Note on implications of the Proposed Section 17A & Section 8 in Prevention of Corruption Act, 1988

We recognize that there will be paralysis of governance at the top levels of bureaucracy if there is needless harassment**,** vexatious investigation into bona fide decisions, and reckless prosecution of senior officials for bona fide advice or decisions in conformity with Government policy. The recent vexatious investigations of several upright public officials for legitimate actions and decisions have done immense damage to Governmental decision-making. Therefore, Government officials should be given immunity and protection from vexatious investigations in matters related to policy decisions in discharge of their functions at the government level. But extending such immunity to all the 20 million public servants irrespective of nature of functions exercised by them paralyses all anti-corruption institutions, renders anti-corruption law ineffective, overburdens the government and further promotes the ubiquitous culture of corruption. Therefore, in place of the omnibus protection to ***all*** public servants and in respect of ***all*** kind of allegations, there must be selective protection in matters relating to policy recommendations and decisions at the Government level.

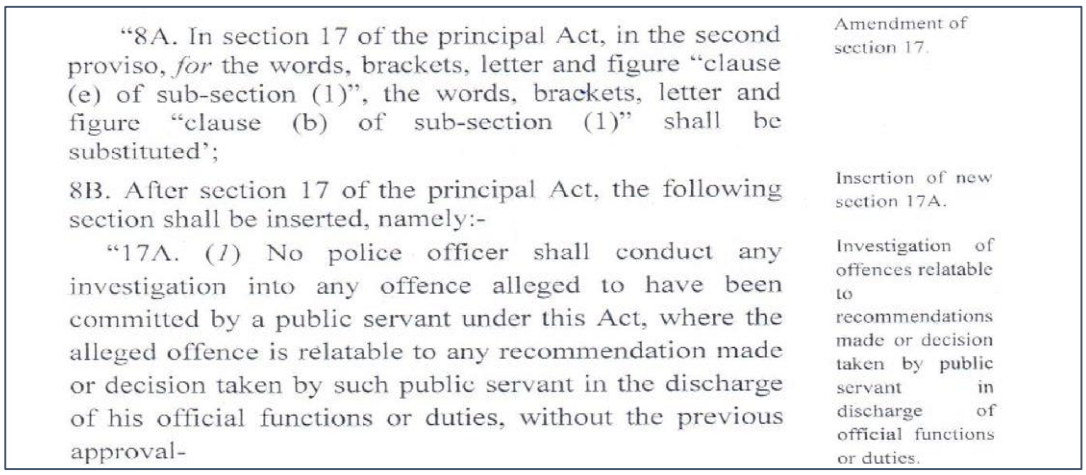
Secondly, when corruption is rampant, we need reliable evidence to act decisively against public servants. Most retail corruption in India is extortionary where a citizen or corporate is fleeced by an unscrupulous official simply to do what was originally due to them or what they are entitled to. In such a scenario, it is important to give immunity to bribe-givers who are victims of extortion in order to be able to prosecute corrupt officials. In a climate of appallingly poor service delivery, ubiquitous corruption and harassment of innocent citizens seeking even the simplest of services, most

households are compelled to pay bribe for even a birth certificate, ration card, caste or income certificate, land record, registration of a sale deed, water or power connection or building plan approval. Unfortunately, the government seems to have not understood this fact and proposed to punish all bribe-givers, including the helpless, ordinary citizens who are forced to pay a bribe. The new section 8 (1) proposes to enhance punishment for all forms of bribe giving, including by ordinary citizens to get a service they are entitled to get. The punishment under this law, once enacted, can be upto 7 years, with a mandatory minimum of 3 years.

Background to the insertion of Section 17A

1. PC Act, 1988 gives full freedom to investigative agencies to conduct enquiry into allegations against any public servant. No prior permission was envisaged in law for investigation. However, Section 19(1) of the PC Act, 1988 as well as Section 197 of CrPC envisage prior sanction of prosecution of a public servant.
2. In 2003, Section 6A was incorporated in the Delhi Special Police Establishment Act, 1946 (DSPE Act, 1946) dealing with CBI. This section mandated prior approval of government before CBI took up investigation of cases of corruption under Prevention of Corruption Act, 1988 (PC Act, 1988) relating to officers of the rank of Joint Secretary and above.
3. In 2014, in the case of *Dr. Subramanian Swami vs Director, CBI and others* (*writ petition (civil) number 21 of 2004 of Centre for Public Interest Litigation vs Union of India)* the Supreme Court struck down Section 6A as unconstitutional and violative of rule of law.
4. Now, the Union government is introducing an official amendment in the pending legislation The Prevention of Corruption (Amendment) Bill, 2013. Under

the proposed Section 8B of the Amendment Bill, a new Section 17A is sought to be inserted in the Principal Act as follows:



"8A. In section 17 of the principal Act, in the second proviso, *for* the words, brackets, letter and figure "clause (e) of sub-section (1)", the words, brackets, letter and figure "clause (b) of sub-section (1)" shall be substituted';

Amendment of section 17.

8B. After section 17 of the principal Act, the following section shall be inserted, namely:-

Insertion of new section 17A.

"17A. (*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 such public servant in the discharge of his official functions or duties, without the previous approval-

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

(Source : Notice of Amendments, Rajya Sabha, November 2015)

Implications of the proposed Section 17A:

Section 17A makes it mandatory on the police/probe agency to obtain sanction of Lokpal, in cases involving employees of the Union, and of respective Lokayuktas, in cases involving employees of the States before initiating any inquiry/investigation against a public servant in all cases of corruption except where the public servant is caught red-handed. Any complaint to police/probe agency shall be treated as a deemed complaint to Lokpal or Lokayukta as the case may be. The Lokpal/Lokayukta should therefore go through elaborate and cumbersome procedure prescribed in Chapter VII of Lokpal and Lokayukta Act, 2013.

However, given the way Lokpal/Lokayukta institutions are structured, it is likely that there will be great delay in sanction of investigation and the whole sanctioning machinery – Lokpal or Lokayukta or respective government will be paralysed with tens of thousands of cases needing prior sanction for investigation. And with **nearly** 200 lakh or 2 crore public servants in India and the CBI and State Anti-Corruption Bureau

(ACB) forwarding each case to Lokpal/Lokayukta before even commencing investigation, the whole anti-corruption institutional framework will be jammed and paralysed.

The Rajya Sabha Select Committee recommended that this prior sanction of investigation should be by the Union or state government. Evidence in many states shows that requests for sanction of prosecution are pending with governments for years even in cases of clear and compelling evidence. It would be unreasonable to expect that the Union or State governments can handle the enormous workload involved in sanction of investigations. If even investigation cannot be launched against a clerk or a minor government official without prior government consent, and if it takes months or years to approve investigation of corruption, public trust in government will be severely eroded, and the corrupt officials will be emboldened to be even more rapacious.

Therefore, it is illogical to extend the discredited single directive to all classes of government employees, retrogressive as it weakens investigative agencies, burdensome on the institutions of Unions and State governments or Lokpal/Lokayuktas, and ultimately counter-productive in combating corruption.

Nevertheless, there is a genuine case to provide protection from malicious or vexatious investigations to key officials at the level of decision-making and policy formulation. Therefore, the following provision may be inserted to give protection in such cases:

> *"17A (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 **Policy** decision taken **at the government level** in the discharge of his/her official functions or duties, without the previous approval-*

in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of the Union, of that Government;

in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of a State, of that Government;

in the case of any other person, of the authority competent to remove him from his office, at the time when the offence was alleged to have been committed:

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 advantage for himself or for any other person:

Provided further that the concerned authority shall convey its decision under this section within a period of three months, which may, for reasons to be recorded in writing by such authority, be extended by a further period of one month.

Prosecution of bribe-giver

As pointed out in the report of the Select Committee of the Rajya Sabha, the proposed Section 8 in the PCA Bill 2013 criminalizes the act of bribe-giving as an independent offence and provides that anyone who offers, promises or gives 'undue advantage' to any person to induce the public servant to perform public duty improperly would constitute cognizable offence. The bribe-giver has been given protection in the proposed sub-Section (2) of Section 8 where the bribe-giver informs the law enforcement authority or investigation agency before giving the bribe. But the Committee does not recommend any protection to ordinary citizens who are forced to pay a bribe for myriad simple services they are entitled to. Parliamentary Select Committee recommends that if the bribe-giver within seven days of giving or paying

bribe to public servant reports the matter to police or law enforcing agency, he may be given immunity from criminal prosecution. It is unrealistic that a helpless, poor citizen can avail this facility and report to the police in a milieu of ubiquitous corruption in most interactions between a citizen and a government agency. There is tremendous asymmetry of power in India which makes 90% citizens weak, defenseless and vulnerable to extraction of bribes even by low-level functionaries in government. Criminalizing most citizens trapped in the milieu of corruption is counter-productive and unenforceable. The state that has failed to protect the citizens and provide even the most basic services without corruption cannot put the onus on citizens and treat them as criminals. Such an approach is morally reprehensible and will only alienate ordinary citizens from our government process. And to incorporate such a provision to severely punish helpless citizens while the Bill seeks to give extra protection to the corrupt employee who receives the bribes is extremely detrimental to public morale and credibility of law makers and government. The answer to extortionary corruption is to create a framework in which efficient and prompt services are delivered without bribe, influence, or harassment; not punishing the hapless citizen who is the victim.

However, there is another class of bribe givers that undermines public good and profits from collusion with corrupt public servants. In awarding of contracts, allocation of natural resources, granting of licenses, appointment and transfer of officials, and fabricating evidence or unduly influencing investigation or prosecution, the bribe giver is gaining undue advantage, obstructing law, undermining public good, plundering the state exchequer, distorting fair competition, adversely affecting the quality of public goods and services, and in general seriously damaging the governance process. Such bribe givers need to be dealt with sternly by law. The present law is too feeble and ineffective to deal with collusive corruption. The Second Administrative Reforms

Commission recommended that in cases of collusive corruption, the punishment should be enhanced and the burden of proof should be shifted on the accused once prima facie evidence is established.

Therefore, a clear distinction needs to be drawn in the definitions part for collusive and coercive corruption. A few verifiable standards would be:

- Is there any out of turn, undeserving benefit to the bribe giver?
- Is there any fraud, misrepresentation or undermining of competition?
- Is there a loss to the exchequer?
- Has the bribe affected the decision materially so that an undeserving person got a benefit?
- Has the quality of public goods or services suffered on account of corruption?
- Has public interest suffered by violation of safety norms, or environmental standards?

If the answer to any of these is positive, it becomes a case of collusive corruption.

Therefore, there is a need to define the offence of 'collusive bribery' in Section 7 in the PCA (Amendment Bill), 2013. An offence could be classified as 'collusive bribery' if the outcome of the transaction leads to a loss to the state, public or public interest. The punishment for all such cases of collusive bribery should be double that of other cases of bribery and the victims of coercive corruption should be completely protected by law. In all such cases if it is established that the interest of the state or public has suffered because of an act of a public servant, then the court shall presume that the public servant and the beneficiary of the decision committed an offence of collusive bribery.

The answer to coercive bribe-giving is timely services without having to resort to bribes, not harsh punishment of the victim of corruption. It is the government's duty

to enact a public service delivery law with the provisions for time lines for each service and compensation for delay. The strange consequence of proposed amendment is that the small bribe-giver who is a victim of a dysfunctional system will be cruelly punished, while bribe taker will enjoy immunity.

Therefore, we request you to ensure that the Members of Parliament across parties are made aware of these grave implications and the proposed amendments be modified accordingly.

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