc.)

So far as Section 9 is concerned the only difference is tht inducement is 'by the exercise of personal influence'. The above analysis shows that public servant may be involved. Sections 8 and 9 of the Act correspond to Sections 162 and 163 IPC. During the currency of the old Act, Sections 161 to 165-A were operating. This court had the occasion to examine Section 5(1)(d) of the old act and Sections 161 and 162 IPC. It has been held that they constitute different offences. (See *Ram Krishan v. State of Delhi*). In view of the above, it would ot be permissible to contend that a public servant would be covered by Section 13(1)(d) [similar to Section 5(1)(d) of the old Act] and therefore the public servant would not be covered by Sections 8 and 9 of the Act. The offences under Section 13(1)(d) and the ofeences under Section 8 and 9 of the Act are different and separate. Assuming, Section 13(1)(d) (i) covers public servants who obtain for 'himself or for any other person' any valuable thing or pecuniary advantage by corrupt or illegal means, that would not mean that he would not fall within the scope o Section 8 and 9. The ingredients are different. If a public servant accepts gratification for inducing any public servant to do or to forbear to do any official act, etc. then he would fall in the net of Sections 8 and 9. In Section 13(1)(d) it is not necessary to prove that any valuable thing or pecuniary advantage has been obtained for inducng any public servant. Another difference is that Section 13(1)(d) envisages obtaining of any valuable thing or pecuniary advantage. On the other hand sections 8 and 9 are much wider and envisage taking of 'any gratification whatever'. Explanation (b) of Section 7 is also relevant. The word 'gratification' is not restricted to pecuniary gratifications or to gratifications estimable in money. Thus, Sections 8 and 9 are wider than Section 13(1)(d) and clearly constitute different offences."[105] As noted earlier Section 13(1)(d) uses only word 'obtain' unlike Section 7 which uses both 'accept' and 'obtain', therefore a demand for bribery is not an essential ingredient under Section 7 whereas it is a requisite under Section 13(1)(d) of the 1988 Act. Discussing Section 13 of the 1988 Act the Supreme Court in *M.*

[105] Ibid. paras 52-58, pp. 38-39

Krishna Reddy v. State, Deputy Superintendent of Police, Hyderabad[106] observed: "An analysis of Section 5(1)(e) of theAct, 1947 which corresponds to Section 13(1)(e) of the new Act of 1988 shows that it is not mere acquisition of property that constitutes an offence under the provisions of the Act but it is the failure to satisfactorily account for such possession that makes the possession objectionable as offending the law. To substantiate a charge under 13(1)(e), the prosecution must prove the following ingredients, namely (1) the prosecution must prove that the accused is a public servant, (2) the nature and extent of the pecuniary resources or property which are found in his possession, (3) it must be proved as to what were his known sources of income i.e. known to the prosecution, (4) it must prove quite objectively that the resources or property found in possession of the accused were disproportionate to his known source of income. Once the above ingredients are satisfactorily proved, the offence of criminal misconduct under section 13 (1) (e) is complete, unless the accused is able to account for such resources or property and it is only thereafter the burden shifts to the accused to prove his innocence."[107] Thus, for an offence under the Section 13 mere possession of property is not sufficient but it is the failure to satisfactorily account for such property which constitutes such offence. Also, form the above discussion it becomes clear that an offence under Sections 8, 9 or 12 can be committed by a public servant or by a private person or by a combination of the two.

Commenting on the offences of bribery and other related offences provided in Sections 7 to 15 of the Prevention of Corruption Act, 1988 the 4th Report of Second Administrative Reforms Commission stated that the emphasis is more on the consideration, gratification and pecuniary advantage whereas, "the experience of the past decades shows that such an indirect definition of corrupt practices is paradoxically restrictive and a whole range of official conduct, detrimental to public interest, is not covered by strong penal provisions. In particular, there are four types of official conduct which cause immense damage to public interest, which do not explicitly constitute violation of criminal law. The first and possibly the most important of these gross perversion of the Constitution and democratic institutions,

[106] *M. Krishna Reddy v. State, Deputy Superintendent of Police*, (1992) 4 SCC 45
[107] Ibid. paras 6 and 7, p. 47

including, wilful violation of the oath of office. Constitutional functionaries have sometimes been found to indulge in such constitutional perversion out of partisan considerations or personal piqe. In most such cases, there may be neither illegal consideration nor pecuniary advantage, nor any form of gratification involved. In some of those cases, the Supreme Court held individuals holding high offices guilty of gross misconduct amounting to perversion of the Constitution. In such cases, except public opinion, political pressure and dictates of the conscience of the individual, there are no legal provisions to punish the perpetrators. The second such class of offences is abuse of authority unduly favouring or harming someone, without any pecuniary consideration or gratification. In such cases, often partisan interests, nepotism and personal prejudices play a role, though no corruption is involved in the restrictive, 'legal' sense of the term. Nevertheless, the damge done by such wilful acts or denial of one's due by criminal neglect have profound consequences to society and undermine the very framework of ethical governance and rule of law. Third, obstruction or perversion of justice by unduly influencing law enforcemnet agencies and prosecution is a common occurrence in our country. Again in most such cases, partisan considerations, nepotism and prejudice, and not pecuniary gain or gratification, may be the motive. The resultant failure of justice undermines public confidence in the system and breeds anarchy and violence. Finally, squandering public money including ostentatious official life-styles, has become more common. In all such cases, there is neither private pecuniary gain nor specific gain or loss to any citizen. There is also no misappropriation involved. The public exchequer at large suffers and both public interest and citizen's trust in government are undermined."[108]
In view of that the report recommended classifying of following "offences under the Prevention of Corruption Act:

- Gross perversion of the Constitution and democratic institutions amounting to wilful violation of oath of office.
- Abuse of authority unduly favouring or harming someone.
- Obstruction of justice.
- Squandering public money."[109]

[108] Second Administrative Reform Commission, *4th Report*, at pp. 61-62
[109] Ibid.

The report does well to point out wrongs which are incidental to corruption but are often overlooked. While it does talk about perversion of Constitution and democratic institutions, obstruction of justice etc. it misses to include in the discussion the concerns of equality, representation, debate, human rights etc. It talks about obstruction of justice only in terms of influencing law enforcement agencies and prosecution and not in wholistic sense which may also include fairness standards. Another offence which is recommended by the report to be included in the Act is of 'collusive bribery'. The report points out that "in any corrupt transaction, there are two parties – the bribe-giver and the bribe-taker. The offence of bribery can be classified into two categories. In one category the bribe giver is a victim of extortion, he is compelled to pay for a simple service, because if he does not submit to the extortionary demands of the public servant, he ends up losing much more than the bribe. The delays, harassment, uncertainty, lost opportunity, loss of work and wages – all resulting from non-compliance with demands for a bribe – are so great that the citizen is sucked into a vicious cycle of corruption for day-to-day survival. Beside, there is another category of cases where the bribe-giver and bribe-taker together fleece society, and the bribe-giver is as guilty or even more guilty than the bribe-taker. These are cases of execution of substandard works, distortion of competition, robbing the public exchequer, commissions in public procurement, tax evasion by collusion, and causing direct harm to people by spurious drugs and violation of safety norms. These two categories of corruption are also termed as 'coercive' and 'collusive' corruption respectively. With the rapidly growing economy, cases of coercive corruption are on the increase, and, at times, these often assume the magnitude of 'serious economic offences'."[110] In view of the Commission to prevent both bribe-giver and the bribe-taker from escaping the punishment the laws should be made more stringent.

Next important and much talked about provision of the 1988 Act is S. 19 which talks about previous sanction necessary for prosecution of public servants. The rationale behind this provision is to safeguard the honest public servants from unnecessary oppression and harassment, and to actualize that end it has been prescribed that before

[110] Ibid. pp. 62-63

prosecuting a public servant a previous sanction of the competent authority is necessary. The language of the section is as follows:

"*S. 19. Previous sanction necessary for prosecution.- (1) 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.
(2) Where for any reason whatsoever any doubt arises as to whether the previous sanction as required under sub-section (1) should be given by the Central Government or the State Government or any other authority, such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed.
(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),-
(a) no finding, sentence or order passed by a special Judge shall be reversed or altered by a court in appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in, the sanction required under sub-section (1), unless in the opinion of that court, a failure of justice has in fact been occasioned thereby;
(b) no court shall stay the proceedings under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice;
(c) no court shall stay the proceedings under this Act on any other ground and no court shall exercise the powers of revision in relation to any interlocutory order passed in any inquiry, trial, appeal or other proceedings.

(4) In determining under sub-section (3) whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice the court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

Explanation.- For the purposes of this section,-

(a) error includes competency of the authority to grant sanction;

(b)a sanction required for the prosecution includes reference to any requirement that the prosecution shall be at the instance of a specified authority or with the sanction of a specified person or any requirement of a similar nature."[111]

As the Section provides the sanctioning authority is required to apply its mind to the evidence placed before it, and only after being satisfied that a *prima facie* case has been made out it should grant the sanction. The 4th Report of the 2nd Administrative Reforms Commission states that "although the intention of the provision is clear, it has been argued that this clause has sometimes been used by a santioning authority to shield dishonest officials. There have also been instances where unintentional defects in the grant of such sanction has been used by the accused to challenge the sanction and have it set aside, thus nullifying the entire proceedings."[112] Section 19 of the 1988 Act corresponds to Section 6 of the 1947 Act. The Supreme Court in *A. R. Antulay v. R. S. Nayak*[113] observed: "Section 6 creates a bar to the court taking cognizance of offences therein enumerated except with the previous sanction of the authority set out in clauses (a), (b) and (c) of sub-section (1). The object underlying such provision was to save the public servant from the harassment of frivolous or unsubstantiated allegations. The policy underlying Section 6 and similar sections, is that there should not be unnecessary harassment of public servant. (See *C.R. Bansi v. State of Maharashtra.*) Existence thus of a valid sanction is a prerequisite to the taking of cognizance of the enumerated offences alleged to have been committed by a public servant. The bar is to the taking of cognizance of offence by the court. Therefore, when the court is called upon to take cognizance of such offences, it must enquire whether there is a valid santion to prosecute the public servant. Undoubtedly, the accused must be a public servant when he is alleged to have committed the offence of

[111] *PCA, 1988*, S. 19

[112] Second Administrative Reform Commission, *4th Report*, p. 65

[113] *A. R. Antulay v. R. S. Nayak (1984)*

which he is accused because Sections 161, 1164, 165 IPC and Section 5(2) of the 1947 Act clearly spell out that the offences therein defined can be committed by a public servant. If it is contemplated to prosecute public servant who has committed such offences, when the court is called upon to take cognizance of the offence, a sanction ought to be available otherwise the court would have no jurisdiction to take cognizance of the offence. A trial without a valid sanction where one is necessary under Section 6 has been held to be a trial without jurisdiction by the court. (See *R.R. Chari v. State of U.P.* and *S.N. Bose v. State of Bihar*.)"[114] In this case one of the questions before the court was whether for the pre-condition of sanction to be applicable the accused must be a public servant on the date of taking cognizance of offence by the court or on the date of commission of the offence? Answering the question the court held: "the *terminus a quo* for a valid sanction is the time when the court is called upon to take cognizance of the offence. If therefore, when the offence is alleged to have been committed, the accused was a public servant but by the time the court is called upon to take cognizance of the offence committed by him as public servant, he has ceased to be a public servant, no sanction would be necessary for taking cognizance of the offence against him. This approach is in accord with the policy underlying Section 6 in that a public servant is not to be exposed to harassment of a frivolous or speculative prosecution. If he has ceased to be a public servant in the meantime, this vital consideration ceases to exist. As a necessary corollary, if the accused has ceased to be a public servant at the time when the court called upon to take cognizance of the offence alleged to have been committed by him as public servant, Section 6 is not attracted."[115] Regarding this the Administrative Reforms Commission has observed that "the objective of this provision was to provide protection to the public servant form malicious prosecution, and his/her status at the time of the commission of the alleged offence is relevant rather than his/her status at the time of taking cognizance of the offence by the court. The interpretation given by the courts may lead to a situation where a person who superannuates, or resigns from service would not get the protection of this provision, even if the alleged offence was committed while he/she was in service. *Therefore, the law should be amended so that*

[114] Ibid. para 19, p. 201
[115] Ibid.

retired public servant can also get same level of protection, as a serving public servant."[116]

It is now quite settled that relevant date for sanction is the date on which court is called upon to take cognizance of the offence. The Supreme Court in *Antulay* also observed that "it unquestionably follows that the saction to prosecute can be given by an authority competent to remove the public servant from the office which he has misused or abused because that authority alone would be able to know whether there has been a misuse or abuse of the office by the public servant and not some rank outsider. By a catena of decisions, it has been held that the authority entitled to grant sanction must apply its mind to the facts of the case, evidence entitled to grant sanction must apply its mind to the facts of the case, evidence collected and other incidental facts before according sanction. A grant of sanction is not an idle formality but a solemn and sarcosanct act which removes the umbrella of protection of Government servants against frivilous prosecutions and the aforesaid requirements must therefore, be strictly complied with before any prosecution could be launched against public servants. (See *Mohd. Iqbal Ahmad v. State of A.P.*) The Legislature advisedly conferred power on the authority competent to remove the public servant from the office to grant sanction for the obvious reason that that authority alone would be able, when facts and evidence are placed before him to judge whether a serious offence is committed or the prosecution is either frivolous or speculative. That authority alone would be competent to judge whether on the facts alleged, there has been an abuse or misuse of office held by the public servant. That authority would be in a position to know what was the power conferred on the office which the public servant holds, how that power could be abused for corrupt motive and whether prima facie it has been so done. That competent authority alone would know the nature and functions discharged by the public servant holding the office and whether the same has been abused or misused."[117] Another question which came before the court was whether in case of a public servant who is holds two offices and is accused of abusing one, from which he is removed, but continues to holds another (which is not alleged to be misused) the sanction of the authority competent to remove him from the latter office necessary? Answering in the negative the Supreme Court observed: "One can

[116] Second Administrative Reform Commission, *4th Report*, p. 68
[117] *A. R. Antulay v. R. S. Nayak (1984)*, para 23 at p. 205

legitimately envisage a situation wherein a person may hold a dozen different offices, each one clothing him with the status of a public servant under Section 21 IPC and even if he has abused only one office for which either there is a valid sanction to prosecute him or he has ceased to hold that office by the time court was called upon to take cognizance, yet on this assumption, sanction of 11 different competent authorities each of which was entitled to remove him from 11 different public offices would be necessary before the court can take cognizance of the offence committed by such public servant, while abusing one office which he may have ceased to hold. Such an interpretation is contrary to all canons of construction and leads to an absurd end product which of necessity must be avoided. Legislation must at all costs be interpreted in such a way that it would not operate as a rouge's charter … therefore, upon a true construction of Section 6, it is implicit therein that sanction of that competant authority alone would be necessary which is competent to remove the public servant from the office which he is alleged to have misused or abused for corrupt motive and for which a prosecution is intended to be launched."[118] In *Vineet Narain v. Union of India*[119], also known as *Hawala case*, among other guidelines the apex court fixed the time limit for the grant of sanction by the competent authority. The Court held: "Time-limit of three months for grant of sanction for prosecution must be strictly adhered to. However, additional time of one month may be allowed where consultation is required with the Attorney General (AG) or any other law officer in the AG's office."[120] The issue of time-limit for granting sanction was raised again in *Subramanian Swamy v. Manmohan Singh*[121]. In this case the appellant Subramanian Swamy, a politician, in order to prosecute Respondent no. 2 A. Raja, a Minister in the Union Council of Ministers, for his alleged involvement in the 2G Scam wrote a letter on 29-11-2008 for grant of sanction to Respondent no. 1 Manmohan Singh who was the then Prime Minister. After this letter the appellant also wrote reminders to Respondent no. 1 on 30-05-2009, 23-10-2009, 31-10-2009, 8-03-2010 and 13-03-2010. It was only after more than one year and four months passed that appellant received a reply on 19-03-2010 from the Secretary, Department of Personnel and Training informing him that a case has been registered by the CBI in regard to 2G Scam and the question of the grant of sanction would arise only after the

[118] Ibid. paras 24 and 26, pp. 206 and 208
[119] *Vineet Narayan v. Union of India*, (1998) 1 SCC 226
[120] Ibid. para 58, p. 270
[121] *Subramanian Swamy v. Manmohan Singh*, (2012) 3 SCC 64

evidence collected by the CBI was considered. Consequently the appellant approached High Court for the issuance of mandamus to Respondent no. 1 for the grant of sanction. High Court refused to do the same arguing that while the matter was being investigated a mandamus cannot be issued, which made the appellant to approach the Supreme Court. Meanwhile Respondent no. 2 resigned as Minister on 14-11-2010, as a result of which he was prosecuted by the CBI. Even the question of grant of sanction for prosecution was reduced to an acedemic one after the resignation of Respondent no. 2, the appellant requested the court to decide two questions viz. (i) whether a private citizen can file a complaint before a Magistrate for prosecuting a public servant under the 1988 Act? And (ii) whether the cometent authority for the grant of sanction for prosecution of a public servant is required to adhere to time specified in the guldelines provided by the Supreme Court in *Vineet Narain Case*? Regarding the first question the court observed: "There is no provision either in the 1988 Act or the Code of Criminal Procedure, 1973 (CrPC) which bars a citizen from filing a complaint for prosecution of a public servant who is alleged to have committed an offence. Therefore, the argument of the lerned Attorney General that the appellant cannot file a complaint for prosecuting Respondent 2 merits rejection. Asimilar argument was negatived by the Constitution Bench in *A.R. Antulay v. R.S. Nayak*."[122] The court also stated: "While Section 190 of the Code of Criminal Procedure permits anyone to approach the Magistrate with a complaint, it does not prescribe any qualification the complainant is required to fulfil to be eligible to file a complaint … the principle that anyone can set or put the criminal law in motion remains intact unless contra-indicated by a statutory provision."[123] Regarding the second question the apex court held: "At the same time, we deem it proper to observe that in future every competent authority shall take appropriate action on the representation made by a citizen for sanction of the prosecution of a public servant strictly in accordance with the direction contained in *Vineet Narain v. Union of India* and the guidelines framed by CVC."[124] In other words court approved the time-limit of three months for the grant of sanction for prosecution prescribed in *Vineet Narain Case* and asked for strict adherence to the said requirement by the every competent authority. This reiteration of the *Vineet Narain* is significant as considerable delays in

[122] Ibid. para 28, p. 87
[123] Ibid. para 30
[124] Ibid. para 56, p. 97

granting of sanction of prosecution may have a discouraging effect on litigants taking up prosecutions against corrupt actors.

Another provision which has been cited as an impediment in the process of prosecuting corrupt officials is Section 6-A of the Delhi Special Police Establishment Act, 1946 which was inserted by Act 45 of 2003. The provision is reproduced as under:

"*Section 6-A. Approval of Central Government to conduct inquiry or investigation.- (1) The Delhi Special Police Establishment shall not conduct any inquiry or investigation into any offence alleged to have been committed under the Prevention of Corruption Act, 1988 (49 of 1988) except with the previous approval of the Central Government where such allegation relates to-*

(a) the employees of the Central Government of the Level of Joint Secretary and above; and

(b) such officers as are appointed by the Central Government in corporations established by or under any Central Act, Government companies, societies and local authorities owned or controlled by that Government.

(2) Notwithstanding anything contained in sub-section (1), no such approval shall be necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any gratification other than legal remuneration referred to in clause (c) of the Explanation to section 7 of the Prevention of Corruption Act, 1988 (49 of 1988)."[125]

This section was inserted in the Delhi Special Police Establishment Act, 1946 with effect from 12-09-2003. The provision inhibited the CBI from conducting any inquiry or investigation against the officers of the level of Joint Secretary and above for any offence under Prevention of Corruption Act, 1988 without the approval of the Central Government. Before Section 6-A came on the statute book the similar requirement of obtaining prior approval of the Central Government was contained in the consolidated set of instructions issued to the CBI by various Ministries/Departments known as

[125] Delhi Special Police Establishment Act, 1946, S. 6-A

'Single Directive'. The Supreme Court quashed the 'Single Directive' in a judgment dated 18-12-1997 when its validity was challenged in *Vineet Narain v. Union of India*[126]. In *Subramanian Swamy v. Director, CBI*[127] the constitutional validity of Section 6-A was challenged and since Section 6-A was inserted by Section 26(c) of the Central Vigilance Commission Act, 2003 therefore the constitutional validity of Section 26(c) was also challenged on the grounds of violation of Article 14 of the Constitution. The Supreme court observed: "It seems to us that classification which is made in Section 6-A on the basis of status in government service is not permissible under Article 14 as it defeats the purpose of finding prima facie truth into the allegations of graft, which amount to an offence under the PC Act, 1988. Can there be sound differentiation between corrupt public servants based on their status? Surely not, because irrespective of their status or position, corrupt public servants are corrupters of public power. The corrupt public servants, whether high or low, are birds of the same feather and must be confronted with the process of investigation and inquiry equally. Based on the position or status in service, no distinction can be made between public servants against whom there are allegations amounting to an offence under the PC Act, 1988. Corruption is an enemy of the nation and tracking down corrupt public servants and punishing such persons is a necessary mandate of the PC Act, 1988. It is difficult to justify the classification which has been made in Section 6-A because the goal of law in the PC Act, 1988 is to meet corruption cases with a very strong hand and all public servants are warned through such a legislative measure that corrupt public servants have to face very serious consequences."[128] The court further stated: "In *Vineet Narain*, this Court did not accept the argument that the Single Directive is applicable only to certain class of officers above the specified level who are decision-making officers and a distinction can be made for them for the purpose of investigation of an offence of which they are accused. We are also clearly of the view that no distinction can be made for certain class of officers specified in Section 6-A who are described as decision-making officers for the purpose of inquiry/investigation into an offence under the PC Act, 1988. There is no rational basis to classify the two sets of public servants differently on the ground that one set of officers is decision-making officers and not the other set of officers. If there is an

[126] *Vineet Narayan v. Union of* India
[127] *Subramanian Swamy v. Deirector, CBI*, (2014) 8 SCC 682
[128] Ibid. paras 59 and 60, pp. 725-26

accusation of bribery, graft, illegal gratification or criminal misconduct against a public servant, then we fail to understand as to how the status of offender is any relevance. Where there are allegations against a public servant which amount to an offence under the PC Act, 1988, no factor pertaining to expertise of decision making is involved. Yet Section 6-A makes a distinction. It is this vice which renders Section 6-A violative of Article 14. Moreover, the result of the impugned legislation is that the very group of persons, namely, high-ranking bureaucrats whose misdeeds and illegalities may have to be inquired into, would decide whether CBI should start an inquiry or investigation against them or not. There will be no confidentiality and insulation of the investigating agency from political and bureaucratic control and influence because the approval is to be taken from the Central Government which would involve leaks and disclosures at every stage."[129] The court finally held: "In view of our foregoing discussion, we hold that Section 6-A (1), which requires approval of the Central Government to conduct any inquiry or investigation into any offence alleged to have been committed under the PC Act, 1988 where such allegation relates to: (a) employees of the Central Government of the level of Joint Secretary and above, and (b) such officers as are appointed by the Central Government in corporations established by or under any Central Act, government companies, societies and local authorities owned or controlled by the Government, is invalid and violative of Article 14 of the Constitution. As a necessary corollary, the provision contained in Section 26(c) of the Act 45 of 2003 to that Extent is also declared invalid."[130] Thus, it is now settled that there is no requirement of approval from the Central Government to conduct any inquiry or investigation into an offence under the PC Act, 1988 against the aforementioned officials. This not only removes a major impediment in investigation or inquiry process against high-ranking bureaucrats but also brings them on par with other officials of their respective departments who occupy lower ranks compared to them. Although the court did not take into account the contention that such high-ranking officials are often involved in decision-making therefore they should be treated differently, one cannot wish away the rationale behind such argument. There have been voices echoing the bureaucratic nervousness while decision-making due to lack of protection accorded to them, which often results in maintaining the status quo, or lack of confidence in taking bold

[129] Ibid. para 64, p. 728
[130] Ibid. para 99, p. 740

decisions. This is much appreciated but this also needs to be juxtaposed with the fact that the protection afforded by Section 19 is still available to them as the requirement of sanction to prosecute them is still there.

Next Section of the PC Act, 1988 worth discussing is Section 20. The language of the Section is as follows:

"*Section 20. Presumption where public servant accepts gratification other than legal remuneration.- (1) Where, in any trial of an offence punishable under section 7 or section 11 or clause (a) or clause (b) of sub-section (1) of section 13 it is proved that an accused person has accepted or obtained or has agreed to accept or attempted to obtain for himself, or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed, unless contrary is proved, that he accepted or obtained or agreed to accept or attempted to obtain that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in section 7 or, as the case may be, without consideration or for a consideration which he knows to be inadequate.*
(2) Where in any trial of an offence punishable under section 12 or under clause (b) of the section 14, it is proved that any gratification (other than legal remuneration) or any valuable thing has been given or offered to be given or attempted to be given by an accused person, it shall be presumed, unless the contrary is proved, that he gave or offered to give or attempted to give that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in section 7, or the case may be, without consideration or for a consideration which he knows to be inadequate.
(3) Notwithstanding anything contained in sub-sections (1) and (2), the court may decline to draw the presumptionreferred to in either of the said sub-sections, if the gratification or thing aforesaid is, in its opinion, so trivial that no inference of corruption may fairly be drawn."[131]

The section provides that in a trial where an accused person is being tried for an offence under section 7 or section 11 or clause (a) or clause (b) of sub-section (1) of section 13 and in the course of the proceedings it is proved that accused has accepted or obtained any gratification or a valuable thing it shall be presumed that he has done

[131] *PCA, 1988*, S. 20

so for a motive or reward mentioned in Section 7. In other words the court shall presume that accused accepted or obatained gratification for a reward or motive mentioned in Section 7 and the burden of proof will shift on the accused. The Section similarly provides for shifting of burden of proof in case of offences under section 12 or under clause (b) of the section 14. Usually in criminal cases the burden of proof is on the prosecution to prove the guilt of the accused and if prosecution fails to do so then accused is acquitted of the alleged offence. But Section 20 here provides for the shifting of burden of proof on the accused if in the course of trial it has been proved that he accepted gratification. This burden can again shift to the prosecution if the accused proves the contrary. It should be noted that S. 20 only talks about the cases in which it has been proved that accused has accepted any gratification, therefore, proving the acceptance of gratification is pre-condition for the application of this section. Thus, in cases in which the acceptance of gratification has not been proved the burden of proof will be on the prosecution and not on the accused. There is a debate about whether the burden of proof and that its standard should be lowered in corruption cases which will be discussed later.

Another provision worth disserting is Section 24 of the Act. It is as follows:

"*Section 24. Statement by bribe giver not to subject him to prosecution.- Notwithstanding anything contained in any law for the time being in force, a statement made by a person in any proceeding against a public servant for an offence under sections 7 to 11 or under section 13 or section 15, that he offered or agreed to offer any gratification (other than legal remuneration) or any valuable thing to the public servant, shall not subject such person to a prosecution under section 12.*"[132]

This provision provides immunity to the bribe-giver from prosecution if he makes a statement before the court that he offered or agrred to offer bribe. The provision has been criticised for the fact that in cases where the bribe-giver is the victim as he has been coerced to give bribe this section makes sense but not in cases of collusive bribery where both bribe-giver and bribe taker are equally guilty.

[132] *PCA, 1988*, S. 24

As the discussion shows the judiciary has tried to lower the impediments in dealing with the menace of corruption time and again by declaring MPs, MLAs, members of Higher Judiciary to be public servants, by setting a time limit for competent authorities for the purpose of granting sanction for the prosecution of corrupt officials, by striking down Section 6-A (1) of the Delhi Special Police Establishment Act, 1946, by explaining the meaning and scope of public duty, by clarifying the substance of the powers of a special Judge etc. But despite this the conviction rate in corruption cases remains very low. In a reply to unstarred question no. 2384 in 16th Lok Sabha, answered on 11.03.2015, following annexure was given:

ANNEXURE[133]

No. of PC Act Cases registered by CBI during last 03 years i.e. 2012, 2013, 2014 and 2015 (upto 31.01.2015)

Year	Number of PC Act cases registered	Out of column (2) number of cases in which chargesheet has been filed	Out of column (2) number of cases Closed/SA/ otherwise disposed off	Out of column (2) number of cases ended in RDA	Out of column (2) number of cases pending under investigation	Out of column (2) number of cases ended in conviction
1	2	3	4	5	6	7
2012	703	489	99	57	58	30
2013	649	426	33	28	162	5
2014	611	210	12	7	382	0
2015	56	0	0	0	56	0
Upto 31.1.15 Total	2019	1125	144	92	658	35

Thus, out of 2019 cases only 35 have resulted in conviction of the accused persons. What implications such a scenerio can present will be discussed in futher discussions

[133] http://164.100.47.192/Loksabha/Questions/QResult15.aspx?qref=14133&lsno=16

on cost approach and behavioural analysis. Also, it has been alleged time and again, before the court and otherwise, that the provision for the requirement of sanction for prosecution by competent authorities has often been used for shielding corrupt officials and it has deterred human actors to pursue such prosecutions. This is taken up for analysis in further discussions. Earlier I have argued that corruption shall also be seen as a phenomenon which undermines the ideals of democracy, subverts constitutional machinery, promotes inequality, creates inefficiencies in delivery of public services, limits the scope of collective decision making, erodes social trust, and violates human rights. Analysis of this legislation (PC Act, 1988) and the judicial decisions finds the courts have discussed at length the predicament of corruption and its ill effects on society but not nearly in the aforesaid sense. I have also aruged that corruption in the public understanding should also be seen as condition of the body politic alongwith the idea of abuse of public office for private gains. Again courts do regard corruption as a social issue and the concepts like 'public duty' used in the legislation can be used in linking the idea of individual and social, but such endeavours have not caught the imagination of the people on a larger scale which is evident from the lack of use of the concept of public duty in anti-corruption prosecutions. In further discussions there is an effort to capture this issue with help of other tools for better analysis.

What can be gathered from the above analysis is the fact that there has been an array of efforts to make the legislation on corruption more potent view a view to tackle the issue of corruption. Broadly these endeavours include the following:

- *Firstly, to broaden the definition and scope of corruption*. Explanation 1 appended to the definition of public servant provides that persons falling under any of the above sub-clauses are public servants, whether appointed by the Government or not. The idea behind this is to make all those working in a Governmental Organization liable for graft who by virtue of their not being appointed by the Government claim the benefit or immunity of not being a public servant. Secondly, Explanation 2 to the said provision says that wherever the words 'public servant' occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation. This

clearly takes note of the situation where holders of public offices by virtue of some legal defect in their right to hold such office may escape the liability for their corrupt transactions. To prevent such an eventuality the explanation clearly equates the actors in actual possession of the situation of a public servant as public servants even though there may be some defect in their right to hold such office. Thus, both the explanations have the effect of further enlarging the scope of the definition to cover those cases which escape the liability merely due to technicalities. The scope of the term 'public servant' is also broadened by clause (viii) of the aforementioned section which deems any person who holds an office by virtue of which he is authorised or required to perform any public duty to be a 'public servant'.

- *Secondly, inclusion of members of the Higher Judiciary, viz. the Judges of the High Court and the Supreme Court within the definition of 'public servant'* in consequence of a series of case law.
- *Thirdly, inclusion of M.P.s and M.L.A.s within the definition of 'public servant'* for the purposes of Prevention of Corruption Act, 1988.
- *Fourthly, encompassing within the definition of 'State' various PSUs or corporations receiving the aid of the Government or which are owned or controlled by the Government.*
- *Fifthly, the definition of 'public duty' includes concepts like 'State interest', 'public interest' and 'community interest' which have a potential for expanding the scope of public duty.*
- *Sixthly, bringing clearity to the meaning of words 'accept' and 'obtain' via case law.*
- *Seventhly, bringing clearity as well as lowering of barriers associated with the provision of 'sanction' to prosecute corrupt officials.*
- *Eigthly, the shifting of burden of proof on the accused if in the course of trial it has been proved that he accepted gratification.*
- *Ninthly, providing immunity to the bribe-giver from prosecution if he makes a statement before the court that he offered or agrred to offer bribe.*

Despite these and other ancilliary changes the data of past few years demonstrates that actual conviction rate has been extremely low in corruption cases if we go by the

figures presented in the Lok Sabha. But if one ponders over thes figures in terms of methodology certain incongurities may appear. For instance the rate of conviction is based upon the 'number of PC Act cases registered' within an year and 'number of cases ended in conviction' out of those registered case within that same year. Problem with such methodology lies in the fact that corruption or any other trial in India is a lengthy process and it is highly unlikely that such a trial gets concluded within the same year and if one goes for tracking the conclusion of each and every trial or case commenced within a particular year it might take decades to accomplish that task. This methodology is also responsible for highly distorting the actual conviction rate which a bunch of cases filed within a particular year may reflect when each and every case is tracked to its conclusion. But this task may extremely burdensome and time taking. What I suggest instead to track 'total number of persons in whose cases trial is completed' within a year and 'persons convicted' out of those completed trials. In other words to calculate the conviction rate two things need to be enumerated: first, the number of case getting concluded within a particular year and second the total number of persons geeting convicted within that particular year. One problem which this proposed methodology may pose is that there might be cases in which more than one individual is being prosecuted and to crorect for the same we may use the number of persons in whose cases trial is compleleted within a particular year and juxtapose it with number of persons getting convicted within that year. Using the aforementioned methodology the conviction rates of major states were calculated (using the data provided by National Crime Records Bureau[134]) leaving out states (mostly North-Eastern states and some UTs) where both parametres corrosponded to almost zero.

ANDHRA PRADESH

Conviction Rate: 53.5%

Year	Persons In Whose Cases Trial Completed	Persons Convicted
2001	44	22
2002	90	47
2003	109	43
2004	100	49

[134] www.ncrb.in

2005	163	89
2006	266	149
2007	298	188
2008	230	151
2009	247	110
2010	192	109
2011	253	114
2012	178	69
Total	2170	1140

ASSAM

Conviction Rate: 76.47%

Year	Persons In Whose Cases Trial Completed	Persons Convicted
2002	0	0
2003	0	0
2004	0	0
2005	1	1
2006	3	3
2007	3	3
2008	2	2
2009	3	1
2010	4	2
2011	5	3
2012	13	11
Total	34	26

BIHAR

Conviction Rate: 72.54%

Year	Persons In Whose Cases Trial Completed	Persons Convicted
2001	10	8
2002	10	9
2003	6	3
2004	11	10
2005	5	3
2006	1	1
2007	4	4
2008	9	8
2009	5	3
2010	12	10
2011	17	4
2012	12	11
Total	102	74

CHHATTISGARH

Conviction Rate: 43.14%

Year	Persons In Whose Cases Trial Completed	Persons Convicted
2002	105	49
2003	105	49
2004	34	21
2005	32	15
2006	21	6
2007	16	4
2008	31	9
2009	21	3
2010	9	4

2011	11	6
2012	9	4
Total	394	170

GUJRAT

Conviction Rate: 31.2%

Year	Persons In Whose Cases Trial Completed	Persons Convicted
2002	154	39
2003	177	55
2004	312	100
2005	455	122
2006	432	130
2007	494	167
2008	200	70
2009	207	66
2010	123	51
2011	135	52
2012	158	39
Total	2847	891

HARAYANA

Conviction Rate:22.7%

Year	Persons In Whose Cases Trial Completed	Persons Convicted
2001	63	4
2002	68	10
2003	72	27
2004	236	51
2005	289	80

2006	145	33
2007	404	42
2008	222	46
2009	420	104
2010	524	88
2011	241	100
2012	211	73
Total	2895	658

HIMACHAL PRADESH

Conviction Rate: 16.04%

Year	Persons In Whose Cases Trial Completed	Persons Convicted
2001	23	4
2002	59	9
2003	43	8
2004	44	20
2005	31	9
2006	23	5
2007	105	1
2008	103	12
2009	175	14
2010	83	11
2011	292	52
2012	172	40
Total	1153	185

JAMMU AND KASHMIR

Conviction Rate: 9.89%

Year	Persons In Whose Cases Trial Completed	Persons Convicted
2001	37	6
2002	61	1
2003	70	5
2004	152	7
2005	42	7
2006	83	8
2007	48	5
2008	93	6
2009	93	6
2010	35	4
2011	33	11
2012	51	13
Total	798	79

JHARKHAND

Conviction Rate: 85.7%

Year	Persons In Whose Cases Trial Completed	Persons Convicted
2002	0	0
2003	8	4
2004	1	1
2006	1	1
2007	0	0
2008	0	0
2009	0	0
2010	0	1
2011	0	1
2012	4	4
Total	14	12

KARNATAKA

Conviction Rate: 20.2%

Year	Persons In Whose Cases Trial Completed	Persons Convicted
2001	174	15
2002	122	9
2003	186	19
2004	265	41
2005	271	42
2006	262	27
2007	171	35
2008	125	20
2009	165	29
2010	277	87
2011	269	85
2012	212	96
Total	2499	505

KERALA

Conviction Rate: 49.82%

Year	Persons In Whose Cases Trial Completed	Persons Convicted
2001	78	58
2002	80	45
2003	74	26
2004	81	23
2005	94	33
2006	42	26
2007	98	62
2008	130	85
2009	150	71

2010	117	71
2011	88	40
2012	110	29
Total	1142	569

MADHYA PRADESH

Conviction Rate: 43.2%

Year	Persons In Whose Cases Trial Completed	Persons Convicted
2001	214	69
2002	190	74
2003	140	64
2004	161	72
2005	203	82
2006	246	144
2007	221	111
2008	267	70
2009	63	34
2010	90	45
2011	92	49
2012	121	54
Total	2008	868

MAHARASHTRA

Conviction Rate: 24.75%

Year	Persons In Whose Cases Trial Completed	Persons Convicted
2001	363	117
2002	443	105
2003	504	131

2004	735	193
2005	811	195
2006	555	134
2007	467	97
2008	678	151
2009	647	137
2010	543	85
2011	517	103
2012	676	146
Total	6439	1594

ODISHA

Conviction Rate: 32.63%

Year	Persons In Whose Cases Trial Completed	Persons Convicted
2001	63	10
2002	77	7
2003	64	14
2004	78	13
2005	78	19
2006	197	55
2007	124	46
2008	155	61
2009	191	86
2010	309	98
2011	283	107
2012	204	79
Total	1823	595

PUNJAB

Conviction Rate: 35.08%

Year	Persons In Whose Cases Trial Completed	Persons Convicted
2001	155	43
2002	199	90
2003	199	90
2004	262	114
2005	287	95
2006	251	62
2007	223	70
2008	246	80
2009	534	164
2010	379	104
2011	511	205
2012	294	125
Total	3540	1242

RAJASTHAN

Conviction Rate: 26.07%

Year	Persons In Whose Cases Trial Completed	Persons Convicted
2001	345	77
2002	345	77
2003	347	106
2004	397	108
2005	317	96
2006	455	97
2007	461	169
2008	203	72
2009	76	23
2010	135	14

2011	409	59
2012	130	46
Total	3620	944

SIKKIM

Conviction Rate: 60%

Year	Persons In Whose Cases Trial Completed	Persons Convicted
2001	6	3
2002	4	3
2003	0	0
2004	3	1
2005	3	3
2006	8	3
2007	7	5
2008	7	3
2009	0	0
2010	1	0
2011	10	6
2012	16	12
Total	65	39

TAMIL NADU

Conviction Rate: 36.51%

Year	Persons In Whose Cases Trial Completed	Persons Convicted
2001	25	13
2002	87	72
2003	39	23
2004	42	26

2005	54	27
2006	41	20
2007	88	43
2008	166	63
2009	96	37
2010	255	31
2011	165	41
2012	114	32
Total	1172	428

UTTAR PRADESH

Conviction Rate: 14.8%

Year	Persons In Whose Cases Trial Completed	Persons Convicted
2001	3	0
2002	8	1
2003	12	2
2004	11	1
2005	15	0
2006	21	0
2007	15	2
2008	20	3
2009	11	4
2010	30	3
2011	15	7
2012	21	4
Total	182	27

UTTARAKHAND

Conviction Rate: 36.84%

Year	Persons In Whose Cases Trial Completed	Persons Convicted
2001	1	0
2002	0	0
2003	2	0
2004	1	0
2005	0	0
2006	0	0
2007	1	0
2008	1	0
2009	1	1
2010	2	2
2011	5	2
2012	5	2
Total	19	7

WEST BENGAL

Conviction Rate: 3.57%

Year	Persons In Whose Cases Trial Completed	Persons Convicted
2001	1	1
2002	0	0
2003	0	0
2004	0	0
2005	0	0
2006	0	0
2007	28	0
2008	0	0
2009	0	0
2010	0	0
2011	0	0
2012	0	0

Total	29	1

DELHI

Conviction Rate: 51.59%

Year	Persons In Whose Cases Trial Completed	Persons Convicted
2001	77	5
2002	47	14
2003	40	9
2004	49	22
2005	56	22
2006	50	37
2007	86	44
2008	87	61
2009	92	50
2010	132	61
2011	165	105
2012	125	89
Total	1006	519

PUDUCHERRY

Conviction Rate: 29.41%

Year	Persons In Whose Cases Trial Completed	Persons Convicted
2001	0	0
2002	4	0
2003	2	0
2004	1	0
2005	0	0
2006	4	1

2007	6	6
2008	0	0
2009	2	0
2010	3	1
2011	5	2
2012	7	0
Total	34	10

CHANDIGARH

Conviction Rate: 39.43%

Year	Persons In Whose Cases Trial Completed	Persons Convicted
2001	1	0
2002	5	1
2003	1	0
2004	1	0
2005	1	0
2006	2	0
2007	8	3
2008	4	3
2009	14	6
2010	13	8
2011	3	2
2012	18	5
Total	71	28

Usually the figures used to manifest the conviction rate in corruption cases are those related to cases handled by CBI which are very low when compared with the data for States, for instnace if we calculate the conviction rate based on the figures presented in Lok Sabha for years 2012, 2013 and 2014 the conviction rate would be around 1.7%. General understanding is that conviction rate in corruption cases is extremely

low which may not be entirely true when compared with the conviction rate of other crimes in India. In fact it is more than or close to 50% in seven states which is not a low figure in Indian context. Also, if National Average is calculated from above figures it comes around 31.15% which is not ridiculously low as in case of CBI. In other words if I am told that out of every 3 persons nearly one person is getting convicted in corruption case then it may not sound as such a low figure. One can counter argue that the number of persons getting convicted is low when compared with number of persons getting arrested. But these figures should not be confused with the disposal rate of corruption cases which is low not just for corruption cases but for other crimes as well. If we go by the media reporting of the conviction rate in corruption cases we come across top stories like these: 'CBI conviction rate stands at a lowly 4%, reveals study'[135]; '0%: Mumbai's Anti-Corruption Bureau's conviction rate in 2016'[136]; 'Convictions in corruption cases probed by CBI has declined since 2014: Government'[137]. But recently there was a top story which said: 'In 70% of the cases, CBI secures conviction of the tainted officials'[138]. This was based upon a study conducted by factly.com over a period of ten years viz. 2006-2016 with regard to cases handled by the CBI. Most of the media reporting of conviction rate in corruption cases is concerned with cases taken up by the CBI. This overlooks the plethora of cases handled by the Anti-Corruption Bureaus of the repective states. This hints at the possibility of a gap in conviction rate in the consciousness of the society and the actual statistical evidence. This becomes important with regard to the discussion on behavioural dimension of corruption which argues the possible repurcussions of a gap between perception and actual statistical evidence in relation to conviction in corruption cases. Thus, it becomes important not just to know the actual conviction rates in corruption cases but also to have a sense of perceptions of the people about such rates and other issues surrounding corruption. The importance of

[135] S. K. Baruah, 'CBI conviction rate stands at a lowly 4%, reveals study', *Hindustan Times*, 3rd November, 2012 http://www.hindustantimes.com/delhi-news/cbi-conviction-rate-stands-at-a-lowly-4-reveals-study/story-wfZ2GgFUuGIeH4M9SAwIjM.html (accessed 4th May, 2017)

[136] J. P. Naidu, '0%: Mumbai's Anti-Corruption Bureau's conviction rate in 2016', *Hindustan Times*, 23rd May, 2016 http://www.hindustantimes.com/mumbai/0-mumbai-anti-corruption-bureau-s-conviction-rate-in-2016/story-fAVLotaMRQwCvD81cK3I6J.html (accessed on 4th May, 2017)

[137] 'Conviction rate in corruption cases probed by CBI has declined since 2014: Government', *Daily News and Analysis*, 9th March, 2016 http://www.dnaindia.com/india/report-convictions-in-corruption-cases-probed-by-cbi-has-declined-since-2014-government-2187326 (accessed on 4th May, 2017)

[138] H. Dhawan, 'In 70% of the cases, CBI secures conviction of the tainted officials', *Times of India*, 18th September, 2016 http://timesofindia.indiatimes.com/india/In-70-of-cases-CBI-secures-conviction-of-tainted-officials/articleshow/54385604.cms (accessed on 4th May, 2017)

such analysis is discussed at length in the behavioural part of this study and it is therefore important to make that link clear at this juncture.

PRVENTION OF CORRUPTION (AMDEMENT) BILL 2013

As I write this The Prevention of Corruption (Amendment) Bill, 2013 is still pending which proposes considerable changes in the 1988 Act. The Statement of Objects and Reasons of the Bill states: "The Prevention of Corruption Act, 1988 provides for prevention of corruption and for matters connected therewith. The ratification by India of the United Nations Convention Against Corruption, the international practice on treatment of the offence of bribery and corruption and judicial pronouncements have necessitated a review of the existing provisions of the Act and the need to amend it so as to fill in gaps in description and coverage of the offence of bribery so as to bring it in line with the current international practice and also to meet more effectively, the country's obligations under the aforesaid Convention. Hence, the present Bill." The 69th Report of the Department Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice the 254th Report of the Law Commission of India (hereinafter referred to as 254th Report), both on The Prevention of Corruption (Amendment) Bill, 2013, point out the deficiencies of the Bill. The concerned Bill proposes to replace the current Section 7 by the following provision:

"*7. (1) Any person, being, or expecting to be, a public servant who,—*

(a) requests any person for, or obtains or agrees to receive or accepts or attempts to obtain from any person, any financial or other advantage, intending that, in consequence, a relevant public function or activity would be performed improperly either by himself or by another public servant; or

(b) requests for, or obtains or agrees to receive or accepts or attempts to obtain, a financial or other advantage from any person and the request, agreement, acceptance or attempt itself constitutes the improper performance of a relevant public function or activity; or

(c) requests for, or obtains or agrees to receive or accepts or attempts to obtain, a financial or other advantage as a reward for the improper performance (whether by

himself or by another public servant)of a relevant public function or activity; or

(d) performs, or induces another public servant to perform, improperly a relevant public function or activity in anticipation of or in consequence of requesting, agreeing to receive or accepting a financial or other advantage from any person, shall be punishable, with imprisonment which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

Explanation 1.—It shall be immaterial whether—

(a) such person being, or expecting to be, a public servant requests or obtains or agrees to receive or accepts, or attempts to obtain (or is to request, agree to receive, or accept) the advantage directly or through a third party;

(b) the financial or other advantage is, or is to be, for the benefit of such person being or expecting to be, a public servant or another person.

Explanation 2.—It shall be immaterial, whether such person being, or expecting to be, a public servant knows or believes that the performance of the public function or activity is improper or whether the public servant who is induced to perform improperly a relevant public function or activity knows or believes that the performance of the public function or activity is 25 improper.

Explanation 3.—"Expecting to be a public servants" If a person not expecting to be in office agrees to receive or accepts or attempts to obtain from any person, any other financial or other advantage by deceiving such other person into a belief that he is about to be in office, and that he will then serve him, he may be guilty of cheating, but he is not guilty of the offence defined in this section.

Explanation 4.—Where a public servant induces a person erroneously to believe that his influence with the Government has obtained a title or other benefit for that person and thus induces that person to give the public servant, any financial or other advantage as a reward for this service, the public servant has committed an offence under this section.

(2) For the purposes of this Act,— (a) a function or activity is a public function or activity, if—

(i) the function or activity is of a public nature;

(ii) the function or activity is performed in the course of a person's employment as a public servant;

(iii) the person performing the function or activity is expected to perform it impartially and in good faith; and

(iv) the person performing the function or activity is in a position of trust by virtue of performing it;

(b) a public function or activity is performed improperly, if— (i) it is performed in breach of a relevant expectation; and

(ii) there is a failure to perform the function or activity and that failure is itself a breach of a relevant expectation;

(c) "relevant expectation",—

(i) in relation to a public function or activity performed, means the performing of the public function or activity impartially or in good faith, as the case may be;

(ii) in relation to a public function or activity performed in a position of trust (by virtue of performing such function or activity), means any expectation as to the manner in which, or the reasons for which, the function or activity will be performed that arises from the position of such trust;

(d) anything that a public servant does, or omits to do, arising from or in connection with that person's past performance of a public function or activity shall be treated as being done, or omitted, by that person in the performance of that function or activity;

(e) the test of what is expected is a test of what a reasonable person in India would expect in relation to the performance of the type of public function or activity concerned."[139]

[139] Prevention of Corruption (Amendment) Bill, 2013, S. 7

The 254th Report points out that Section 7 of the PC Act 1988 makes it an offence for a public to "accept, obtain, agree to accept or attempt to obtain" any gratification whatever, other than legal remuneration under certain circumstances whereas amended Section 7(1) uses the terms "requests any person for, obtains, agrees to receive, accepts or attempts to obtain" any "undue financial or other advantage" for the "improper performance" of a "relevant public function or activity". This is attempted at amending the Act on the lines of UK Bribery Act (rather than UNCAC) which covers corruption in private sector as well. The 254th Report recommends for deletion of phrase 'requests for' (which has been lifted from UK Bribery Act) as the same has been criminalized under phrase 'attempts to obtain' of the present Act. The Report also recommends deletion of word 'relevant' where it appears before phrase 'public function or activity'. The reasons it gives for the same is following:

"a. The term 'relevant function or activity' has been included, and defined in section 3 of the Bribery Act, because the Act sought to punish private acts of bribery, but wanted to classify only some of them as punishable. This is not relevant in the Indian context because the PC Act only deals with corruption amongst public servants. Hence, the word "relevant" is not as useful.

b. Moreover, unlike section 3 of the Bribery Act which defines "relevant function or activity", the proposed section 7(2)(a) only defines "public function or activity", thereby creating unnecessary confusion about the use of "relevant"."[140]

One of the foremost criticisms of the 254th Report is that 2013 Bill has merely lifted provisions from the UK Bribery Act without understanding their scope. Moreover the Bill has failed to illustrate applicability of those provisions by PC Act which has further added to the ambiguity regarding interpretation of Section 7. Next important provision which the Bill proposes to replace is Section 8 which is presented in the following form:

"*8. Any person who—*

(a) offers, promises or gives a financial or other advantage to another person, and intends such financial or other advantage—

[140] Law Commission of India, *Report no. 254: Prevention of Corruption (Amendment) Bill, 2013*, New Delhi, Government of India, February 2015, pp. 9-10

(i) to induce a public servant to perform improperly a public function or activity; or

(ii) to reward such public servant for the improper performance of such public function or activity; or

(b) offers, promises or gives a financial or other advantage to a public servant and knows or believes that the acceptance of such financial or other advantage by the public servant would itself constitute the improper performance of a relevant public function or activity, shall be punishable with imprisonment which shall not be less than three years but which may extend to seven years and shall also be liable to fine:

Provided that when the offence under this section has been committed by a commercial organisation, such commercial organisations shall be punishable with fine.

Explanation.—It shall be immaterial whether the person to whom the financial or other advantage is offered, promised or given is the same person as the person who is to perform, or has performed, the public function or activity concerned, and, it shall also be immaterial whether such financial or other advantage is offered, promised or given by the person directly or through a third party."[141]

The Statement of Objects and Reasons explains the purpose of introducing Section in following words: "Experience has shown that in a vast majority of cases, the bribe-giver goes scot free by taking resort to the provisions of section 24 and it becomes increasingly difficult to tackle consensual bribery. The aforesaid Convention enjoins that the promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, be made a criminal offence. Accordingly, it is proposed to substitute a new section 8 to meet the said obligation." 254th Report accuses Section 8 by stating that "Section 8 (a) suffers from similar problems as section 7(1)(a) in that it prima facie suggests that the section criminalises only those cases where the person bribes a public servant to perform a public function or activity "improperly". It does not seem

[141] *PC(Amendment) Bill, 2013*, S. 8

to cover those cases, which are very common in India, where the bribe giver is seeking the performance of a routine, or 'proper' public function e.g. giving a bribe to process a routine application."[142] Also, it is criticized for lack of illustration and proper explanation increasing the ambiguity of the provision.

Bill further proposes to replaces Sections 9 and 10 of the current Act by following provisions:

"*9. (1) A commercial organisation shall be guilty of an offence and shall be punishable with fine, if any person associated with the commercial organisation offers, promises or gives a financial or other advantage to a public servant intending—*

(a) to obtain or retain business for such commercial organisation; and

(b) to obtain or retain an advantage in the conduct of business for such commercial organisation:

Provided that it shall be a defence for the commercial organisation to prove that it had in place adequate procedures designed to prevent persons associated with it from undertaking such conduct.

(2) For the purposes of this section, a person offers, promises or gives a financial or other advantage to a public servant if, and only if, such person is, or would be, guilty of an offence under section 8, whether or not the person has been prosecuted for such an offence.

(i) a body which is incorporated in India and which carries on a business, whether in India or outside India;

(ii) any other body which is incorporated outside India and which carries on a business, or part of a business, in any part of India;

(iii) a partnership firm or any association of persons formed in India and which carries on a business (whether in India or outside India); or

(iv) any other partnership or association of persons which is formed outside India and

[142] Law Commission of India, *Report no.* 254, pp. 25-26

which carries on a business, or part of a business, in any part of India;

(b) "business" includes a trade or profession or providing service including charitable service;

(c) a person is said to be associated with the commercial organisation if, disregarding any offer, promise or giving a financial or other advantage which constitutes offence under sub-section (1), such person is a person who performs services for or on behalf of the commercial organisation.

Explanation 1.—The capacity in which the person performs services for or on behalf of the commercial organisation shall not matter irrespective of whether such person is employee or agent or subsidiary of such commercial organisation.

Explanation 2.—Whether or not the person is a person who performs services for or on behalf of the commercial organisation is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between such person and the commercial organisation.

Explanation 3.—If the person is an employee of the commercial organisation, it shall be presumed unless the contrary is proved that such person is a person who performs services for or on behalf of the commercial organisation.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the offence under section 8 and this section shall be cognizable.

10. (1) Where a commercial organisation has been guilty of an offence under section 9, every person who at the time the offence was committed was in charge of, and was responsible to, the commercial organisation for the conduct of the business of the commercial organisation shall be deemed to be guilty of the offence and shall be punishable with imprisonment which shall not be less than three years but which may extend to seven years and shall also be liable to fine:

(3) For the purposes of section 8 and this section,— (a) "commercial orgnisation"

means—

Provided that nothing contained in this sub-section shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he has exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under 5 section 9 has been committed by a commercial organisation and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of any director, manager, secretary or other officer of the commercial organisation, such director, manager, secretary or other officer shall also be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly under this section.

Explanation.—For the purposes of this section, "director", in relation to a firm, means a partner in the firm."[143]

While Section 8 of the Bill penalizes a commercial organization's act of bribing a public servant Section on the other hand criminalizes the failure of commercial organization to prevent persons associated with it from bribing a public servant. The 254th Report observes: "Section 9 creating an offence relating to bribing of a public servant by a commercial organisation is taken from section 7 of the UK Act, which deals with the failure of a commercial organisation to prevent bribery. In the UK context, it would be punishable for a private person to bribe another private person or a public servant in the context of commercial organisations intending to obtain or retain business. In the proposed 2013 amendment, the only bribery that is made punishable is when it pertains to a public servant for the purposes of section 9(1)(a) and (b). Hence, section 9 is a distinct offence from section 8."[144] The report recommends amending the proposed provision by introducing a statutory obligation on the government to publish guidelines for the commercial organisations so that they can put in place 'adequate systems' to prevent persons associated with it from bribing

[143] *PC(Amendment) Bill, 2013*, Sections 9-10
[144] Law Commission of India, *Report no.* 254, p 31

public servants.

Section 10 of the proposed Bill deems every person who is in charge of and responsible for the conduct of the business of the commercial organization to be liable for an offence under Section 9 of the proposed amendment. Report explains the the import of the Section as: "The effect of section 10 is that if an employee (P) of a company (C), sitting in Bangalore bribes a local official (R) to get its clearance on time, then the combined effect of the 2013 Bill is that P will be liable under section 8; R under section 7; and C under section 9, unless it can prove it has in place adequate procedures designed to prevent such conduct. However, section 10 will operate to deem every single person in charge of, and responsible to, C – thus, every Director on the Board of Directors, who may be sitting in Delhi more than 2000 kms away – guilty, and the burden on proof will shift on each of these Directors to prove they had no knowledge or had exercised due diligence. The situation could be even worse if for instance, P had the high level clearance of one of the sitting Directors to bribe R, because of which every other Director will now be faced with the difficult task of discharging their high burden of proof. As is evident thus, section 10(1) of the 2013 Bill is overbroad and unlike the provisions in the UNCAC or the UK Bribery Act. However, even section 10(2), with its elements of negligence, is overtly broad and not along the lines of section 14(2) of the UK Bribery Act. To provide for consistency and coherence between sections 9 and 10 of the 2013 Bill and to remove the over-broad elements of negligence, section 10 should be redrafted."[145]

Further the Bill omits Section 11 of the PC Act, which deals with public servant accepting a valuable thing without consideration or inadequate consideration, since the same has been taken care of by the provisions of reformulated Section 7. Next provision to be added to the current framework is Section 17A which was added pursuant to the 2014 amendment.

"*17A. Investigation of offences relatable to recommendations made or decision taken by public servant in discharge of official functions or duties.*

[145] Ibid. pp. 35-36

(1)No police officer shall conduct any investigation into any offence alleged to have been committed by a public servant under this Act, where the alleged offence is relatable to any recommendation made or decision taken by a public servant in the discharge of his official functions or duties, without the previous approval-

(a) of the Lokpal, in the case of a public servant who is employed, or as the case may be, was at the time of commission of the alleged offence employed in connection with the affairs of the Union, and is a person referred to in clauses (a) to (h) of sub-section (1) of section 14 of the Lokpal and Lokayuktas Act, 2013;

(b) of the Lokayukta of the State or such authority established by law in that State under whose jurisdiction the public servant falls, in the case of a person who is employed, as the case may be, was at the time of commission of the alleged offence employed in connected with the affairs of a State, conveyed by an order issued by the Lokpal in accordance with the provisions contained in Chapter VII of the Lokpal and Lokayuktas Act, 2013 or Lokayukta of the State or such authority referred to in clause (b) for processing of inestigation against the public servant

Provided that no such approval shall be necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any undue financial or other advantage for himself or for any other person intending that, in consequence, a relevant public function or activity shall be performed improperly either by himself or by another public servant."[146]

The 254th Report observes: "The proviso to the proposed section 17A (1) is similar to Clause (2) of the repealed section 6A of the Delhi Special Police Establishment Act, 1946 (hereinafter "DSPE Act") which provided that in certain factual scenarios/gross cases, no sanction/previous approval would be necessary. However, the proviso to the proposed section 17A (1) is narrower than Section 6A (2) of the DSPE Act – now requiring that even if a person is caught on the spot while accepting illegal gratification ("undue financial or other advantage"), it would have to be shown by the prosecution that it was intended that such acceptance consequential to a relevant public function or activity being performed improperly."[147] The last important set of

[146] *PC(Amendment) Bill, 2013*, S. 17-A
[147] Law Commission of India, *Report no.* 254, pp. 45-46

changes which the Bill seeks to propose are provisions related to attachment and forfeiture of property. This includes a lengthy chapter the provisions. These provisions though intended to give clarity to the procedure related to attachment and forfeiture are more likely to create confusion as there are already statutes governing the same. These are The Criminal Law (Amendment) Ordinance, 1944, Prevention of Money Laundering Act, 2002, and The Lokpal and Lokayukta Act, 2013. Even the 254th Report recommends replacing the sections 18A-18N by a single provision which will refer to the provisions from the Criminal Law (Amendment) Ordinance, 1944 and Prevention of Money Laundering Act, 2002.

It would have been worthwhile to engage in a deeper discussion with regard to the provisions of the Bill had they been enacted and put into force but it has been three years and the Bill has not passed and in the meanwhile there is a plethora of addendums made to it which make it more troublesome to delve into such discussion as the document with its proposed changes has become an extremely complex document.

COMMENT

Over the years there have been modifications by means of amendments and judicial interpretation to make the law relating to corruption not only more wider in scope but also procedurally less troublesome for the prosecutors. This was much needed because prosecution of corrupt actors has never been an easy task especially when coupled with the impediments which accompanied this Act. In the previous chapter the public private dichotomy in the definitions of corruption was analyzed. The PC Act, 1988 defines corruption in a transactional sense which is much appreciated considering the practicalities of legal interpretation, detection and enforcement. But it would be unfair to say that the aforesaid Act just focuses on the transactional part of the corruption as it also corroborates a link with the body politic part of the corruption when it makes use of concepts like ‘public interest’, ‘state interest’ and ‘community interest’ in the definition of ‘public duty’. Though the Act uses these aforesaid concepts but it nowhere defines them. This leaves room for the judicial interpretation but even courts have refrained from giving a precise definition to these concepts and

have at the same time acknowledged the dynamic nature of such ideas. Courts have tried to delineate the concept of 'public duty' in a manner which denies an unrestricted scope for use of the said concept. According to the courts an act performed by a person may be beneficial to the society or community or may be in the interest of the public but that alone would not make it a 'public duty'. Firstly the person concerned must hold a public office and secondly by virtue of holding that office he must be either authorized or required to perform that duty. This restricts the wide scope which these concepts might acquire. Overall the jurisprudence around the concepts like 'public interest', 'state interest' and 'community interest' with regard to corruption is undeveloped in India. We can acknowledge the link between the transactional and body politic part of the corruption which the Act offers by making use of these concepts but at the same time it needs to be juxtaposed with the fact that case law and jurisprudence around these has not evolved. This is suggestive of a similar trend as was noticed in the definitional part of the corruption in previous chapter. This may raise questions about the possible inter-relation of these trends. Also, does the way we talk about or define or perceive corruption in a society has got anything to do with it? In the behavioural part of this work an attempt has been made to discuss this with the help of tools of content analysis.

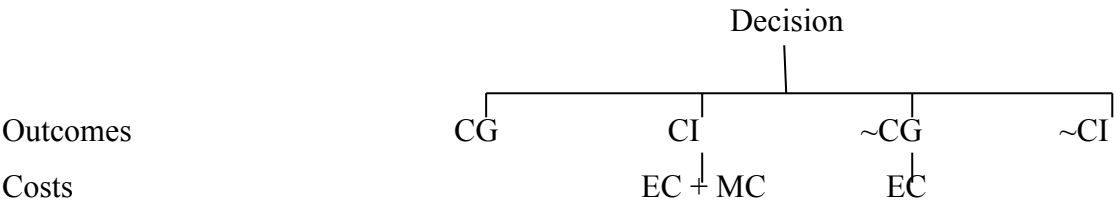
CHAPTER 4: COST APPROACH OF CORRUPTION

Building upon the insights of the earlier chapters this section intends to demonstrate that economic approach focuses mainly on minimization of economic costs at the price of moral costs which though difficult to calculate are invaluable. But when we say that the moral costs of convicting an innocent person are so high that costs of letting go a culprit would not outweigh them then we fail to juxtapose the probable costs of harm to the rights of individuals and society as a whole which a wrongdoer will inflict by his corrupt act. This approach to analysis emanates from the flawed focus on corruption as an individual level phenomenon and not a social transaction.

The section takes the case of Section 20 of the Prevention of Corruption Act, 1988 which provides for the shifting of burden of proof on the accused if in the course of trial it has been proved that he accepted gratification. This burden can again shift to the prosecution if the accused proves the contrary. It should be noted that S. 20 only talks about the cases in which it has been proved that accused has accepted any gratification, therefore, proving the acceptance of gratification is pre-condition for the application of this section. Thus, in cases in which the acceptance of gratification has not been proved the burden of proof will be on the prosecution and not on the accused. There is a debate in Law and Economics scholarship about whether the burden of proof and that its standard should be lowered in corruption cases. This emanates from costs associated with the adjudication itself. The adjudication process involves certain costs in actualizing its end, and the purpose of legal procedure is to minimize two types of costs viz. "error costs" and "direct costs". Error costs are the social costs of incorrect decisions i.e. when a judicial system errs or fails to effectuate the allocative or other social functions accredited to it. While direct costs are the costs of making decisions or running the legal system (public costs for judges' salaries, juries, courthouses etc. and private costs of hiring lawyers, obtaining testimonies etc.)[148] The economic goal is *to minimize the sum of error and direct costs* as it is not desirable to increase the direct cost of legal process by one dollar in order to reduce

[148] R. A. Posner, 'An Economic Approach to Legal Procedure and Judicial Administration', *Journal of Legal Studies*, vol. 2, no. 2, 1973

error costs by 50 (or 99) cents. As Bayles points out "if one tries to minimize only direct costs, error costs might become exorbitant. Similarly, at some point the increase in direct cost to achieve accuracy is greater than savings in reduced error costs"[149]. Bayles further discusses that there can be four possible outcomes of an adjudication. That is, the court can convict a guilty person (CG), convict an innocent person (CI), not convict a guilty person (~CG), or not convict an innocent person (~CI). Out of these outcomes or decisions two are correct i.e. CG and ~CI and two are incorrect CI and ~CG. He says that upshots or aftermaths of each incorrect decision will be inefficient use of resources and inappropriate expenses. Thus, each incorrect decision, whether it be convicting an innocent or not convicting a guilty person, will result in economic costs (which are sum of error costs and direct costs). Here, Bayles introduces the moral costs approach of Dworkin which implies that convicting an innocent person (CI) is worse than not convicting a guilty person (~CG), "regardless of the bare economic harm involved in the two, because it infringes the right not to be convicted if innocent"[150]. Such infringements or violations of rights are moral harms or costs. Thus, to the economic approach of Posner, i.e. to minimize economic costs (which are sum of error costs and direct costs), Bayles adds moral costs approach and proposes that the economic approach should be to minimize the sum of economic costs (EC) and moral costs (MC).



With the help of this diagram or chart he tries to put forward his argument that convicting an innocent person will involve greater costs as compared to not convicting a guilty person, therefore procedural system should be biased to avoid CI errors. Or in other words ~CG errors are preferable to CI errors. And "*this effect can be obtained by shifting the burden of proof to make conviction more difficult*"[151]. Thus, this logic supports the existing system of burden of proof (how they are placed

[149] M. Bayles, 'Principles for Legal Procedure', *Law & Philosophy*, vol. 5, no. 1, 1986, p. 41
[150] Ibid p. 46
[151] Ibid p. 47

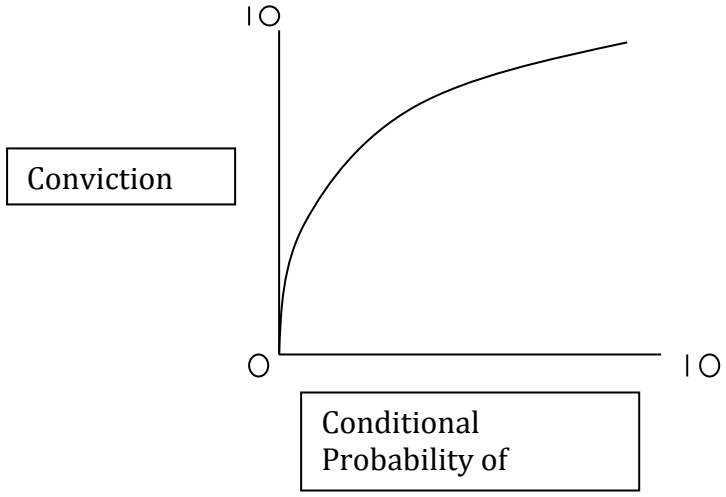
or biased) in the procedural or evidentiary laws. In order to make sure that an innocent person does not get convicted the burden of proof is shifted in favour of the defendant to make conviction more difficult.

It should be noted here that terms 'burden of proof' and 'standard of proof' are not the same though they may appear to be used interchangeably here. 'Burden of proof' means an obligation which is placed on a particular party to the proceedings to produce evidence and prove their case (failing which the claim of that party will also fail), while 'standard of proof' simply means the level of proof demanded in a case e.g. 'beyond reasonable doubt' or 'balancing of probabilities' etc. And as noted above the placing of 'burden of proof' on a particular party has an effect of raising the 'standard of proof'. This is more so in cases of corruption because of the nature of the transaction i.e. the fact that these crimes are committed in secrecy and often the victim is also the co-offender. This may lead to two problems, i.e. the problem of gathering evidence and problem of acquittal, as due to lack of evidence the party on whom there is 'burden of proof' (which is the prosecution in corruption cases) will not be able to fulfil its obligation to prove its claim and hence the defendant will be acquitted.

Apart from the aforesaid costs (error and direct costs) there are two other types of errors in adjudication viz. "biased and unbiased errors". Unbiased error is any error that is as likely to operate against one party to dispute as it is to operate against the other (i.e. both parties have half-half chances of winning) e.g. accepting perjured testimony. A biased error on the other hand is more likely to defeat plaintiffs than defendants or vice versa[152]. An example of biased error would be rule of burden of proof. Now we will discuss the analysis made by Posner regarding the possible effects of raising the standard of proof or biasing the evidentiary or procedural laws to avoid CI errors. Applying Posner's analysis will mean that if we assume that if both parties have same burden of proof, the probability of an accurate determination of liability in both situations will be 90 per cent, meaning that in 10 per cent of the cases in which corrupt person should be convicted gets acquitted, while in 10 per cent of the cases in which accused should be acquitted gets convicted. According to Posner "now let the standard of proof be changed to require that prosecution prove guilt of the accused to

[152] Posner, *Journal of Legal Studies*, pp. 399-401

a certainty. Accused persons will win every case. The probability of innocent persons not being held liable will rise to one, causing the social loss from legal errors favouring corrupt will fall to zero. *But the probability of corrupt persons getting convicted will fall to zero, which will cause the social loss from such failures to rise*"[153]. Thus the above analysis manifests that when the standard of proof is changed to require the prosecution to prove guilt of an accused to certainty (to protect innocent persons) the probability of corrupt persons getting convicted will fall to zero. Consider the following figure illustrated by Posner:



"The rate of conviction of the guilty can be expressed as a decreasing function of the conditional probability of convicting the innocent. This is because a change in the standard of proof that increases the likelihood of an innocent person's being convicted, and vice versa. *If the standard of proof is set so high a level that the probability of an innocent person's being convicted is zero, the conviction rate for the guilty people will also be zero, since only with a zero conviction rate can all possibility of an innocent person's being convicted be eliminated*".[154] Thus it may be regarded as one reason for low conviction rate. Consequently, if the conviction rate of the guilty will be low then the corrupt persons will have more incentive to be corrupt rather than honest. But as pointed out earlier that conviction rates are not ridiculously

[153] Ibid. p. 407
[154] Ibid. p. 411

low statistically as they in popular perception due to huge differences in CBI and State figures.

There are conflicting view as some argue that standard of proof required by PC Act is low as initial burden of proof is on the prosecution while others argue that standard is low as Section 20 provides for shifting of burden of proof if in the course of trial it is proved that accused accepted gratification. Why corruption cases need to be treated differently? In answer to that the proponents of lowering the burden of proof argue that in corruption cases exchanges of gains or the transactions are not carried out in public, these are crimes which are committed in secrecy. Because of this reason it becomes really difficult for the prosecution to identify the witnesses who can appropriately and sufficiently supply or adduce evidence in the court. Also in many of the cases the witnesses are themselves the co-offenders in the case (for example the person who offered the bribe) and therefore as the case proceeds such witnesses tend to become hostile in the court. And in some cases the credibility of such witnesses' testimony is questioned in the court. Due to these predicaments it is desirable to have lower standard of proof in corruption cases as compared with ordinary criminal cases.

One of the principles which seem to be at play in criminal justice system is that a defendant's interest is being balanced against the society's need for effective law enforcement. David Hammer observes in this regard that conviction and punishment of the innocent should be prevented but this goal should not be given the overriding importance which it is getting. He says, "if wrongful convictions were wholly unacceptable the criminal standard of proof would demand absolute certainty. But, as has been widely recognized for many years, '[t]here is no such thing as certainty in this life, absolute certainty'. If absolute certainty were demanded there would be no convictions and '[t]he law would fail to protect the community'. Wrongful convictions are generally recognized as far more harmful than erroneous acquittals but, in administering criminal justice, 'some risk of convicting the innocent must be run'. A standard below absolute certainty is imposed to minimize the expected costs of both wrongful convictions and mistaken acquittals."[155]Stumer also in his work acknowledges that "some wrongful convictions are inevitable and the right not to be

[155] D. Hammer, 'A Dynamic Reconstruction of Presumption of Innocence', *Oxford Journal of Legal Studies*, Vol. 31, No. 2, 2011, p. 422

wrongfully convicted is not absolute"[156] but at the same time advices that "unfairness to the defendant cannot be justified by reference to the community interest in supressing the serious crime."[157]Stumer, does not offer a coherent solution to the problem as on one hand he argues against absolute or mathematical certainty and on the other he prescribes maximal level of certainty. Hammer points out the difficulty of the above situation as follows: "The conceptual distinction between practical certainty and absolute certainty may be useful for some purposes, but the distinction is not clear cut. Absolute certainty occupies a fixed position on the scale of certainty and practical certainty approaches it asymptotically, moving increasingly closer without ever reaching it. As a standard of proof, practical certainty or Stumer's 'highest degree of certainty possible', carries the same risk as an absolute standard. It is unachievable. It will always be possible to imagine further evidence lifting the fact-finder to a higher level of certainty. If the absence of this further evidence is an obstacle to conviction, then conviction would be impossible, leading to a failure of law enforcement."[158]

Lando in his paper concludes: "Let me finally add that the spirit of this article has not been to suggest that wrong convictions should be taken lightly; as revealed by the answers to the survey, social `costs' of wrongful convictions are high. Rather, the idea was that while the wrongful convictions are `costly', so are criminal offenses to the victims, and that it may therefore be misleading to only consider injustice costs when setting the standard of proof." [159] He is simply trying to point out that as per the common understanding the wrongful convictions are costly, and truly so, but at the same time criminal offences to the victims also carry huge costs, thus, it may not be so prudent to consider only the costs of wrongful conviction while setting the standard of proof. Lando in his other work[160] shows that when only deterrence matters the optimal standard of proof is a preponderance-of-the-evidence standard (given some other assumptions) while if fairness is an issue the standard will generally be stricter and involve Bayesian updating. When both fairness and deterrence matter the

[156] A. Stumer, 'The Presumption of Innocence: Evidential and Human Rights Perspectives', Oxford, Hart Publishing, 2010, p. 43
[157] Ibid. p. 155
[158] Hammer, *Oxford Journal of Legal Studies*, p. 424
[159] H. Lando, '*Prevention of Crime* and the *Optimal Standard of Proof in Criminal Law*' (LEFIC Working paper (wp); *2003-04* / LEFIC)
[160] H. Lando, 'The Optimal Standard of Proof in Criminal Law When Both Fairness and Deterrence Matter', Working Paper, Department of Finance, Copenhegan Business School, 2000

standard of proof will (generally) lie in between the two standards. The point to be picked up from this is that if nature of a crime is such that it becomes important to overweigh the fairness concerns by deterrence concerns then the standard of proof needs to be lower and as per Lando it should be at preponderance of the evidence standard.

Moreover, in earlier discussions it has been noted that in corruption cases it is not just the illegal transaction which needs to be prevented but there are equity as well as behavioural concerns. Also, there are concerns like commission of the crime in secrecy, difficulty of identifying witnesses, witnesses being the co-offenders etc. Corruption needs to be treated more seriously as it involves subversion of regimes, democratic principles of representation and constitution itself. As discussed earlier corruption generates certain behavioural concerns as in corrupt regimes citizens will face problems of subversion of regimes, constitutional and democratic principles which may in turn spread the feeling among them that they are not being treated fairly and consequently they may exhibit 'spiteful behaviour' which may be tax evasion, less respect to public goods, disobeying of law, corrupt behaviour etc. Thus, it can be argued that if there are costs of convicting an innocent person then there are also huge costs involved with the phenomenon like subversion of regimes, undermining of democratic and representative processes or abuse of Constitution.

When we say that the moral costs of convicting an innocent person are so high that costs of letting go a culprit would not outweigh them then we fail to juxtapose the probable costs of harm to the rights of individuals and society as a whole which a wrongdoer will inflict by his corrupt act. For instance in an institutional set up where guiding principle is equality before law, i.e. like should be treated alike or all of those who are similarly placed in a society should be treated in a similar manner, if a person who pays bribe is treated more favourably then this is not just abuse of the public office but also of the principles of equality, justice etc. Similarly in a Rawlsian setup a person's ability or inability to pay bribe is a morally arbitrary factor and if distribution of benefits or disadvantages in a society is made on such criteria then clearly violates the standards of fairness and justice. Because of the ability of the corruption to not

only distort or pervert the public offices or agents but also to have such far-reaching repercussions on justice, equality, democratic processes, fairness standards, representation processes, constitutional machinery etc., it also should be considered something which perverts the 'body politic' as well.

The PC Act tries to strike a balance by way of Section 20 which provides for the shifting of burden of proof on the accused if in the course of trial it has been proved that he accepted gratification. This burden can again shift to the prosecution if the accused proves the contrary. Thus, the provision maintains a balance by keeping the standard of proof neither too high by keeping it exclusively within the domain of prosecution nor too low putting it entirely upon the accused.

It is suggested here that one of the principles of an economic approach is optimal information. It has now been repeatedly stated that how the contemporary focus with respect to corruption is on the individual rather than society and numerous arguments have been made for the juxtaposition of both angles. The economic argument made above needs to be taken into account for the sake 'optimal information' concern of the economic approach in addition to the other arguments. Also, like the previous endeavours a trend similar to that noticed in definitional and legal analysis is identified.

CHAPTER 4: BEHAVIOURAL ANALYSIS OF CORRUPTION

The most influencing insight which economic analysis of law provides is that human actors respond to incentives. This insight has two implications; first, law can be employed as an apparatus to bring in socially desirable behaviour as well as to discourage socially undesirable behaviour. In other words law can be used as tool by policy makers to subsidize socially desirable behaviour and tax undesirable behaviour. Secondly, law can be used from the perspective of efficiency and distributive concerns i.e. it can be used as a device to encourage or discourage the production of social resources as well as a tool for efficient allocation of such social resources. To exhibit in a coherent manner the repercussions of the incentives on people in a legal system the analysts borrowed from economics the 'rational choice theory' which focuses on assumptions relating to how human actors respond to incentives. These assumptions were then applied to the domain of law to understand how law as a tool can be used in incentivising and de-incentivising certain behaviour. Thus, these incentive effects of legal rules were studied and analyzed in designing an efficient legal policy to attain desired social behaviour. The underlying conception of the rational choice theory as pointed out by Richard Posner is that "man is a rational maximizer of his ends"[161] the adherents of 'utility maximization version' of rational choice theory take the above conception a bit further as according to them:

"Stripped of its mathematical adornments, the basic requirement of expected utility theory is that decision makers conduct an explicit or implicit cost-benefit analysis of competing options and select the optimal method of achieving their goals (that is, the method that maximizes expected benefits and minimizes expected costs, or maximizes net expected benefits), subject to external constraints."[162]

Thus, primary assumption of this theory is that an actor makes a decision by carrying out a cost-benefit analysis and making a choice which results in maximization of net

[161] R. A. Posner, 'Are We One Self or Multiple Selves?: Implications for Law and Public Policy', *Legal Theory,* Vol. 3, no. 1, 1997, p. 24

[162] R. B. Korobkin, and T. S. Ulen, 'Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics', *California Law Review*, vol. 88, no. 4, 2000 , p. 1063

expected benefits to him. "Consider expected utility theory's account of decision making under uncertainty. Suppose that an individual must choose between a certain and an uncertain course of action - for example, between a certain return on an investment and an uncertain return on a more speculative investment. Suppose, further, that outcome O1 occurs with certainty but that outcomes O2,..., On are probabilistic: only one of them will eventuate, but they are all possible. How would the rational choice theorist predict that the actor will decide which investment to choose? The actor will presumably attach a utility to each possible outcome - U(O1), U(02), and so forth, along with a probability of each outcome's occurring - p1, P2, and so on. Calculating the value of the certain course of action is straightforward. Because O1 is certain to occur, p1 = 1, so that the expected utility to the actor of O1 equals U(O1). The uncertain investment presents more of a challenge to evaluate because the uncertain outcomes are mutually exclusive, P2 +... + Pn = 1. The decision maker can reduce the multiple possibilities to a single expected utility by solving:

$$EU(\text{uncertain action}) = P2U(02) +... + PnU(On).$$

The rational consumer then compares the expected utility of the certain course of action with the expected utility of the uncertain course of action, and selects the one with the higher value."[163]

Thus, broadly we can enumerate the assumptions of expected utility version as: an actor is always maximising his utility by making choices which maximise his expected benefits; in doing so carries out cost-benefit analysis; he always has optimal information with him to take such decisions; he is always self-interested etc. The primary objection of the behavioural law economists to these traditional notions of expected utility theory is that even though human actors may intend to act rationally (i.e. maximise their expected utility) in actuality they are not utility maximizers due to limited cognitive capabilities. The expected utility version assumes that human beings are infinitely rational and can processes unlimited information; these assumptions are far from reality. In the current discussion we will see that in reality the behaviour of the human actors is not as rational as it is hypothesised as. In real world due to limited

[163] Ibid. pp. 1062-1063

cognitive capabilities and inadequacy of information human actors often rely on mental shortcuts to make decisions and these mental shortcuts are not based on any rational criteria rather available information, emotions, and other concerns. The seminal argument of the behavioural law economists is that due to the reliance of human actors on these mental shortcuts rather than on actual statistical evidence the actual human behaviour is different from the hypothesized human behaviour. In the following discussions we will see how the actual human behaviour deviates from the hypothesized behaviour.

A considerable literature seems to have been accumulated on the "biases" and "bounds" on human behaviour which is comparatively new in the field of economics when juxtapositioned with other social sciences. Well the object of study of these bounds and biases is to differentiate the hypothesized human behaviour from the actual human behaviour; the later of course reflected when we take into consideration the aforesaid bounds and certain other factors like availability heuristics, over-optimism, hindsight bias etc. These ideas try to project a more informed picture of human behaviour and at the same time dispute the traditional ideas of utility maximization, rationality assumption, optimal processing of information etc. We will now look into these bounds and ideas and try to find out how they fit into our area of interest i.e. corruption, as it still remains unexplored from the perspective of a behavioural approach.

BOUNDED RATIONALITY

The idea was made known by Herbert Simon in his famous work[164] way back in 1955. As noted earlier the application of the idea to the field of economics is relatively new when compared with other social sciences. The idea simply points out the actuality that human cognitive capabilities are limited. As Jolls, Sunstein and Thaler have stressed: "We have limited computational skills and seriously flawed memories. People can respond sensibly to those failings; thus it might be said that people sometimes respond rationally to their own cognitive limitations, minimizing the sum of decision costs and error costs. To deal with limited memories we make

[164] H. A. Simon, 'A Behavioral Model of Rational Choice', *The Quarterly Journal of Economics*, vol. 69, no. 1, 1955

lists. To deal with limited brain power and time we use mental shortcuts and rules of thumb. But even with these remedies, and in some cases because of these remedies, human behaviour differs in systematic ways from that predicted by the standard economic model of unbounded rationality. Even when the use of mental shortcuts is rational, it can produce predictable mistakes. The departures from the standard model can be divided into two categories: judgment and decision-making. Actual judgements show systematic departures from models of unbiased forecasts, and actual decisions often violate the axioms of expected utility theory."[165] Thus, they are trying to pitch the abstraction that due to limited or bounded cognitive abilities human actors rely on certain rules of thumb or mental shortcuts, and while the use of such rule of thumb may be rational in the context of economising on thinking time the forecasts which will emerge from such reliance will be different from the standard rational choice model. In other words, actors frequently resort to mental shortcuts in the process of decision making which often result in choices which do not confirm to the utility-maximization principle. One way of saying it could be that it is presumed that under ideal situations i.e. assuming every human being to be rational we can expect utility-maximization from every such human being, but due to cost and processing limitations in obtaining information as well as the limited cognitive abilities utility-maximization is a physical impossibility. It is the unconscious use of heuristics in the processes of judgment and decision-making that leads to bounded rationality in decision-making. Daniel Kahneman and Amos Tversky[166] ratiocinate that the use of rules of thumb or heuristics leads us to misguided and fallacious conclusions. They define two types of heuristics i.e. "availability heuristic" and "representativeness heuristic". By use of "availability heuristic" individuals try to calculate the probability of an event by recalling other instances of that type in near memory, for example, the probability of a car accident will depend upon whether they have recently seen a car accident or not. Thus, rather than relying on the actual statistical evidence of a given phenomenon the actors rely on the evidence or occurrence of that phenomenon in their near memory. This is a clear deviation from the expected rational behaviour as a rational actor is supposed to rely on the actual statistical probability of an event before

[165] C. Jolls, C. R. Sunstein, and R. Thaler, 'A Behavioral Approach to Law and Economics', *Stanford Law Review*, Vol. 50, no. 5, 1998, p. 1477

[166] A. Tversky, and D. Kahneman, 'Judgment Under Uncertainty: Heuristics and Biases', in D. Kahneman, P. Slovic and A. Tversky (eds.), *Judgment Under Uncertainty: Heuristics and Biases*, New York and Cambridge: Cambridge University Press, 1982

making a judgement about the probability of occurrence or non-occurrence of that event. Moreover these rational human beings are also required to update from time to time this statistical probability (base rate) to predict that particular event more accurately. Thus, what "availability heuristic" suggests is that an individual will rarely, due to his limited cognitive abilities, act as a rational human being as in calculating the probability of the occurrence or non-occurrence of an event he will rely on the information about that particular event in his near memory rather than on the actual statistical probability.

Another related phenomenon is "representativeness heuristic" which refers to the behaviour of the actors in which they neglect the relevant statistical information and rather rely on the representativeness of that event to make judgement about the probability of the occurrence or non-occurrence of that event. Korobkin and Ulen explain it as follows: "The "representativeness heuristic" refers to the tendency of actors to ignore base rates and overestimate the correlation between what something appears to be and what something actually is. As an example of this tendency, consider the now-famous "bank teller" problem used by Tversky and Kahneman. Experimental subjects were given a description of a woman, Linda, with a number of characteristics that appeared representative of someone who is a feminist. Subjects were then asked whether it was more likely that Linda was (a) a bank teller or (b) a bank teller active in the feminist movement. Nearly 90% of respondents chose b, a choice that is logically impossible because every person described by choice b is also described by choice a, although the reverse is not true. Subjects ignored the base rate (there are more bank tellers than feminist bank tellers) because the description of Linda appeared more "representative" of the latter than of the former."[167] Thus, the mere fact that something is more representative will not mean that it is more likely. Therefore the above mentioned biases demonstrate that in actual behaviour human beings tend to ignore the base rate or statistical probabilities which the rationality assumption considers as the base of making judgments by a human actor.

It will now be seen how the behavioural approach in context of corruption provides a better picture of human behaviour in contrast to the plain economic analysis. Moving

[167] Korobkin and Ulen, *California Law Review*, p. 1086

to the possible contribution of the issue at hand to the area of research i.e. corruption, I would like to refer that there has been sufficient literature which has concerned itself with appraising the possible deterrents of corruption such as strict laws or penalties.[168] Though this policy prescription (that strict laws or penalties deter corruption) has been disputed time and again but some recent research has suggested that stiffer laws and penalties result in less corruption, e.g. as Garoupa and Klerman[169] state: "A central conclusion of the literature is that corruption is usually socially undesirable, because it dilutes deterrence. As a consequence, it is usually optimal to expend resources to detect and penalize corruption." What these scholars have argued, which they acknowledge as the central conclusion of their literature, is that corruption is not socially desirable due to the fact that it dilutes the deterrent effect of the legal machinery as in a corrupt regime it is easier to bypass or undermine the laws. Thus, they suggest that is usually more favourable to spend resources to detect and penalize corruption. Also Friehe in his paper concludes: "In our model, potential offenders tend to reduce the violation probability in response to an increase in the magnitude of the penalty."[170] Thus, he is stating that his model demonstrates that when there is an increase in the magnitude of the penalty there are fewer violations by the potential offenders. This literature belongs to the traditional law and economics domain and suggests that in presence of stricter laws against corruption a rational agent would tend to be less corrupt. We will now try to show how these prescriptions are only partly correct in light of the behavioural specifications.

Now consider a situation where corruption laws are strict but the procedural laws are inefficient and often result acquittal of the corrupt agents when prosecuted. In such a situation where acquittal rate in corruption cases is high and conviction rate very low, it can very well be the case that a rational agent (who turns out to be not that rational due to his limited cognitive capabilities) relies on a rule of thumb like say "availability heuristic" or "representativeness heuristic" and finds out that in his near memory no one or a very less number of people were convicted on the charge of

[168] *See* T. Besley, and J. McLaren, 'Taxes and Bribery: The Role of Wage Incentives', *Economic Journal*, vol. 103, no. 416, 1993; D. Mookherjee, and I. P. L. Png, 'Corruptible Law Enforcers: How Should They Be Compensated?', *Economic Journal*, vol. 105, no. 428, 1995; D. Acemoglu, and T. Verdier, 'Property Rights, Corruption and the Allocation of Talent: A General Equilibrium Approach', *Economic Journal*, vol. 108, no. 450, 1998

[169] N. Garoupa and D. Klerman, 'Corruption and the Optimal Use of Non-Monetary Sanctions', *International Review of Law and Economics*, vol. 24, no. 2, 2004, p. 220

[170] T. Friehe, 'Correlated Payoffs in the Inspection Game: Some Theory and an Application to Corruption', *Public Choice,* vol. 137, no. 1, 2008, p. 142

corruption. He may imply form this that his probability of being caught and getting convicted is very low which might give him the incentive to be corrupt. Thus, if the strict laws regime is not being complemented by a strict procedural regime (where those who are rightly being caught are getting convicted also) then the aforesaid predictions about the effects of strict laws regime will not be correct as due to the reliance of the wrong-doers on "availability heuristic" to judge the probability of being caught and getting convicted. What is being argued here is that the prescription of the economic analysis of law in regard to the corruption (i.e. strict penal laws will have the optimal deterrent effect) does not hold good when we assume that it is being supported by an inefficient procedural law regime which results in acquittal of the corrupt agents when prosecuted. In other words we can have a strict penal law regime against corruption which may help in detecting the corrupt agents but if we do not have a strict procedural law regime which ensures that those wrong doers are convicted also then we may have results which will vary from the prescriptions of the law and economics models considering the effect of "availability heuristic".

A question now can be raised that what kind of impact "availability heuristic" can have on the traditional law and economics policy prescriptions for deterring the corruption? We know that traditional rational choice model prophesizes that potential wrong-doers commit crime only if the benefits from the crime exceed the expected costs of committing crime.[171]Therefore if the policy makers intend to deter the crime they can raise these expected costs which can occur from committing the crime above the expected benefits from crime. About the costs expected costs of crime Cooter and Ulen have stated: "expected costs of crime are determined by multiplying the (monetized) severity of punishment by likelihood that the criminal will be arrested and convicted."[172]Thus, if the policy makers know that such wrong-doers are biased by "availability heuristics" then they can achieve a more efficient model of deterrence by attaining a mechanism to manipulate the bias of wrongdoers in such a way that they over-estimate the likelihood of their being caught and convicted. Let us discuss the situation referred earlier where in a regime the conviction rate in corruption cases is very low while the acquittal rate is very high. In such a situation the wrong-doer

[171] S. Shavell, 'Criminal Law and the Optimal Use of Non-monetary Sanctions as a Deterrent', *Columbia Law Review,* vol. 85, no. 6, 1985

[172] R. Cooter, and T. Ulen, *Law and Economics*, Addison, Wesley Longman, 2000, p. 447

will be biased by availability heuristics when he'll notice that his chances of getting convicted are very less and by applying the above formula given by Cooter and Ulen we can say that his expected costs of committing the crime i.e. say taking the bribe would be very less as compared to the benefits associated with committing the crime and therefore the wrong-does will be incentivised to commit the crime. Thus, such regimes are not only inefficient as they fail to achieve the optimal rate of conviction due to procedural law and other context specific constraints, but they incentivise the wrong doers to be corrupt. In such a situation we can think of two things, first, to correct the procedural and other context specific flaws or errors so as to reach an optimal level of conviction rate (such a possibility has been discussed at length earlier). Secondly, the policy makers can think of certain mechanisms by which they can manipulate the "availability heuristic" in their favour and dis-incentivise the wrong-doers form being corrupt. One of such mechanism can be relevant to the situation where due to myriad constraints in policy reform the first step mentioned above cannot be taken and in this situation the wrong-doers have incentive to be corrupt, then in such a case the policy makers can resort to a strategy where they can go for "highly publicizing" those few cases in which the wrong-doers were actually convicted. The policy makers can cleverly design a proper campaign to spotlight and propagandize the few corruption cases, which resulted in conviction of the offender, in a way such that the potential offenders over-estimate the probability of their being caught and getting convicted. The propaganda can be configured in a manner such that it conveys a picture of tougher stance of the government organs towards corruption which is in sharp contrast to its earlier attitude. Such mechanism can help the policy makers to divert the earlier "availability heuristic" bias in their favour to dis-incentivise the corrupt behaviour. One possible example of such a design could be putting posters, which contain newspaper cuttings of headlines along with photographs showing corrupt officials who were convicted for the corruption, in public offices, bus stops, railway stations, banks, places of public resort etc. The idea should be to make these so visible that they don't escape the attention of the citizens, with the probable effect of manipulating the "availability heuristics" of the human actors to achieve desirable behaviour.

In earlier discussion it has been pointed out that there is a gap between the perceived conviction rate of wrongdoers in corruption cases and actual statistical numbers.

There is now accumulation of sufficient literature (with experimental evidence) on how such gaps may lead to 'availability heuristics' and consequently to misinformed decision-making. In case of corruption such 'availability heuristics' may generate wrong perceptions about conviction rates which may further incentivize wrongdoers to commit corrupt acts. What avenues do policy-makers have to deal with a situation like this? One possible solution can be as suggested earlier to use this bound on rationality in their favour by correcting the bias by systematic information campaign to neutralize the mis-information generated by availability heuristics. Important thing to note here is that the goal here need not be just to prevent already corrupt actors from getting instigated by availability heuristics to be corrupt but also to neutralize the effect of availability heuristics to prevent other neutral actors in the society from getting incentivized to be corrupt.

BOUNDED WILLPOWER

Another bound on human behaviour which human actors frequently demonstrate is "bounded willpower". The idea simply is that often rational human actors fail to make rational choices because of factors like temptation and procrastination. Even though the rational actors know that a particular act will be detrimental to their long-term interest but they still do it due to lack of self-control or what we may call bounded willpower. It has been observed that "this term refers to the fact that human beings often take actions that they know to be in conflict with their own long-term interests. Most smokers say they would prefer not to smoke, and many pay money to join a program or obtain a drug that will help them quit."[173] A common example is the inability of households to save their incomes due to lack of self-control or because of the temptation to spend. In such cases even though the rational actor knows that his action will result into long-term losses but still he is unable to do demonstrate sufficient willpower to overcome the temptation of performing that action, thus, he fails to take rational and optimal decision.

It can be suggested here how the idea of 'bounded willpower' can be used by the policy makers to deter corruption. Traditional law and economics scholarship states

[173] Jolls, Sunstein and Thaler, *Stanford Law Review*, p. 1479

that if the expected costs of committing a crime exceed the expected benefits of doing that act then potential wrong-doers as rational human beings trying to maximise their utility do not consider it worthwhile to commit the crime. We have already discussed the errors which bounded rationality may generate in the above mentioned situation, let us see what might be the effects of bounded willpower on the rational human actors in such a situation. One important feature of the criminal behaviour as deduced by the traditional law and economics scholarship is that while the benefits from a crime are instantaneous the costs of the crime are to be encountered over a period of time. For example if a bureaucrat takes a bribe then the monetary benefit of that bribe will be immediately available to him, but if gets caught and is punished with imprisonment of say five years then the costs that he will bear will not be immediate rather he has to bear them for five years. The costs in such a case will be spread out over five years of time. In traditional economic analysis the future costs of such punishment are discounted to the present value and what the conventional approach[174] suggests is that there will be a constant discount rate i.e. "the difference between the attractiveness or aversiveness of a reward or punishment today versus tomorrow is the same as the difference between a year from now and a year and one day from now."[175]The behavioural economists dispute this by producing evidences[176] in the support of their counter claim that wrong-doers display sharply declining discount rates. "This means that impatience is very strong for the near rewards (and aversion very strong for near punishments) but that each of these declines over time – a pattern referred to as *hyperbolic discounting*."[177]

What significance this has for deterring corruption? Well it can be seen that the behavioural economists have shown that the aversion for near punishment is very strong, this supplements the prescription made by Cooter in his work[178]: "Frequent, mild punishment is favoured over infrequent harsh punishment. *Frequent punishment strengthens the will to resist the impulse towards wrong-doing*." Thus, it can be

[174] A. M. Polinsky, and S., Shavell, 'On the Disutility and Discounting of Imprisonment and the Theory of Deterrence', *Journal of Legal Studies*, vol. 28, no. 1, 1999
[175] Jolls, Sunstein and Thaler, p. 1539
[176] See G. Loewenstein and R. H. Thaler, 'Intertemporal Choice', *Journal of Economic Perspectives*, vol. 3, no. 4, 1989; D. Laibson, 'Golden Eggs and Hyperbolic Discounting', *Quarterly Journal of Economics*, vol. 112, no. 2, 1997;
[177] C. Jolls, 'Behavioural Economics Analysis of Redistributive Legal Rules', *Vanderbilt Law Review*, vol. 51, no. 6, 1998, p. 1539
[178] R. D. Cooter, 'Lapses, Conflict, and Akrasia in Torts and Crimes: Towards an Economic Theory of the Will', *International Review of Law and Economics*, vol. 11, no. 2, 1991, p. 159

suggested here that frequent punishments can act as a deterrent towards the crime of corruption as it enhances the will to endure the impulse for being corrupt. By frequent punishment we simply mean that the probability of getting caught and being convicted is more. The above observations are substantial because of their relevancy to the problem of corruption as the act itself is considered by the most to be result of temptation or lack of self-control. Thus, if a regime ensures the increase in the frequency of conviction in corruption cases then it sure will have a deterring effect on the potential wrong-doers as the frequency of punishment enhances the will to resist the impulse of committing an act of corruption.

BOUNDED SELF-INTEREST

It can be described as the bound which restricts the human actors to behave in ways which will promote their self-interest. The actors sometime make choices which are inconsistent with their long-term interest. The traditional rationality assumption on the other hand envisages a rational actor who aims at utility maximization and he is supposed to behave only in ways which are consistent with his self-interest. The behavioural insights suggest that contrary to the traditional model people sometimes care for others and in some cases even for strangers. "Self-interest is bounded in a much broader range of settings than the conventional economics assumes, and the bound operates in ways different from what the conventional understanding suggests. In many market and bargaining settings (as opposed to the non-market settings such as bequest decisions), *people care about being treated fairly and want to treat others fairly if those others themselves behaving fairly*. As a result of these concerns, the agents in a behavioural economic model are both nicer and (when they are not treated fairly) more spiteful than the agents postulated by neoclassical theory."[179] The evidence to the above is produced by referring to the "ultimatum game" which serves as an example of the bounded self-interest. "In this game, one player, the proposer, is asked to propose an allocation of a sum of money between herself and the other player, the Responder. The Responder then has a choice. He can either accept the amount offered to him by the Proposer, leaving the rest to the Proposer, or he can reject the offer, in which case both players get nothing. Neither player knows the identity of his or her counterpart, and the players will play against each other only

[179] Jolls, Sunstein and Thaler, p. 1479

once, so reputations and future retaliation are eliminated as factors. Economic theory has a simple prediction about this game. The Proposer will offer the smallest unit of currency available, say a penny, and the Responder will accept, since a penny is better than nothing. This turns out to be a very bad prediction about how the game is actually played. Responders typically reject offers of less than twenty percent of the total amount available; the average minimum amount that Responders say they would accept is between twenty and thirty percent of that sum. Responders are thus willing to punish unfair behaviour, even at a financial cost to themselves. This is a form of bounded self-interest. And this response seems to be expected and anticipated by Proposers; they typically offer a substantial portion of the sum to be divided ordinarily forty to fifty percent. Economists often worry that the results of this type of experiment are sensitive to the way in which the experiment was conducted. What would happen if the stakes were raised substantially or the game was repeated several times to allow learning? In this case, we know the answer. To a first approximation, neither of these factors changes the results in any important way. Raising the stakes from $10 per pair to $100, or even to more than a week's income (in a poor country) has little effect; the same is true of repeating the game ten times with different partners. (Of course, at some point raising the stakes would matter; probably few people would turn down an offer of five percent of $1,000,000.) We do not see behaviour moving toward the prediction of standard economic theory."[180] Thus the desire to be treated fairly (which is termed as pride by some) generates certain bound on the self-interested behaviour.

The aforesaid experiments corroborate the argument that desire to be treated fairly brings about bounds on the self-interested behaviour, similarly we will notice from the following observation that desire to treat fairly also generates bounds on self-interested behaviour. "It appears that the desire to treat others fairly can cause deviations from self-interested behaviour just as the desire to be treated fairly can do the same. Results of the "dictator game" demonstrate this effect. In the dictator game, Player1 must propose a division of a stake between himself and Player 2, just as in the ultimatum game. Unlike the ultimatum game, however, Player2 has no choice but to accept the proposed division. In the dictator game, the average Player1 offers a less-

[180] Ibid. p. 1490

equal division than does the average Player1 in the ultimatum game, but he still offers, on average, a significant percentage of the stake to Player2. The effect is reduced if the context is manipulated so that, for example, Player1 is told there is an objective reason that he rather than Player2 has the right to determine the allocation, or the "social distance" between the two players is emphasized, but it fails to disappear even if the players' identities remain hidden from one another. It would be naive to suppose that transacting parties always place fair treatment of a bargaining partner above their own profits, but the evidence suggests that, for many people, self-interest maximization can be somewhat tempered by the affirmative desire to treat others fairly."[181] Thus, as mentioned earlier due to the desire of human actors to be treated fairly, as well as, to treat fairly may result into deviations from the traditional model of self-interested behaviour.

An attempt shall be made here to use the implications of above knowledge in the tackling the menace of corruption. In what way can the policy makers make use of such bound on self-interested behaviour? We can infer from the given experiments that due to operation of such bound two types of behaviours are encountered, first, nicer or fair if the individual was treated fairly, second, spiteful if the individual was not treated fairly. Let us deal with the situation in which the human actor displays nicer or fair behaviour which is possible in circumstances where the concerned individual either gets treated fairly (ultimatum game) or thinks that he should treat fairly (dictator game). Policy makers can think of a situation where an individual 'A' wants to bribe 'B' a civil servant. Now how can the policy makers make use of the probable behavioural mannerism of 'A' such that he restrains himself from bribing 'B'? In the given scenario if we can propagate the information that 'B' is an honest person and he treats people fairly then will it have any positive consequences on behaviour of 'A'? Or suppose if the policy makers in a regime carry out a media campaign in which they aim at focusing the instances in which bureaucrats have acted in a heroic manner with integrity (so that they project an image of bureaucracy which is changing and becoming fair and honest) then what repercussions it might have on the behaviour of potential bribe-givers? Will they think that since the bureaucrats are becoming fair then they should also respond by becoming fair and restrain themselves

[181] Korobkin and Ulen, p. 1136

from bribing? These are questions which need to be tested with the help of carefully carried out experiments involving human actors.

Moving further the situation in which individuals become spiteful in consequence of an unfair treatment needs to be discussed. This personal trait of human behaviour suggests that human actors when not treated fairly become more spiteful or act more maliciously than suggested by the neo-classical theory. This will again posit a question as to how this behavioural disposition of the agents can be employed by the policy makers to have desirable effects in reducing corruption or corrupt behaviour. Let us take a situation in which a civil servant 'A' asks bribe from an agent 'B'. 'B' here, of course, will feel that he has not been treated fairly and he might in some cases will be more spiteful than traditionally thought and may be willing to go to any limits to punish 'A' even though it is not in his long term interest. Policy-makers can exploit this situation to their advantage by carefully designing conditions in which this impulse of an agent to punish the civil servant can be used to instigate them to file the complaints against such corrupt officials. For example if in the public offices posters are put up informing the individuals of their rights to get certain services from the public officials and what possible actions might be taken against an official who refuses to perform them. The punishments, which a civil servant might get, can be quoted in bold or capital letters with red colour so that immediately catches the attention of whoever visits such offices. The message encrypted in such posters should be simple and twofold, first, how unfairly an individual has been treated by being asked for the bribe, and second, how he can punish the concerned official for his unfair behaviour. Also, the contact numbers of the anti-corruption agencies can be displayed in public offices and places of public resort.

ENDOWMENT EFFECT

"Endowment effect" suggests that people usually attach higher importance to their endowments when compared with other items equally or more valuable. It is a part of a broader phenomenon of "loss aversion" which predicts that losses are weighted more heavily when compared with gains. As Korobkin and Ulen have illustrated "the most famous examples of the endowment effect come from a series of experiments

concerning mugs and lottery tickets. In one experiment, Kahneman and his colleagues provided each member of one group of subjects with a coffee mug and each member of another group with $6. They elicited from the first group ("sellers") the minimum price that the subjects would demand to give up the mug. From the second group ("buyers"), they elicited the maximum amount of money that the subjects would pay to acquire one of the mugs. Both groups were told that the experimenters would take this information, calculate the market-clearing price for the mugs, and reallocate and execute trades between the mug holders who would prefer cash to their mug at the market price and the cash holders who would prefer a mug to cash at that price. Surprisingly, from the perspective of rational choice theory, sellers valued the mug at roughly twice the price of buyers, and very few trades took place, even when multiple iterations of the experiment were conducted to allow participants to learn from experience."[182]In such a situation the prediction of Coase theorem would have been that half of the mugs would be traded since the transaction costs were zero, but we see deviations from the said theorem as very few trades took place and those which were traded asked twice the price of the mugs. The point of the experiment was that the ownership of the mugs created an "endowment effect" and consequently a higher price was placed on those endowments. The central idea is that losses are weighted more heavily than gains.

Again a question can be raised here that what kind of implications can this behaviour have for our model of deterring corrupt behaviour? Well it will be difficult to answer the question right away but it can have interesting repercussions (which can be explored through experimentation) on the corrupt behaviour. Why I say so is because of the fact that when an official holds a public office he enjoys certain benefits by virtue of holding that office, e.g. the social recognition, the esteem, authority, power attached to it etc. There can be no doubt about the "endowment effect" which these benefits would be accruing to the said official and their loss can be weighted very heavily by him. It would be interesting to see that how this "endowment effect" can be put to use by policy-makers in achieving the desirable behaviour. One possible mechanism can be to design visible representations (in forms of posters, advertisements, one-liners) in such a manner so that they remind the public officials

[182] Ibid. pp. 1108-09

of the reality that if they lose their jobs (due to corrupt behaviour) what kind of benefits they are going to lose. It can be in the form of pamphlets (to be circulated within the office) which highlight the present state of all those officials who have lost their jobs on the charge of corruption. Again all this can be appraised better when explored with the help of carefully conducted experiments.

Thus, in this discussion it has been identified that there are various "bounds" and "biases" which operate on the rational behaviour of human actors and which distinguish the hypothesised rational behaviour from the actual behaviour evident from various experiments and games. The literature on behavioural law and economics discusses various other biases or bounds on rational behaviour but here I have focussed on only those which I found relevant to our area of concern i.e. corruption. The scheme of the discussion has been threefold, i.e. firstly, the various bounds and biases like bounded rationality, bounded willpower, bounded self-interest, availability and representativeness heuristics, endowment effect etc. have been discussed to set up and entrench conceptual clarity about these ideas and how these establish the clear deviations from hypothesised rational behaviour. Secondly, the possible or probable repercussions which these may have on corrupt behaviour have been discussed while highlighting the deviations from traditional law and economics prescriptions for tackling corruption. Thirdly, prescriptions from a behavioural perspective have been provided as well as areas of possible future experimentations have been identified and suggested.

With regard to "bounded rationality" it has been suggested that strict laws regime alone cannot produce the required deterrent effect thus they should be supplemented with strict procedural regimes (where the probability of conviction of corrupt actors is more) as "availability heuristic" operates to reduce the deterrent effect of strict penal laws. Another suggestion has been to manipulate the "availability heuristic" by carrying out a propaganda or media campaign which highlights those cases in which corrupt officials were not only caught but convicted also. This will result in generation of information in such a manner that "availability heuristic" will operate to deter corrupt behaviour. With regard to "bounded willpower" it has been suggested that frequent punishments can act as a deterrent towards the crime of corruption as it enhances the will to endure the impulse for being corrupt. By frequent punishment we

simply mean that the probability of getting caught and being convicted is more. With regard to "bounded self-interest" two suggestions i.e. one each for both fair and spiteful behaviour has been made which also point out the possibility of those prescriptions being explored on experimental level. Similarly with regard to "endowment effect" also the prescription is in the form of a testable prediction and its feasibility is contingent upon experimentation.

CONTENT ANALYSIS

The following study tries to make sense of a portion of media portrayal of corruption and in doing so it makes use of framing theory. Framing theory in this context will refer to how media frames or presents news regarding corruption and what effects such a phenomenon might have on individual behaviour. Entman argues that, "whatever its specific use, the concept of framing consistently offers a way to describe the power of a communicating text. Analysis of frames illuminates the precise way in which influence over a human consciousness is exerted by the transfer (or communication) of information from one location – such as a speech, utterance, news report, or novel – to that consciousness."[183] He further states: "Framing essentially involves *selection* and *salience.* To frame is to *select some aspects of a perceived reality and make them more salient in a communicating text, in such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation* for the item described."[184] But the seminal insight of his work is the purpose which framing can serve, he argues: "We should identify our mission as bringing together insights and theories that would otherwise remain scattered in other disciplines. Because of the lack of interchange among the disciplines, hypotheses thoroughly discredited in one field may receive wide acceptance in another. Potential research paradigms remain fractured, with pieces here and there but no comprehensive statement to guide research. By bringing ideas together in one location, communication can aspire to become a master discipline that synthesizes related theories and concepts and exposes them to the most

[183] R. M. Entman, 'Framing: Towards Clarification of a Fractured Paradigm', *Journal of Communication*, vol. 43, no. 4, 1993, pp. 51-52
[184] Ibid.

rigorous, comprehensive statement and exploration."[185] Thus, framing as a tool and communication as a discipline can be instrumental in accomplishing some degree of coherence in a concept by coalescing its different uses or dimensions scattered crosswise disciplines. But first let us delve into the effects which framing may exert. Iyengar[186] has discussed the framing effects of news coverage by dividing news frames into two categories viz. 'thematic' and 'episodic'. He says that "the episodic news frame depicts issues in terms of specific instances – for example, a terrorist bombing, a homeless person, or a case of illegal drug usage. Episodic reports are essentially illustrations of issues. The thematic frame, by contrast, depicts political issues more broadly and abstractly by placing them in some appropriate context – historical, geographical, or otherwise."[187] He argues that "episodic framing breeds individualistic as opposed to societal attributions of responsibility"[188] and "by reducing complex issues to the level of anecdotal cases, episodic framing leads viewers to attributions that shield society and government from responsibility. Confronted with a parade of news stories describing particular instances of national issues, viewers come to focus on the particular individual or groups depicted in the news rather than historical, social, political, or other such structural factors."[189] In other words framing, in a given manner, of a news item relating to a particular issue results in shifting of focus in a way that reader perceives it as a specific instance of that issue rather than on a more broader and abstract level which further leads to individualistic rather than societal or governmental attribution of responsibility for that issue.

DATA AND MEASURES

A study of reporting of corruption in English newspaper *Times of India* was conducted covering a period from 01-01-2016 to 31-12-2016. *Times of India* was chosen because it is the highest circulated English newspaper in India and holds 4th

[185] Ibid. at p. 51
[186] S. Iyengar, 'Framing Responsibility for Political Issues: The Case of Poverty', *Political Behaviour*, Vol. 1, No. 12, Cognition and Political Action, 1990
[187] Iyengar, S., 'Framing Responsibility for Political Issues', *The Annals of the Academy of Political and Social Science*, Vol. 546, The Media and Politics, 1996, p. 62
[188] Ibid.
[189] Ibid. p. 70

rank in overall circulation of newspapers comprising all languages.[190] The electronic archival database of the newspaper was relied upon to increase the accuracy of search and reduce the possibility of error of the human eye. The keywords 'corruption', 'graft' and 'bribe' were searched for the aforementioned period which yielded all the articles containing the keywords in the title and the body of the news reports. Out of these 620 news items were selected which qualified as news reports about corruption. Rather opting for a methodology of relying upon random sampling method all the news items related to corruption were included in this analysis. This study employs an array of variables to get a sense on media coverage on corruption.

RESULTS

Episodic/Thematic Frames

The results attest that episodic frame of media reporting of corruption overshadows or predominates the thematic frame. 89.52% of the news reports used an episodic frame 10.48% were classified as thematic frame news reports. This implies that during the period spanning from 1-01-16 to 31-12-2016 the reader of *Times of India* would have been a lot more exposed to episodic frame of news reporting of corruption which focuses on specific instance of corruption than to thematic frame of news reporting which makes an in-depth analysis of corruption. In other words a typical reader during that period will notice more news reports about specific instance of individual corruption, which view corruption as an individual outcome, rather than news reports which make political, historical, geographical or other analysis of corruption which view corruption as a societal outcome. Due to this an average reader attributes responsibility of corruption to individuals rather than to society or government. Park[191] also makes a similar finding by arguing that if episodic frames dominate the newspaper reporting then "from the perspective of the newspaper, corruption is viewed as individual level phenomena rather than as a societal level phenomena."[192]

[190] http://www.auditbureau.org/files/Highest%20Circulated%20amongst%20ABC%20Member%20Publications%20(across%20languages).pdf retrieved on 11.01.2017

[191] C. S. Park, 'How the Media Frame Political Corruption: Episodic and Thematic Stories Found in Illinois Newspapers', paper originally prepared for the Ethics and Reform Symposium on Illinois Government, September 27-28, 2012 – Union League Club, Chicago, Illinois

[192] Ibid. p. 14

He further states that "more than anything else, episodic frame stories have a tendency to be devoid of a clear definition of corruption. Many episodic articles use the term 'corruption' merely in connection with crimes committed by public officials ignoring the diverse dimensions of corruption such as individual cases of corruption, officials involved in corruption, the different impacts of corruption, official reports on corruption, press releases on corruption, anti-corruptive measures, public opinion polls, and suggestions from the experts."[193] This is corroborative of the earlier discussion on defining corruption where it was argued that contemporary definitions about corruption predominate the 'abuse of public office for private gains' angle which is reflective of the individual instances of corruption rather than the 'condition of body politic part' which considers it as a societal level phenomena. It is worth repeating here what has been argued before that a more complete hermeneutical event of understanding corruption would take place if the two aforesaid concepts were juxtaposed together.

It is worth bringing in the earlier discussion on availability heuristics in the current context. As noted earlier, by use of "availability heuristic" individuals try to calculate the probability of an event by recalling other instances of that type in near memory. As Reisberg has stated: "The organization of memory creates a bias in what's easily available, and this bias in availability leads to an error in frequency judgment."[194] It can be argued that the domination of episodic frame in media reporting of corruption can lead to flooding of the near memory with examples of individual instances of corruption which may facilitate viewing it as an individual level phenomena. Park has concluded, "episodic frame news may confuse people's judgment for causal responsibility of corruption."[195] This thus has a corroborative effect on the argument which has been made above and earlier in this work.

Type of Frame	Number	Percentage
Episodic	555	89.52

[193] Ibid. p. 17
[194] D. Reisberg, *Cognition: Exploring the Science of the Mind*, New York, W. W. Norton, 2012, p. 403
[195] Park, 'How the Media Frame Political Corruption: Episodic and Thematic Stories Found in Illinois Newspapers p. 18

Thematic	65	10.48
Total	620	100

Examples of episodic news frames:

Govt files complaint against police chief

TIMES NEWS NETWORK

New Delhi: The Delhi government on Thursday filed a criminal complaint against police commissioner B S Bassi in a city court, alleging that he had indulged in corrupt practices and misused his position as a senior police officer. The complaint was filed under section 200 of the CrPc in the court of chief metropolitan magistrate Kadambari Awasthi who will hear the matter on March 19.

The allegations of corruption against Bassi were first levelled by the AAP government during the winter session of the Delhi assembly in December. It had then alleged that Bassi purchased two flats in different group housing societies in violation of norms. The government had initiated a vigilance inquiry into a missing file related to purchase and sale of a flat at Lucky Home Co-Op Society in Rohini, which was allegedly owned by a close relative of Bassi.

The Delhi government had also said that it ordered an inquiry into the matter after receiving a complaint against illegal construction at Rohini housing society. During preliminary investigation, the flat in question was found to be owned by relatives of Bassi, the government had claimed. Deputy CM Manish Sisodia had said that the details were confirmed though the file related to the flat had gone missing from the office of the registrar of cooperative societies. Bassi had then called the allegations false.

Appeared on 19th February 2016 on page no. 3 of New Delhi edition.

ACB chargesheet against Bhujbal, son

Nephew, 14 Others Also Named In Sadan Case

S Ahmed Ali & Rebecca Samervel | TNN

The ACB accused former Maharashtra PWD minister Chhagan Bhujbal of misconduct, misuse of his official position and cheating

Mumbai: The anti-corruption bureau (ACB) on Wednesday submitted a chargesheet against former PWD minister Chhagan Bhujbal in the Maharashtra Sadan case, accusing him of misconduct, misuse of his official position, cheating and criminal conspiracy, among others.

Also named in the chargesheet that runs into 24,500 pages are Bhujbal's son Pankaj, nephew Sameer and 14 others, including government officials and developers, for misappropriating funds in the construction of the state guest house in Delhi. All of them have been charged under IPC sections for forgery, cheating, breach of trust, criminal conspiracy and sections under the Prevention of Corruption Act. If convicted, the result could mean jail terms of up to seven years.

Bhujbal declined comment, saying he was yet to read the documents. "Certainly I will comment on the chargesheet after consulting my lawyers and after reading the entire document," he told **TOI**. So far, Bhujbal has taken the view that it would be wrong to blame him since all the decisions were taken by a cabinet sub-committee headed by the then CM.

The allegations against the Bhujbals concern a contract the senior NCP leader gave a firm, K S Chamankar Enterprises, in 2005 without inviting tenders, when he was the PWD minister. The builder got the development rights of a slum on RTO land in Andheri, with the condition that Maharashtra Sadan in Delhi, the RTO building in Andheri and a guest house on Malabar Hill be constructed in return. The firm is said to have entered into an agreement with another company for the work and afterwards sold the development rights of the RTO land to a construction company. The Bhujbals are also accused of receiving kickbacks.

Others who have been named as accused are former PWD officials Arun Devdhar, Maniklal Shah, Devdutt Marathe and Deepak Deshpande, other government officials Bipin Sankhe and Anilkumar Gaikwad, developers and architect Pravina Chamankar, Krishna Chamankar, Praneeta Chamankar and Prasanna Chamankar, and Tanveer Shaikh, Iram Shaikh, Geeta Joshi and Sanjay Joshi, employees of the Bhujbal-owned Mumbai Educational Trust and their spouses who were directors in firms promoted by the Bhujbals.

The screws have been turning on the Bhujbals since CM Devendra Fadnavis gave the ACB the go-ahead to probe them.

Appeared on 25th February 2016 on page no. 14 of the above-mentioned edition.

ACB catches forest guard taking bribe

TIMES NEWS NETWORK

New Delhi: A forest guard was caught red-handed by the anti-corruption branch (ACB) for allegedly taking a bribe to allow illegal cutting of two trees in Paschim Vihar. The Delhi government employee, Dinesh Kumar was posted in the west district forest department. ACB sleuths have recovered Rs 40,000 from him.

It's illegal to cut down trees unless the forest department gives permission for it. Also, tree cutting is allowed only in extreme circumstances after an inspection by forest officials proves that it is a threat to life.

ACB received a complaint that Kumar was demanding a bribe of Rs 2 lakh for cutting down the two trees. Sources said that the accused finally struck a deal for Rs 1 lakh. A trap was laid and when Kumar came to the designated spot for taking the bribe he was arrested.

Appeared on 22nd April 2016 on page no. 3.

Examples of thematic news frames:

When Doctors Take Bribes

How entrenched conflict of interest in Indian healthcare endangers patients

Sumit Ray

When your doctor prescribes a medicine saying it's the best for you, are you sure it's in your best interest, or was he taken on a luxury cruise last summer by the pharmaceutical company which sells that medication? If he refers you to a particular hospital or diagnostic facility, is it your best interest he has in mind? Or is he getting a "cut" or commission (euphemistically called "facilitation fees") for it?

Doctors might say they cannot be bought with expensive meals and holidays but there is strong evidence that even the smallest of gifts or favours can alter their prescribing practices. A study by Dr Ashley Wazana, published in the Journal of the American Medical Association (JAMA), established that gifts, sponsored meals, conference travel, funding for conferences, all significantly alter the prescribing practices of doctors in favour of the sponsoring pharmaceutical or medical device industry.

A 2013 study by Marrisse King in the British Medical Journal (BMJ) found that students graduating from US medical schools that had strong conflict of interest policies against gifts from industry, had a 55-75% reduced chance of prescribing more expensive medication compared to cheaper medication that was equally good. Similar studies may not have been done in India, but they prove the point (unless Indian doctors would like to claim they are more honest/ honourable/ morally incorruptible than their counterparts in the rest of the world).

A conflict of interest is a set of circumstances that creates a risk that professional judgment or actions regarding a primary interest will be unduly influenced by a secondary interest. Primary interest refers to the principal goals of the profession, such as health of patients and integrity of research. Secondary interest includes not only financial gain but also such motives as the desire for professional advancement and the wish to do favours for family and friends.

Anandyadi Das Basu

Gifts, travel grants, "cut-practice" are absolutely illegal for doctors according to the Medical Council of India (MCI) rule book. MCI also states: "The personal financial interests of a physician should not conflict with the medical interests of patients."

There is a reason why the medical profession has always been held up to higher ethical standards than any other. The 2009 Manual of Ethics of the World Medical Association states, "People come to physicians for help with their most pressing needs – relief from pain and suffering and restoration of health and well-being. They allow physicians to see, touch and manipulate every part of their bodies, even the most intimate. They do this because they trust their physicians to act in their best interests." A doctor has to have way more empathy and understanding than in any other profession. This expectation is neither recent, nor restricted to any particular country.

Unfortunately enforcement by MCI has been very poor, leading to entrenched corruption in healthcare delivery systems in India. Rather than strengthening controls on these corrupt practices, MCI amended its code of ethics to allow institutions and associations to be exempt from the rules on gifts, grants and funds from pharmaceutical and device industries.

When your doctor prescribes a medicine saying it's the best for you, are you sure it's in your best interest, or was he taken on a luxury cruise last summer by the pharmaceutical company which sells that medication?

The law allows seven or more people to form a society or foundation. So, if you are not allowed to take what constitutes a pure and simple bribe from industry as an individual doctor, you shall be allowed to do so as a group of seven or more! We are already seeing a rapid rise in the number of "societies", "foundations" and "associations" among doctors to make use of this loophole, as this amendment has been in the works since 2010. This will have disastrous consequences for an already corrupt healthcare system and you, as a patient, will pay for it.

The parliamentary standing committee on health observed that exempting professional associations of doctors from the ambit of ethics regulations is nothing short of legitimising such associations indulging in unethical and corrupt practices. It added, "It seems that the MCI has become captive to private commercial interests."

Even today a majority of medical practitioners uphold true values and ethics. Unfortunately, their voices and ideas have been drowned by a more vociferous group who believe that success is determined by profit margins, or rather profiteering by healthcare delivery organisations, rather than by high quality ethical care. And yet, they puzzle over rising violence against doctors across the country.

They don't seem to see that the violence is a direct fallout of the erosion of the trust that doctors take decisions in the patient's interest and of a sense of helplessness. The US and India report the highest number of attacks on doctors by patients (physical violence in India and "litigational violence" in the US). It is no coincidence that both are countries where healthcare delivery is dominated by a profit-driven private sector.

As doctors we need to be aware of these facts and put public pressure to ensure that the government acts on the recommendations of the parliamentary committee to strengthen the code of ethics for doctors by bringing healthcare institutions, foundations, societies and associations under its ambit. MCI will also have to ensure better and stricter implementation so that justice is seen to be done in cases where the code is flouted. Else, Indians' health will suffer even more than at present.

The writer is Senior Consultant & Vice-Chair, Critical Care & Emergency Medicine, Sir Gangaram Hospital, New Delhi

Appeared on 26th April 2016 on page no. 14.

Is An Honest India Possible?

Curbing corruption requires campaign finance reform and neutral intervention of technology

Pavan K Varma

A fundamental question needs an honest answer beyond political partisanship: For a country that was led to freedom by a man of the unimpeachable rectitude of Mahatma Gandhi, why are our citizens ranked among the most corrupt in the world today?

Is there something in our psyche that predisposes us to condone corruption? Do we accept as normal the gulf between precept and practice? Is there a certain moral ambivalence in our notions of right and wrong?

Or, is the high level of corruption in our society primarily due to the discretionary power of officials, weak institutional accountability, opaque and deliberately convoluted laws, predatory sarkari inspectors, a dilatory judiciary, and, above all, the nexus between politics and black money?

I raise this issue because at a recent dinner there was this gentleman who was waxing eloquent about rampant corruption in high places, but later casually mentioned to me that he had that very day paid a couple of hundred rupees to a policeman to avoid a traffic challan. Is our outrage against corruption then something like litmus paper, changing with the colour of personal requirements? Is it bad when you have to bribe when you don't want to, and good when it gets you what you want?

There are always honourable exceptions, but it does seem that for many Indians ethics is largely related to utility. For many who preach about the importance of ethics, the premium in real life is on ends not means, on pragmatism and worldly success not morality. What matters is not any fixity of principle but clarity of purpose.

Lakshmi, the goddess of wealth is widely revered, but all invocations to her emphasise the felicity she brings, not the means by which this felicity should be acquired. The aarti to her makes this explicitly clear: Jis ghar mein tum rahti, tahen sab sadguna aata, khan-paan ka vaibhav, sab tumse aata

Arundyuti Das Basu

(In the home you inhabit virtues come automatically; all grandeur and luxuries come from you).

The fault is not that of Lakshmi. In fact she may well be unhappy that while a great many of her devotees criticise corruption in the public realm, they secretly admire the dividends it yields. The power and pelf it brings to an individual often benefit members of his extended kin and community, who are not too finicky about whether the largesse is tainted or not.

At the same time, the display of lavish lifestyles and money power attracts more envy than opprobrium. In such a milieu, corruption is often equated with a morally neutral entrepreneurship. Those who take bribes, and those who give it, are both 'entrepreneurs' bound by the same amoral conviction that money is more important for the ends it achieves and not the means by which it is obtained.

In this sense the issue of corruption is unfortunately entirely removed from the moral domain; it becomes simply a matter of costs, investments, return, tactics and profit. Those who do not understand this are looked upon as impractical deviants, suffering in their world of irrelevant utopianism.

The real proof of the NDA government's resolve to curb black money by demonetising notes, will be tested if BJP declares that it will fight all future elections without using unaccounted money. Will BJP, and indeed all political parties, accept this challenge?

It is interesting too that in everyday life the traditional Hindu worldview accepts exemptions to morally correct behaviour. A man can do no wrong if he acts to protect his svadharma, conduct that is right for his jati or station. He cannot be held accountable for actions that are part of his ashramadharam, or stage in life.

He cannot be penalised for transgressions made in the name of kuladharma, conduct that is right for one's family. And finally, almost anything he does is justified in a situation of distress or emergency, appadharma. In the Mahabharata Yudhishtara, the epitome of rectitude, himself says that dharma is elusive, too subtle to be etched in stone.

Keeping these factors in mind, moral exhortation against corruption is unlikely to work in India. What will act as a deterrent are better laws that guarantee exemplary convictions for deviant behaviour. In addition, we need the neutral intervention of technology in as many areas as possible, especially where the common man has to interact with government.

For instance, if you can buy a train ticket or pay your house tax and income tax online, this largely eliminates the role of the human intermediary. In Madhya Pradesh and Bihar the Right to Public Services Act, that enables citizens to receive a service from government in a time bound and transparent manner, with penalties for delay imposed on the pre-identified officer rendering that service, have greatly reduced the scope of corruption.

Technology can also help to digitally track all financial transactions, including for benami properties and money illegally stashed abroad. Independent regulators and a model legal framework ensuring transparency in the disposal of national resources and government procurement processes are necessary too.

Finally, but most importantly, corruption can never be eliminated until substantive reform takes place in the funding and financial accountability of political parties. This is the seed of all corruption in India.

The real proof of the NDA government's resolve to curb black money by demonetising notes, will be tested if BJP declares that it will fight all future elections without using unaccounted money. Will BJP, and indeed all political parties, accept this challenge?

The writer is an author and member of JD(U)

Appeared on 19th November 2016 page no. 20.

Source analysis

Source	Number	Percentage
Police/CBI/ ED/ ACB	148	23.87
Court	71	11.45
Political Party/Politicians	186	30
Journalist	82	13.23
Activist/NGOs/RTI	9	1.45
Government/Government Agencies	53	8.55
Officials	25	4.03
Independent Organizations	8	1.29
Famous Personalities	7	1.13
Anonymous	26	4.19
Others	5	0.81
Total	620	100

The above-mentioned data tries to locate the source of the news reports about corruption. Many news items consisted of multiple news sources but for the purpose of this study only the dominant source per news report is considered. It can be noticed that 30% of the news reports have their source in statements by political parties or politicians. A major chunk of these reports comprise of allegations and counter-allegations by these political actors which has a unique feature i.e. a majority of these statements locate the source of corruption in their rival political outfits and almost always defend the allegations of corruption on fellow party men. In such discourses the responsibility for corruption is attributed to political outfits rather than to other structural or societal factors. Thus, rather than attracting attention to an array of potential factors responsible for corruption these political dialogues divert attention towards portrayal of corruption as an anomaly which not only originates from a particular political outfit but is part and parcel of its ideology.

Prominence Analysis

Prominence analysis had taken three factors into account viz. location i.e. the page number where the news report is placed; size of the news report; and images i.e. the

visual representation accompanying the news items which may be photographs, charts, cartoons etc.

Location

Page no. where it appears	Number	Percentage
1	71	11.45
2	36	5.81
3	36	5.81
4	27	4.35
5	36	5.81
6	31	5
7	18	2.9
8	30	4.8
9	26	4.19
10	24	3.87
11	19	3.06
12	27	4.35
13	38	6.13
14	25	4.03
15	38	6.13
16	15	2.42
17	13	2.1
18	14	2.26
19	15	2.42
20	21	3.39
21	13	2.1
22	13	2.1
23	8	1.3
24	7	1.13
25	4	0.65
26	3	0.48
27	2	0.32

28	2	0.32
29	4	0.65
30	3	0.48
31	1	0.16
32	0	0
Total	620	100

One of the indicator for the prominence or importance of a news report can be its location i.e. page number where it is placed. Above data can be read in two different ways. One can look at it and say that front page consisted of maximum number of news reports about corruption if number of reports page-wise is considered. On the other hand it can be stated that front page contained only 11.45% of the total news reports about corruption whereas rest of the pages contained 88.55% of the news items relating to corruption. In other words 88.55% of the news reports were not on the front page which is the most prominent page of the newspaper. I prefer the later interpretation.

Size

Size	Number	Percentage
Less than 2''	193	31.13
More than 2''	427	68.87
Total	620	100

Overall size of the news item is another indicator of prominence and generally bigger size implies higher prominence and higher communicative effectiveness.[196] Some content analysis methods do not even consider stories which are not wider than 2 inches to be eligible as news reports.[197] Current analysis shows that 31.13% of the total news reports were less than the size of 2 inches which means that almost one

[196] D. Michaelson, and T. L. Griffin, 'A New Model for Media Content Analysis', USA, Institute for Public Relations, 2005

[197] S. Lynch, and L. Peer, 'Analysing Newspaper Content: A How-To Guide' USA, Readership Institute, 2002

third of the total stories were not prominent enough to make any communicative impact.

Images

Visual presentation	Number	Percentage
Photograph of Accused/Claimant	168	67.46
Photograph General	49	19.68
Cartoon	24	9.63
Other	8	3.21
Total	249	100

Another indicator of prominence is presence of photography or other visual presentation. In the present analysis 249 out of 620 news reports about corruption contained visual presentation of any kind which is 40.16% of the total news items. It also means that 59.84% of the news items had no photo or picture. Out of these 249 news items 67.46% were the photos of the accused or claimants (who level charges of corruption).

It is interesting to note that during the period of one year there were only 16 stories about conviction of the offenders in the cases of corruption out of which 3 stories related to conviction in other countries. One out of these 3 stories was related to India. On an average there are roughly 1000 convictions in corruption cases every year but one of the top newspaper of the country reports only 16 out of which only 13 occurred within the territories of India which is roughly 1.3% of the total convictions. Another interesting fact about this is that out of these 16 only 3 news items were able to find a place on the front page of the newspaper and among these 3 news reports 2 were about convictions in other countries. Also, out of these 16 news reports 11 are less than 2 inches in size. This is important in the not only in the context of discussion on 'availability heuristics' referred before but also with reference to the study made with reference to supposed low conviction rate in corruption cases. There is a huge gap between the perceptions of the people and actual statistical conviction rate in

corruption cases. And as we can see from the above numbers there is a huge gap in reporting of the conviction numbers in the newspaper taken for our analysis.

Some of the top stories related to conviction are as follows:

Four-year jail for corrupt ex-inspector

New Delhi: A special CBI judge on Thursday sentenced, to four years jail, a former Delhi Police inspector convicted for corruption, a CBI statement said.
A Rs 5 lakh fine was slapped on Virender Singh Chauhan, who was found to possess disproportionate assets up to Rs 31.55 lakh, while his wife Manju Chauhan was sentenced to two years rigorous imprisonment and a Rs 1.5 lakh fine. IANS

This particular story appeared on 27th February 2016 on 5th page of the New Delhi edition of Times of India. It apprises the reader about the conviction of a former Delhi Police inspector and the consequent sentence for corruption.

Former minister Thungon gets 42 months in jail

New Delhi: Former Union minister PK Thungon was on Monday sentenced to three-and-a-half-years imprisonment in a 23-year-old graft case relating to allotment of government shops during 1993 and 1994. Special CBI judge Sanjeev Aggarwal also imposed a fine of Rs 1 lakh on the former Arunachal Pradesh chief minister.

On February 24, Thungon was held guilty and was convicted under section 120B (criminal conspiracy) of IPC read with section 13d(iii)(if while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest) and 13(2) (criminal misconduct by public servant) of the Prevention of Corruption Act. TNN

The news item above appeared on 1st March 2016 of the above-mentioned newspaper and edition. Interesting fact about this news report is that it relates to the conviction of

a former Union Minister but still fails to find a space on the front page and rather appears on 23rd page.

Chopper deal: Finmeccanica ex-chief gets jail

A Milan court has sentenced Italian firm Finmeccanica's former chief Giuseppe Orsi to four-and-a-half years in jail for corruption in the Indian VVIP helicopter deal while the head of the company's UK subsidiary AgustaWestland, Bruno Spagnolini, got four years.

Thursday's conviction came even as CBI and ED have failed to make headway in the case back home. The Rs 3,546-crore deal was scrapped in 2014. **P 16**

This news item appeared on 9th April 2016 of the above-mentioned edition on the front page of the newspaper. It relates to the conviction of the chief of an Italian firm for corruption in the Indian VVIP helicopter deal.

Newspaper reporting is a portion of media reporting and some of the space, which it traditionally occupied, has been lost as a result of mushrooming of numerous news channels and with the advent of social media. Also, in a country like India the reach of English newspapers is not much when compared with the local language dailies, but the impact factor of English newspaper on the local newspapers cannot be wished away. The scope of this analysis is limited because of the difficulties of analyzing local language newspapers due to lack of sophisticated search and other tools on the sites of such news dailies. Nonetheless, every fragment of media reporting has its value especially in context of the fact how these processes are contributing to the social construction of reality in a given setup. And as Entman has suggested can become a tool of bring together scattered ideas in different disciplines to synthesize theories and concepts.

CHAPTER 6: CONCLUSION

This work began with an acknowledgement of the problem of defining as well as multiplicity of meanings of corruption. It has been discussed how dictionary and the rudimentary meanings of corruption gyrated around themes like: something moving from better to worse; or some debasing impurity or decay; or degeneration or disintegration; or decay of natural or original condition of something etc. The word itself is derived from Latin word *corrumpere* and its cognates, which implies 'to pervert, destroy, deprave or infect'. It needs to be realized that whenever we talk about corruption in its rudimentary form the aforesaid meanings should come to our mind, but it also needs to be realized that the use of the term corruption is scarcely to invoke its rudimentary form. The term 'corruption' is overwhelmingly used to denote corruption of officials or corruption in government, as we know it and in this institutional sense it is addressed as 'abuse of public office for private gain'. *Prima facie* this may not be reflective of the rudimentary meaning of corruption but when we look at it more closely it can be considered as some form of depravity or degeneration or decay of an official or the institution when the official power or office itself is abused for personal gains. Also, overwhelming use of the term in regard to its official or institutional sense has somewhat overshadowed its basic dictionary meaning as a result of which one thinks of corruption primarily in the sense of its official of institutional context. But the interesting thing to note is that in our most basic uses of the term it usually refers to 'bribery'. Thus, 'abuse of public office for private gains' is this umbrella definition which tries to include all such transactions in which abuse of public office is made in order to get some personal gain which includes bribery and the similar transaction. While making a diachronic analysis of the meaning and definitions of the term corruption it was noted that how ancient thinkers viewed corruption in a much broader sense when they considered it as a condition of body politic or failure of constitutional ideals etc. Many scholars are arguing that corruption need not be seen just as a transaction in which money changes hands but it needs to take into account the consequences it has on processes of representation or the values it bypasses or the constitutional ideals it affects. My argument is not to include these aspects as effects of corruption but to view these aspects as corruption itself. In other words they should not be viewed as 'effects' of

corruption but ‘as corruption’ as the ancient and medieval thinkers would have liked to call them. Also, when we are aware of the fact that these meanings contribute to processes that construct social realities it is prudent to place a better-informed conversation on corruption in the public domain. Since it was not possible to make an assessment of laws relating to corruption across the world therefore a study of law of corruption in India was made. This assays the development of law of corruption since independence i.e. how successive amendments, case laws etc. have evolved the body of law on corruption over the period of time and how has it performed in relation to convictions in the corruption cases. Briefly following developments can be reproduced here: Firstly, the definition and scope of corruption was broadened. Explanation 1 appended to the definition of public servant now provides that persons falling under any of the above sub-clauses are public servants, whether appointed by the Government or not. The idea behind this was to make all those working in a Governmental Organization liable for graft who by virtue of their not being appointed by the Government claim the benefit or immunity of not being a public servant. Secondly, Explanation 2 to the said provision says that wherever the words ‘public servant’ occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation. This clearly takes note of the situation where holders of public offices by virtue of some legal defect in their right to hold such office may escape the liability for their corrupt transactions. To prevent such an eventuality the explanation clearly equates the actors in actual possession of the situation of a public servant as public servants even though there may be some defect in their right to hold such office. Thus, both the explanations have the effect of further enlarging the scope of the definition to cover those cases that escape the liability merely due to technicalities. The scope of the term ‘public servant’ is also broadened by clause (viii) of the aforementioned section which deems any person who holds an office by virtue of which he is authorized or required to perform any public duty to be a ‘public servant’. Secondly, inclusion of members of the Higher Judiciary, viz. the Judges of the High Court and the Supreme Court within the definition of ‘public servant’ in consequence of a series of case law. Thirdly, inclusion of M.P.s and M.L.A.s within the definition of ‘public servant’ for the purposes of Prevention of Corruption Act, 1988. Fourthly, encompassing within the definition of ‘State’ various PSUs or corporations receiving the aid of the Government or which are owned or controlled by

the Government. Fifthly, the definition of 'public duty' now includes concepts like 'State interest', 'public interest' and 'community interest' which have a potential for expanding the scope of public duty. Sixthly, clarity to the meaning of words 'accept' and 'obtain' via case law. Seventhly, bringing clarity as well as lowering of barriers associated with the provision of 'sanction' to prosecute corrupt officials. Eighthly, the shifting of burden of proof on the accused if in the course of trial it has been proved that he accepted gratification. Ninthly, providing immunity to the bribe-giver from prosecution if he makes a statement before the court that he offered or agreed to offer bribe. Finally, the conviction rate concerning the cases of corruption is much higher when compared with social perceptions reflected in the news reports and survey undertaken under this study. It was shown that despite these welcome developments over the years the public confidence, when it comes to steps to counter corruption, is low. This prompted an attempt at the media content analysis regarding reporting on corruption in the behavioural part of the work. Again placement of such information in public domains should be considered as an end in itself not just as a means of providing a better-informed picture for the sake of processes of social construction of reality as whatever passes as knowledge in society matters irrespective of its validity. It was pointed out that jurisprudence around the concepts like 'public interest', 'state interest' and 'community interest' with regard to corruption is undeveloped in India. We can acknowledge the link between the transactional and body politic part of the corruption which the Act offers by making use of these concepts but at the same time it needs to be juxtaposed with the fact that case law and jurisprudence around these has not evolved. This is suggestive of a similar trend as was noticed in the definitional part of the corruption. In discussion on economic analysis of corruption it has been argued the economic approach focuses mainly on minimization of economic costs at the price of moral costs which though difficult to calculate are invaluable. But when we say that the moral costs of convicting an innocent person are so high that costs of letting go a culprit would not outweigh them then we fail to juxtapose the probable costs of harm to the rights of individuals and society as a whole which a wrongdoer will inflict by his corrupt act. This approach to analysis emanates from the flawed focus on corruption as an individual level phenomenon and not a social transaction. Again this focus is identical to the ones identified in the definitional and legal discussions. The discussion in the behavioural part of this work has presented a critique of the traditional law and economics insights

not just generally but also with respect to corruption. It has demonstrated that human memories are seriously flawed and human actors rely upon mental shortcuts or rule of thumbs to make decision and how these mental shortcuts act as bounds on the rationality of the human actors. This work discussed how various 'biases' and 'bounds' can be thought of in terms of corrupt behaviour not just at individual level but also at societal levels. Behavioural part is concluded with 'media content analysis' of corruption that corroborates various arguments and insights of this work. Thus, apart from an array of insights gathered during this work I again repeat the importance of bringing together insights and meanings scattered in various disciplines and juxtaposing them to synthesize a coherent concept I regard to the problem of corruption. The common thread, which runs through various dimensions analysed in this work, is the focus on individual rather than societal angle with respect to the phenomena of corruption. In these discussions it has been pointed out why this is happening and why it needs to be corrected. It also throws some light on how our meanings surrounding a phenomenon may be related to the manner in which information is being presented to us.

BIBLIOGRAPHY

- 4th Report, Second Administrative Reforms Commission, New Delhi (2007)
- Acemoglu, D., and Verdier, T., 'Property Rights, Corruption and the Allocation of Talent: A General Equilibrium Approach', in *Economic Journal*, 108(450), (1998), 1381-1403
- Ades, A. and Tella, R. D., 'The New Economics of Corruption', in *Political Studies*, XLV (1997), pp.496-515
- Adler, P. A. and Adler, P., 'The Deviance Society', in *Deviant Behavior*, 27: 2 (2006), pp. 129-148
- Andreski, S., 'Kleptocracy as a System of Government in Africa', in Heidenheimer, Arnold J., Jophnson, Michael and Le Vine, Victor (eds), *Political Corruption: A Handbook*, New Brunswick, NJ, Transaction Press, 1978
- Alschuler, A. W., "Criminal Corruption: Why Broad Definitions of Bribery Make Things Worse" (University of Chicago Public Law & Legal Theory Working Paper No. 502, 2015).
- Bacio-Terracino, J., 'Linking Corruption and Human Rights', *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 104 (March 24-27, 2010), pp. 243-246
- Bayar, G., 'The Role of Intermediaries in Corruption', in *Public Choice*, 122 (2005), pp. 277-298

- Bayles, M., 'Principles for Legal Procedure', in *Law & Philosophy*, 5 (1986), p. 33-57
- Basu, K., Bhattacharya, S. and Mishra, A., 'Notes on Bribery and the Control of Corruption', in *Journal of Public Economics*, 48 (1992), pp. 349–59
- Becker, G. S. and Stigler, G. J., 'Law Enforcement, Malfeasance and the Compensation of Enforcers' in *Journal of Legal Studies*, 3(1), January 1974, pp. 1-19.
- Besley, T., and McLaren, J., 'Taxes and Bribery: The Role of Wage Incentives', in *Economic Journal*, 103(416), (1993), 119-141
- Blau, A., ' Hobbes on corruption', *History of Political Thought* 30:4 (2009), 596-616.
- Bowles, R. A., and Garoupa, N., (1997), 'Casual Police Corruption and the Economics of Crime', in *International Review of Law and Economics*, 17 (1997), pp. 85-87
- Broadman, H. G. and Recanatini, F., 'Corruption and Policy: Back to the Roots', in *Journal of Economic Policy Reform*, 5: 1 (2002), pp. 37-49
- Chappell, A. T. and Piquero, A. R., 'Applying Social Learning Theory to Police Misconduct', in *Deviant Behavior*, 25: 2 (2004), pp. 89-10
- Clarke, M. (ed.), *Corruption: Causes, Consequences and Control*, London: Frances Pinter 1983
- Cooter, R. D. 'The Objectives of Private and Public Judges', in *Public Choice*, 41(1), 1983, pp. 107-32.
- ____, 'Lapses, Conflict, and Akrasia in Torts and Crimes: Towards an Economic Theory of the Will', 1 1 *INT'LR EV.L. & ECON*.(1991), p. 159-164

- Cooter, R. and Ulen, T., Law and Economics, 3rd edition (Addison, Wesley Longman: 2000)
- Euben, J. Peter. (1989). Corruption. In Terence Ball, James Farr & R. L. Hanson (Eds), *Political innovation and conceptual change* (pp. 220–46). Cambridge: Cambridge University Press
- Ferguson, M. and Ogloff, J. R. P., 'Criminal Responsibility Evaluations: Role of Psychologists in Assessment', in *Psychiatry, Psychology and Law*, 18: 1, (2011), pp. 79-94
- Freckelton SC, I., 'Psychiatry, Psychology and Law and ANZAPPL', in *Psychiatry, Psychology and Law*, 15: 1, (2008), pp. 1-7
- Friehe, T., 'Correlated Payoffs in the Inspection Game: Some Theory and an Application to Corruption', in *Public Choice,* (2008) 137, pp. 127-143
- Galanter, M., 'Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society', in *UCLA Law Rev*., Oct. 1983, 31, pp. 4-71.
- Garoupa, N., & Klerman, D., 'Corruption and the Optimal Use of Non-Monetary Sanctions', in *International Review of Law and Economics*, 24 (2004), p. 219-225
- Hammer, D., A Dynamic Reconstruction of Presumption of Innocence, in *Oxford Journal of Legal Studies*, Vol. 31, No. 2 (2011), p. 417-435
- Hindess, B., "Introduction: How Should We Think About Corruption" in *Corruption: Expanding the Focus*, ed. Manuhuia Barcham, Barry Hindess and Peter Larmour (Canberra: Australian National University)

- Hoffman, M. B., 'The Neuroeconomic Path of Law', *Philosophical Transactions: Biological Sciences*, in *Law and the Brain*, Vol. 359, No. 1451,(Nov. 29, 2004), pp. 1667-1676
- *Jolls, C., 'Behavioral Economics Analysis of Redistributive Legal Rules',* 51 *VAND. L. REV.* (1998), pp. 1653-1678
- Jolls, C., Sunstein, C. R., Thaler, R., 'A Behavioral Approach to Law and Economics', in *Stanford Law Review*, Vol. 50, no. 5 (May, 1998), pp. 1471-1550
- Jones, S. and Quisenberry, N., 'The General Theory of Crime: How General is It?', in *Deviant Behavior*, 25: 5, (2004), pp. 401-426
- Kahan, Dan M. & Nussbaum, Martha C., 'Two Conceptions of Emotion in Criminal Law', *96 COLUM. L. REV.* 2, (1996), pp. 269-374
- Kaufmann, D., 'Corruption: The Facts', in *Foreign Policy*, No. 107 (Summer, 1997), pp. 114-131
- Klitgaard, R., *Controlling Corruption*, (Berkeley, CA: University of California Press, 1988)
- ____, "Gifts and Bribes", in Richard Zeckhauser, ed., *Strategy and Choice*, (Cambridge, MA: MIT Press, 1991)
- ____, 'Managing the Fight against Corruption: a Case Study', in *Public Administration and Development*, 4 (1984), pp. 77-98
- Korobkin, R. B. & Ulen, T. S., 'Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics', in *CAL. L. REV.*, 88 (2000) , pp. 1051-1144
- Kumar, C. R., 'Corruption and Human Rights in India: Comparative Perspectives on Transparency and Good Governance (Oxford OUP 2011)

- Laibson, D., 'Golden Eggs and Hyperbolic Discounting', 1 12 *Q.J.E CON*., 1997, pp. 443- 77
- Landes, W. M. and Posner, R. A., 'Adjudication as a Private Good,' in *J. Legal Stud.*, 8(2), Mar. 1979, pp. 235-84
- *Lando*, H., '*Prevention of Crime and the Optimal Standard of Proof in Criminal Law',* (LEFIC Working paper (wp); *2003-04* / LEFIC)
- ____, The Optimal Standard of Proof in Criminal Law When Both Fairness and Deterrence Matter, Copenhegan Business School, 2000
- Lipset, S. M., and Lenz, G. S., "Corruption, culture, and markets" in *Culture Matters*, ed. L. E. Harrison and S. P. Huntington: 2000, New York: Basic Books
- Loewenstein, G., and Thaler, R. H., '**Intertemporal Choice'**, in Goldstein, W. M., and Hogarth, R. M.: *Research on Judgment and Decision Making: Currents, Connections, and Controversies* New York, NY: Cambridge University Press, 1997, pp. 365-78
- Mauro, P., 'Corruption and Growth', in *Quarterly Journal of Economics*, 110 (1995), 681-712
- Mishra, A., (ed.), *Economics of Corruption*, New Delhi: Oxford, 2005
- Mookherjee, D. and Png, I. P. L., 'Monitoring vis-a-vis Investigation in Enforcement of Law' in *American Economic Review*, 82(3), June 1992, pp. 556-65
- ____, 'Corruptible Law Enforcers: How Should They Be Compensated?', in *Economic Journal*, 105 (1995), pp. 145-159

- Mulgan, R., Aristotle on Legality and Corruption, in CORRUPTION: EXPANDING THE FOCUS 25 (Manuhuia Barcham, Barry Hindess, and Peter Lamour, eds., 2012
- Ngugi, J. M., 'Making the Link Between Corruption and Human Rights: Promises and Perils', *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 104 (March 24-27, 2010), pp. 246-50
- Nye, J. S., "Corruption and Development: A Cost Benefit Analysis", *American Political Science Review*, 61, June, 1967
- Parry, J. 'The Crisis of Corruption and the Idea of India - a Worm's Eye View', in I. Pardo (ed.) Morals of Legitimacy: Between Agency and System, Oxford: Berghahn Books, 2000
- Pardo, I., (ed.) Between Morality and the Law: Corruption, Anthropology and Comparative Society, Aldershot: Ashgate, 2004
- Pearson, Z., 'An International Human Rights Approach to Corruption' in Lamour, P. and Wolanin, N. (eds.), Corruption and Anti-Corruption (Canberra 2001), pp. 30-61
- Penovic, T., 'Mental Harm as an Instrument of Public Policy', in *Psychiatry, Psychology and Law*, 15: 1 (2008), pp. 140-152
- Philip, M. (1997). Defining political corruption. In P. Heywood (Ed.), *Political corruption* (pp. 20–46). Oxford: Blackwell.
- _____, 2002, "Conceptualizing Political Corruption". Pp. 41-57 in Arnold J. Heidenheimer and Michael Johnston (eds.) *Political Corruption: Concepts and Contexts*. New Brunswick, NJ: Transaction Publishers

- Polinsky, A. M. 'Optimal Liability When the Injurer's Information About the Victim's Loss is Imperfect', in *Int. Rev. Law Econ.*, 7(2), Dec. 1987, pp. 139-47
- Polinsky, A. M. and Shavell, S., 'On the Disutility and Discounting of Imprisonment and the Theory of Deterrence', *in J LEG STUD*, 28(1), 1999, pp. 1-16
- Posner, R. A., 'An Economic Approach to Legal Procedure and Judicial Administration', in *Journal of Legal Studies*, 2 (1973), pp. 399-458
- Posner, R. A., 'Are We One Self or Multiple Selves?: Implications for Law and Public Policy', in *LEGAL THEORY,* 3 (1997), pp. 23-35
- Rangarajan, L. N., (ed.), *Arthshastra by Kautilya*, Calcutta: Penguin Books, 1987
- Rawls, J., *A Theory of Justice*, Cambridge, MA: Harvard University Press, 1971 ed.
- Rose-Ackerman, S., 'The Economics of Corruption', in *Journal of Public Economics*, IV (1975), pp. 187-203
- ____, *Corruption: A Study of Political Economy* (New York: Academic Press, 1978)
- Ross, S. (1973), 'The Economic Theory of Agency: The Principal's Problem', in *American Economic Review*, 63 (1973), 134-139
- Rothstein, B. and Torsello, D., 'Is Corruption Understood Differently in Different Cultures?', Working Paper No. 2013:5, Quality of Government Institute, University of Gonthenburg
- Saxonhouse, A. W., "To Corrupt: The Ambiguity of the Language of Corruption in Ancient Athenes" in *Corruption: Expanding the Focus*, ed.

Manuhuia Barcham, Barry Hindess and Peter Larmour (Canberra: Australian National University)

- Shavell, S., 'Criminal Law and the Optimal Use of Non-monetary Sanctions as a Deterrent', in *COLUM. L. REV.,* 85 (1985), pp. 1232-1265
- Shleifer, A., and Vishny, R. W., 'Corruption', in *The Quarterly Journal of Economics*, Vol. 108, No. 3 (Aug., 1993), pp. 599-617
- Simon, Herbert A., 'A Behavioral Model of Rational Choice', in *Q.J. ECON.*, 69 (1955), pp. 99-118
- Spence, Edward H. 2007. Plato's Ring of Corruption. In E. Close, M. Tsianikas and G. Couvalis (eds.) "Greek Research in Australia: Proceedings of the Sixth Biennial International Conference of Greek Studies, Flinders University June 2005", Flinders University Department of Languages - Modern Greek: Adelaide, 35-44.
- Stigler, G. J., 'A Theory of Oligopoly', in *Journal of Political Economy*, LXXII (1964), pp. 44-61
- Stumer, A., The Presumption of Innocence: Evidential and Human Rights Perspectives, Hart Publishing, Oxford 2010
- Sunstein, C. R., (ed.), *Behavioral Law and Economics*, Cambridge University 2000
- Thompson, D. F., 'Mediated Corruption: The case of Keating five' in *American Political Science Review*, 87 (1993), pp. 369-381
- Transparency International, Global Corruption Report, 2003
- Tversky, A. & Kahneman, D., 'Judgment Under Uncertainty: Heuristics and Biases', in *JUDGMENT UNDER UNCERTAINTY*, vol. 3, 11 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982)

- Tummala, Krishna K., 'Corruption in India: Control measures and Consequences', in *Asian Journal of Political Science*, 10: 2 (2002), pp. 43-69
- Warren, M., "What Does Corruption Mean in a Democracy", American Journal of Political Science, Vol. 48, No. 2 (Apr., 2004), pp. 328-343
- Waterbury, J. (1973). Endemic and Planned Corruption in a Monarchical Regime. World Politics, 25(4), 533-555
- Widmalm, S., 'Explaining Corruption at the Village Level and Individual Level in India', 2005, *Asian Survey* XLV (5): 756-76
- World Bank, World Development Report 1997: The State in a Changing World, World Bank, Washington DC, 1997

CASES

- S.S. Dhanoa v. Municipal Corporation, Delhi and Ors [1981 (3) SCC 431]
- K. Veeraswami v. Union of India [(1991) 3 SCC 655]
- A. R. Antulay v. R. S. Nayak [(1984) 2 SCC 183]
- K. M. Karunanidhi v. Union of India [(1979) 3 SCC 431]
- P. V. Narasimha Rao v. State (CBI/SPE) [(1998) 4 SCC 626]
- Dalco *Engineering Private Ltd. V. Shree Satish Prabhakar Padhye [AIR* 2010 *SC* 1576]
- Bihar Public Service Commission v. Saiyed Hussain Abbas Rizwi [(2012) 13 SCC 61]
- K. Balaji Iyengar v. State of Kerala [(2010) SCC OnLine Ker 4969]

- State of Punjab v. Nirmal Kaur [(2009) 13 SCC 418]
- Essar Teleholdings Pvt. Ltd. v. Registrar General, Delhi High Court [(2013) 8 SCC 1]
- Vivek Gupta v. CBI [(2003) 8 SCC 628]
- A. Subair v. State of Kerala [(2009) 6 SCC 587]
- C. K. Damodaran Nair v. Government of India [(1997) 9 SCC 477]
- State v. Jitendra Kumar Singh [(2014) 11 SCC 724]
- Prakash Singh Badal v. State of Punjab [(2007) 1 SCC 1]
- M. Krishna Reddy v. State, Deputy Superintendent of Police, Hyderabad [(1992) 4 SCC 45]
- Subramanian Swamy v. Manmohan Singh [(2012) 3 SCC 64]
- Vineet Narain v. Union of India [(1998) 1 SCC 226]
- Subramanian Swamy v. Director, CBI [(2014) 8 SCC 682]