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A Legal and Constitutional Dimension of the Prevention of Corruption Act and Global Insights

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Transparency International¹ is an organization and a global movement whose vision is to end the injustice of corruption. Every year, the organisation releases an annual ranking on how corrupt the public sectors are perceived to be. The rank of India in 2019 was 80², in 2020, it was 86³, in 2021 & 2022, it remained at 85,⁴ whereas in 2023, it increased to 93⁵. The discussed ranks are from the 'Corruption Perception Index'⁶. When researching, the author's perception is that corruption is a new norm that eventually becomes a norm in society. However, on further dive, one can realise that some countries have a low corruption rate, such as Denmark, which has consistently occupied the first rank for the past five years. Other than Denmark, there are countries like Finland, New Zealand, Norway, and Singapore. These countries are a few of the top 10 countries with the lowest corruption rate. It is not considered a norm there but considered an evil that was combated by using different mechanisms. India

¹ 'Home' (Transparency, 23 June 2024) <<https://www.transparency.org/en/>> accessed 12 September 2024

² '2019 Corruption Perceptions Index - Explore India's Results' (Transparency, 24 January 2020) <<https://www.transparency.org/en/cpi/2019/index/ind>> accessed 12 September 2024

³ '2020 Corruption Perceptions Index - Explore India's Results' (Transparency, 28 January 2021) <<https://www.transparency.org/en/cpi/2020/index/ind>> accessed 12 September 2024

⁴ '2021 Corruption Perceptions Index - Explore India's Results' (Transparency, 25 January 2022) <<https://www.transparency.org/en/cpi/2021/index/ind>> accessed 12 September 2024

⁵ '2023 Corruption Perceptions Index - Explore India's Results' (Transparency, 30 January 2024) <<https://www.transparency.org/en/cpi/2023/index/ind>> accessed 12 September 2024

⁶ 'About' (Transparency) <<https://www.transparency.org/en/about>> accessed 12 September 2024

is also among those countries that have also introduced a few mechanisms. One such is the Prevention of Corruption Act⁷. Even though it was introduced in late 1980, corruption is still a growing issue in India. Thus, this paper aims to analyse the scope of the Act and its constitutional compliance to understand the cause of the increasing corruption in India. Along with that, the author tried to look into other countries that are actively combating corruption. Such comparative analysis has resulted in the development of suggestions to tackle the issue.

Keywords: *corruption, combat, analysis, perception index.*

INTRODUCTION

‘A fish rots from the head down’.

Any country to become developed must build a strong economy. However, to build such an economy, one must eliminate all the threats such as hyperinflation, financial crisis, debt crisis, corruption, mismanagement and many more, which, if neglected thereafter, become a reason for a crumbling economy. Corruption is one such silent enemy. The previously mentioned proverb gives one a view of the consequences of corruption even though it exists only in certain parts. Corruption, even if it exists only in a few sectors, has the power to decay the whole system, i.e. a whole nation. It is a commonly acknowledged truth that corruption exists in India. However, as one of the fastest-growing economies, India is handling this issue very lightly and not taking enough measures to combat such corruption.

From a Legal perspective, there is a meticulously drafted Act known as the Prevention of Corruption Act,⁸ which exclusively deals with corruption in public sectors and commercial organisations. Thereafter, this article further analyses countries such as South Sudan, Somalia, Ukraine, and Georgia as per the Corruption Perception Index⁹ and tries to derive a few approaches or inspirations from other countries that India may try to adopt to combat corruption.

⁷ The Prevention of Corruption Act 1988

⁸ *Ibid*

⁹ About (n 6)

India has its fair share of corruption and to combat the same, a legal framework was introduced in 1988 and was later amended in 2018. There are a few criticisms surrounding the definitions and disposal of cases, but from time to time and case to case, they are clarified in the best way possible.

ANALYSIS OF THE PREVENTION OF CORRUPTION ACT 1988

Categories of Offenders: Under the POCA, the offenders may belong to the following three categories:

- Public Servant
- Non-Public Servant
- Commercial Organisation

Public Servant - A detailed definition is provided under Sec.2(c) of the Act. A Public Servant serves i.e. discharges duty on behalf of the government or any local authority or any corporation established under a central provisional or state Act. Such a person receives remuneration either in the form of fees or commissions from the Government itself. The duty discharged by the person during his official hours is known as public duty.¹⁰

Non-Public Servant - A non-public servant can also be an offender when that person is said to have the influence or power to induce a public servant. The power of influence may be due to personal relations or non-personal relations.

Commercial Organisation - A Commercial Organisation is a firm legally known as a body that is either incorporated in India or outside India and carries its functions within India or outside India or a part of India and remains outside India or vice-versa. A company in the form of a Partnership also falls under this category. (Sec.9(3)(a)).¹¹

¹⁰ Prevention of Corruption Act 1988, s 2(c)

¹¹ Prevention of Corruption Act 1988, s 9(3)(a)

TYPES OF OFFENCES

Improper Duty: Upon careful examination of the list of offenders, it is evident that they are in a position of trust. There is an obligation cast upon them to be responsible, transparent, ethical, and accountable. However, if the obligation laid upon them is not fulfilled, then it is known as improper duty. Such as, a public servant who needs to be ethical accepts monetary rewards and falsifies a document that falls within the scope of improper duty.

Dishonesty: Any activity which is fraudulent, untruthful, deceitful, or insincere comes under the scope of dishonesty. For instance, if a director of a commercial organisation is embezzling the funds of the organisation, then the director is acting dishonestly.

Forebear: Forebear in this context is to 'refrain' or 'holdback', such as refraining from acting promptly. For instance, a public servant who is aware of the riots that are taking place has refrained from acting.

Cause Forbearance: Cause of Forbearance means if someone else orders the act of refrainment, such as if a Sub Inspector orders the Assistant Sub Inspector not to patrol certain areas to cover up the illegal activities happening over there.

Obtaining/Accepting/Attempting (by himself or any other party): If a public servant or any other listed offender initiates the process of a bribe, then it is known as attempting. If the transaction is successful, then it is known as obtaining. If the initiation is from the other party and the public servant doesn't state the contrary and receives the bribe, then it is known as accepting.

PENALTIES FOR THE OFFENCES

- If a Public servant obtains or accepts or attempts to obtain a bribe by himself or by any other party, such person receives imprisonment, which is not less than 3 years and may extend up to 7 years with a fine payable¹².

¹² Prevention of Corruption Act 1988, s 7

- If the bribe is taken by other parties who have the power of influence over the public servant due to personal relations, then such person is entitled to receive imprisonment not less than 3 years, which may extend up to 7 years along with a fine payable¹³.
- If the bribe is taken by other parties who have the power to induce not due to personal relations, then such a person is entitled to imprisonment, which may extend up to 7 years or a fine or both. Such punishment is not applicable if and only if the party is compelled to influence the public servant and report the incident within 7 days to the concerned agency¹⁴.
- If a member of a commercial organisation, such as an employee of not so high level, acts dishonestly, forebears or causes forbearance, acts improperly or accepts or attempts to accept a bribe, then the organisation is bound to pay a fine,¹⁵ but if such a member acted as per the instructions of members who have authority such as the director manager, the secretary or any such officer, then such members of the authority are guilty. They may receive imprisonment of 3 years, which may extend up to 7 years, along with a fine payable¹⁶.
- A person who received inadequate consideration (bribe) or no such consideration at all is considered guilty if he gives undue advantage such as falsifying the documents, preferential treatment or misrepresentation to others. Such a person may receive 6 months of imprisonment, which may extend to 5 years, along with a fine¹⁷.
- A person is considered guilty even if he didn't directly participate in it but abetted any of the categorised offences and as a consequence, the unfair treatment or undue advantage took place. Such a person receives imprisonment not less than 3 years but may extend to 7 years along with a fine¹⁸.
- If a public servant misuses the property entrusted to him or intentionally enriches himself during the period of his office, then such offence is considered criminal misconduct and

¹³ Prevention of Corruption Act 1988, s 7A

¹⁴ Prevention of Corruption Act 1988, s 8

¹⁵ Prevention of Corruption Act 1988, s 9

¹⁶ Prevention of Corruption Act 1988, s 10

¹⁷ Prevention of Corruption Act 1988, s 11

¹⁸ Prevention of Corruption Act 1988, s 12

he is entitled to receive imprisonment not less than 4 years, which may even extend up to 10 years along with a fine¹⁹.

- If the offender is a habitual offender i.e., there is a previous record of him committing any of the listed offences, then such offender is entitled to receive 5 years of imprisonment, which may extend up to 10 years along with a fine payable²⁰.
- If the offences which are recognised in the Act are attempted, then the offender is said to receive 2 years of imprisonment, which may extend up to 5 years along with a fine.²¹

INVESTIGATION PROCESS

The officers in charge need no arrest warrant when the offence is committed during the discharge of the official duties of the offender. Also, there is no need to obtain an order from the Magistrate.

Key Authorities in Offence Prosecution:

- 'In the case of Delhi special police establishment, someone who is not below the rank of inspector of police.
- In the case of metropolitan areas, someone who is not below the rank of assistant commissioner of police.
- If it is some other place other than the previously-mentioned areas, then it is someone who is not below the rank of deputy superintendent of police or a police officer of equivalent rank.'²²

Presumption of Offence: A public servant who is the alleged offender in the scenario of accepting a bribe or providing undue advantage without any such bribe is presumed to be the

¹⁹ Prevention of Corruption Act 1988, s 13

²⁰ Prevention of Corruption Act 1988, s 14

²¹ Prevention of Corruption Act 1988, s 15

²² Prevention of Corruption Act 1988, s 17

offender unless the contrary is proven. The burden of proof in these cases lies on the public servant. It is applicable only for the cases under sec 7²³ and sec 11^{24,25}

CONSTITUTIONAL COMPLIANCE

Right to Fair Trial:²⁶ As discussed previously, under the heading of presumption of offence, in some of the cases, the public servant is presumed to be the offender unless the contrary is proven. To prove that he is not the offender as well as an innocent, the whole burden of such proof lies on the offender. Burdening a single party to acquire proof is always a highly criticised provision irrespective of the law it is present in, as it directly collides with the right of an individual to have a fair trial. Therefore, the clauses that deal with the presumption of offence and the burden of proof on the accused conflict with the Right to a fair trial.

Right against Self-Incrimination:²⁷ This right provides that there is no need for any person to put forth any such piece of evidence which may be later used against himself.

This can be violated under Sec.21²⁸ of the PCA, where an accused person can be a competent witness. The clause also clearly mentions that the accused must 'voluntarily' turn into a witness. However, there are high chances of convincing the accused coercively and obtaining the confession. Along with that, the prosecutors may use the clause as a plea deal or reduce sentences and encourage the accused as a part of legal strategies. Such strategies create conflict within the accused between aiding the prosecution and protecting his rights.

Right to Privacy:²⁹ Often, while proving that the accused has not committed any offence and in the process of relieving the burden laid on him/her by the law under the clause presumption of offence, the accused has to disclose some personal details such as personal property details, family members' property details, call records and so on.

²³ Prevention of Corruption Act 1988, s 7

²⁴ Prevention of Corruption Act 1988, s 11

²⁵ Prevention of Corruption Act 1988, s 20

²⁶ Constitution of India 1950, art 21

²⁷ Constitution of India 1950, art 20(3)

²⁸ Prevention of Corruption Act 1988, s 21

²⁹ Constitution of India 1950, art 21

In this context, not only the privacy of the accused is at stake, but also the family members, friends or the person who are considered the allies of the accused are at risk.

All these may affect the right to privacy under the Constitution.

Right to Equality:³⁰ Everyone, irrespective of their caste, creed, gender, religion, race, background, or societal position, must be treated equally before the law. It is one of the important provisions which is laid down in the preamble as well. However, there is a clause of presumption of offence and also another clause that casts the burden of proof on the accused, and both clauses are considered not compatible with the equality provision as they circle inequality by placing the accused in a disadvantageous position.

COMPARATIVE ANALYSIS

The Corruption Perception Index (CPI)³¹ consists of 180 countries. Some countries have increased their corruption index, which means they are successfully combating corruption, whereas some countries have decreased their share in the corruption index, which means they are failing to combat corruption. Adding to those, there are some countries, such as Japan, that do not have any specific change in their index. For more clarity, the points in CPI vary from 0 to 100, where 0 stands for highly corrupt and 100 stands for highly clean state. Thus, if a country is increasing its share in the CPI, that means it is improving its conditions and becoming immune to corruption by adopting various mechanisms and, if necessary, inventing a few mechanisms. At the same time, if a country's share in CPI is decreasing, that means it is unable to fight against corruption and if it is doing so, it is failing.

Therefore, there are three types of countries as per CPI:

- Decreased their corruption index
- Increased their corruption index

1. Remained same

³⁰ Constitution of India 1950, art 14

³¹ About (n 6)

1. Decreased their Corruption Index: Countries like Somalia, South Sudan, Ukraine and many other countries have low corruption perception index i.e. they have high corruption rates. Most countries have legal frameworks to combat such offences, but the problem isn't solved by merely drafting such bills and enacting them. Most of the countries have weak institutions, political instability and non-independence of the judiciary. The weak institutions, which are considered as one of the reasons for the high corruption rate in this context, are less judiciary infrastructure, committees or autonomous institutions to combat corruption are less in number.

Another reason, i.e., Political instability in this instance, is that either the country must be in civil war or an unstable government. Along with that, in highly corrupted countries, the judiciary is highly intervened by other organs i.e., legislative and executive, which makes the judiciary become influenced and thereafter becomes dependent.

Previously mentioned countries occupy the lower place in the chart of CPI from the beginning but there are some countries which occupy the higher place but still as time passes, their corruption perception index decreases such as New Zealand, whose score was 87³² in 2022 and 85³³ in 2023. Another example here is that of Sweden, whose score was 83³⁴ in 2022 and 82³⁵ in 2023. These are two of the top 10 countries in the world with the lowest corruption rates. However, an article under the title 'Trouble in the top'³⁶ sheds light on the problems faced by the countries that are at the top of the CPI.

The CPI takes its data from different institutes such as the World Bank, the International Monetary Fund, the European Union, the United Nations and so on. However, often, the collected data fails to measure the data surrounding transparency and related context. The countries in the top position may have less corruption rate in other countries but there are more

³² '2022 Corruption Perceptions Index - Explore New Zealand's Results' (*Transparency*, 31 January 2023)

<<https://www.transparency.org/en/cpi/2022/index/nzl>> accessed 11 September 2024

³³ '2023 Corruption Perceptions Index: Explore the Results' (*Transparency*, 30 January 2024)

<<https://www.transparency.org/en/cpi/2023>> accessed 11 September 2024

³⁴ '2022 Corruption Perceptions Index: Explore the Results' (*Transparency* 31 January 2023)

<<https://www.transparency.org/en/cpi/2022>> accessed 11 September 2024

³⁵ '2023 Corruption Perceptions Index - Explore Sweden's Results' (*Transparency* 30 January 2024)

<<https://www.transparency.org/en/cpi/2023/index/swe>> accessed 11 September 2024

³⁶ 'CPI 2023: Trouble at the Top - News' (*Transparency*, 30 January 2024)

<<https://www.transparency.org/en/news/cpi-2023-trouble-at-the-top>> accessed 11 September 2024

cases of cross-border corruption. Their strong legal framework, autonomous institutions, independent judiciary and socio-cultural background all go in vain in the cross-border corruption, which cannot be measured in the CPI.³⁷

2. Increased Corruption Index: Even though the data on the corruption index is not available, there is one of the countries that stands as the model for combating corruption. Georgia, from being the most corrupt nation, has improved its situation and thereafter stood as a model country to combat corruption. Three major differences can be seen in the country post-2004 i.e., strong political will, zero tolerance, and swift actions combined with transparency. Even though corruption has not disappeared in the country, still the corruption rate has decreased drastically compared to earlier times. This is also an example where one can see that the countries with stable political power will perform better compared to the others.

Remains Same: The countries that remained the same as they were in the previous years have different aspects they need to look into. One of them is that if there is no reported offence, it doesn't mean no offence has been committed at all. It means the people in power are exploiting the loopholes that are neglected in such a way that it is off the radar of officials. Such countries that have shown no improvement may be in an advantageous position as they have not attracted any new forms or cases of corruption but also, there is an unseen and disadvantageous side to it, which is they are prone to serious corruption cases in the future. Therefore, no improvements also mean there is a need to revisit the existing framework and gain the public trust to encourage whistle-blowers. Whistleblowers must be given a sense of security so that they can come forward and report any illegal or corrupt activities happening around them.

SUGGESTIONS

After examining the mechanisms employed by various countries, a few suggestions are formulated.

Political Will: 'No one can change the system'. These are the words one can hear multiple times from the public. There are political parties who started their journey to change the system but

³⁷ *Ibid*

eventually became a part of the system themselves. However, the contrary is proven in Georgia, where the political party had a strong will to combat the corruption and even succeeded in doing so. The political parties should also focus on building a strong will by creating anti-corruption bodies and whistle-blower protection and by incorporating several such approaches, which will give fruitful results.

Zero-Tolerance Policy: One of the policies that are followed by most countries that are successfully combating corruption is the zero-tolerance policy. The policy is nothing but showing no interest in any form of corruption and the offender is punished rigorously thereafter. By adopting this policy, one is saying a strict no to black money, bribes, and both active and passive corruption, which may include non-monetary goods as well.

Public Awareness: In our country, anti-corruption topics are limited to essay writing, speeches, and political campaigning. However, are the youth even aware of the seriousness of the situation? We cannot predict it. The youth and children who are going to become future citizens of the county must be aware of the real reason behind the need to combat corruption.

Explaining them from different perspectives, especially economically, will be a better approach as corruption leads to inefficient resource allocation, which leads to unequal development and gives rise to monopolies, stifling competition and innovation. Also, campaigns in rural areas must be conducted regularly and surveys must also be carried out. Topics such as how one must report corruption activities and how evidence can be collected by them should also be covered.

Speedy Disposal of Cases: The legal framework in India is great to combat corruption legally but the process is time-consuming. An increased number of courts and enforcement agencies taking digital assistance might help in the speedy disposal of cases.

CONCLUSION

‘Prevention is better than cure’. In the context of corruption, prevention cannot be done by a single agency. It is a collective effort. From a legal perspective, ample measures are taken to counter the corruption. Nevertheless, legal support is only a part of the fight against it. Apart from the legal framework, other areas need focus as well. The other areas come under executive

and judiciary, such as an executive must work on ethical standards and promote ethical leadership within the organisation. Along with that, the executive can advocate for policy changes. Along with that, taking the assistance of technology to tackle cases of corruption will lead to visible and swift actions.

The other area of focus, apart from the executive, is on the judiciary. The judiciary system must interpret the anti-corruption laws impartially and promote judicial integrity. The judiciary must also protect the whistle-blowers during the proceedings of the court, such as conducting an in-camera proceeding.

Moreover, corruption is not India's issue it is a global problem. If not addressed timely, then another financial crisis can be seen. The world is connected and dependent on each other due to globalisation. If a country's economy collapses, it will surely affect one or more countries. Therefore, corruption is a multifaceted approach; collaboration of government, civil society, and private sectors is necessary to establish an equitable society.