

CORRUPTION IN THE JUDICIARY

Subhankar Senapati

University Law College, Utkal University, Bhubaneswar

In the present context, corruption is accepted not as an unfortunate but as a practical tool in hands of the opportunist. And this is not because it paves easy way for things to be done but because of its abundant prevalence throughout the Govt. and administrative system. Corruption has long existed all around the world since time immemorial in one form or the other. It can be traced back to the fourth B.C to have been in India through the inscriptions of the Arthashastra by Kautilya¹. Kautilya goes on to state that there are forty ways of embezzlement and goes on to enumerate the same. This filthy concept has now taken shape of a political weapon which is unleashed onto the rivals in the right circumstances. India as a country stands widely infected by this plague of corruption. The state of such affairs leaves a man of principles unrecognized and struggling. Corruption may be said to be that, which forms the bond between the politicians, bureaucrats, and criminals giving way to the notion 'money is power'. The prevalence of corruption has sadly made its existence accepted as a part of the procedure. However, there have been a whole range of significant policies that have come to form an essential and an important step in the endeavor of combating with the evil of corruption. In India, the Supreme Court is relatively clean, though there are obviously exceptions. Proceedings are wide in court and documents are available for minimum payment. The accused is entitled to copies of all documents depend upon by the prosecution free of charges. Duplicates of authenticated orders can also be obtained. There is effective system of alteration in the form of reviews and appeals. Centre for Media Studies conducted a country wide research in 2005 on public approaches and experiences of corruption in lower courts and found that bribes seems to be fixed as the price of getting things done. The pre-determined amount paid in a twelve month period is around Rs.2630 crores. The Money was paid to the officers in the following ratios: 61 percent to lawyers, 29 percent to court officials, 5 percent to judges, and the remaining to middlemen. The main causes of corruption are delays in the disposal of cases, lack of judges, and complicated procedures, all of which are exacerbated by a predominance of new law. As of February 2006, 33,635 cases were impending in the Supreme Court with 26 judges, 3,341,040 cases in the high courts with 670 judges and 25,306,458 cases in the lower courts.

CORRUPTION LAWS IN INDIA

¹ Pranab Bardhan, 'Corruption and Development: A Review of Issues'.

Public servants in India can be penalized for corruption under the Indian Penal Code, 1860 and the Prevention of Corruption Act, 1988. The Benami Transactions (Prohibition) Act, 1988 prohibits benami transactions. The Prevention of Money Laundering Act, 2002 penalizes public servants for the offence of money laundering. India is also a signatory (not ratified) to the UN Convention against Corruption since 2005. The Convention covers a wide range of acts of corruption and also proposes certain preventive policies.

Key Features of the Acts related to corruption

Indian Penal Code, 1860:

- The IPC defines “public servant” as a government employee, officers in the military, navy or air force; police, judges, officers of Court of Justice, and any local authority established by a central or state Act.
- Section 169 pertains to a public servant unlawfully buying or bidding for property. The public servant shall be punished with imprisonment of upto two years or with fine or both. If the property is purchased, it shall be confiscated.
- Section 409 pertains to criminal breach of trust by a public servant. The public servant shall be punished with life imprisonment or with imprisonment of upto 10 years and a fine.

The Prevention of Corruption Act, 1988

- In addition to the categories included in the IPC, the definition of “public servant” includes office bearers of cooperative societies receiving financial aid from the government, employees of universities, Public Service Commission and banks.
- If a public servant takes gratification other than his legal remuneration in respect of an official act or to influence public servants is liable to minimum punishment of six months and maximum punishment of five years and fine. The Act also penalizes a public servant for taking gratification to influence the public by illegal means and for exercising his personal influence with a public servant.
- If a public servant accepts a valuable thing without paying for it or paying inadequately from a person with whom he is involved in a business transaction in his official capacity, he shall be penalized with minimum punishment of six months and maximum punishment of five years and fine.
- It is necessary to obtain prior sanction from the central or state government in order to prosecute a public servant.

The Benami Transactions (Prohibition) Act, 1988

- The Act prohibits any benami transaction (purchase of property in false name of another person who does not pay for the property) except when a person purchases property in his wife’s or unmarried daughter’s name.

- Any person who enters into a benami transaction shall be punishable with imprisonment of upto three years and/or a fine.
- All properties that are held to be benami can be acquired by a prescribed authority and no money shall be paid for such acquisition.

The Prevention of Money Laundering Act, 2002

- The Act states that an offence of money laundering has been committed if a person is a party to any process connected with the proceeds of crime and projects such proceeds as untainted property. "Proceeds of crime" means any property obtained by a person as a result of criminal activity related to certain offences listed in the schedule to the Act. A person can be charged with the offence of money laundering only if he has been charged with committing a scheduled offence.
- The penalty for committing the offence of money laundering is rigorous imprisonment for three to seven years and a fine of upto Rs 5 lakh. If a person is convicted of an offence under the Narcotics Drugs and Psychotropic Substances Act, 1985 the term of imprisonment can extend upto 10 years.
- The Adjudicating Authority, appointed by the central government, shall decide whether any of the property attached or seized is involved in money laundering. An Appellate Tribunal shall hear appeals against the orders of the Adjudicating Authority and any other authority under the Act.
- Every banking company, financial institution and intermediary shall maintain a record of all transactions of a specified nature and value, and verify and maintain records of all its customers, and furnish such information to the specified authorities.

Process followed to investigate and prosecute corrupt public servants

- The three main authorities involved in inquiring, investigating and prosecuting corruption cases are the Central Vigilance Commission (CVC), the Central Bureau of Investigation (CBI) and the state Anti-Corruption Bureau (ACB). Cases related to money laundering by public servants are investigated and prosecuted by the Directorate of Enforcement and the Financial Intelligence Unit, which are under the Ministry of Finance.
- The CBI and state ACBs investigate cases related to corruption under the Prevention of Corruption Act, 1988 and the Indian Penal Code, 1860. The CBI's jurisdiction is the central government and Union Territories while the state ACBs investigates cases within the states. States can refer cases to the CBI.
- The CVC is a statutory body that supervises corruption cases in government departments.

The CBI is under its supervision. The CVC can refer cases either to the Central Vigilance Officer (CVO) in each department or to the CBI. The CVC or the CVO recommends the action to be taken against a public servant but the decision to take any disciplinary action against a civil servant rests on the department authority.

- Prosecution can be initiated by an investigating agency only after it has the prior sanction of the central or state government. Government appointed prosecutors undertake the prosecution proceeding in the courts.
- All cases under the Prevention of Corruption Act, 1988 are tried by Special Judges who are appointed by the central or state government.

CAUSES OF CORRUPTION

Undue influence by the executive and legislative branches

Despite constitutional assurance of equality between the three government branches (the legislature, which makes the laws; the executive, which administer the laws and manage the business of government; and the judiciary, which resolves disputes and applies the law), the executive and legislature have significant control over the judiciary in many countries. Where the rule of law has been weak, the judiciary is frequently viewed as an acquiescent branch of government. Judges in weak judiciaries are submissive to politically connected individuals in the executive and legislative branches. Sometimes the president of the country or a politically motivated body (such as the Ministry of Justice or Parliament) has the power to appoint and promote judges without the control of transparent and objective selection procedures, or eligibility requirements may be vague, allowing for irrational consent. Unless compelled by law, the executive and legislative branches are hostile to cede their influence over the judiciary. This was true in Thailand where the judiciary was a part of the Ministry of Justice until 1997 when the courts became independent and subjected to the control of the Supreme Court². Once appointed, judges may feel compelled to respond positively to the demands of the powerful in order to maintain their own status. Rather than act as a review on government in protecting civil and human rights, judges in corrupt judiciaries often encourage state interests over the rights of the individual. In many countries, the president has the power to reward judges who accept his wishes with modern office equipment, higher quality housing and newer cars.

Social tolerance of corruption

In many countries social conversations are administered less by law than customary or familial code of conduct. To regard as corrupt judges who back the interests of their relatives overlook the notion that it may be more dishonorable for a judge to ignore the wishes of the family than to abide strictly by the law. Government decisions may be based more on personal influence than merit. The strength of personal relationships is so good in some countries that all judicial decisions are suspected of being a commodity of influence. In some countries, paying a bribe is considered an essential requirement for judicial services and, indeed, the only method for accomplishing results. In countries where court processes are complicated, court users prefer to pay bribes as a cheaper means of getting quicker services. Court staff also demand bribes for services to which citizens are

² (see also 'Judicial independence and corruption', page 15)

legally designated. In some countries, the payment of fees for judicial services is so rooted that complaints arise not if a bribe is sought, but if the requested bribe is greater than usual.³

Low judicial and court staff salaries

Judicial salaries that are too low to attract qualified legal personnel or retain them, and that do not enable judges and court staff to support their families in a safe environment, prompt judges and court staff to supplement their incomes with bribes.⁴ Although judges' salaries are not as attractive as those of legal professionals in the private sector, the security of the judicial position and the respect earned to the profession should compensate for loss of earnings. In relation to other government employees, judges should receive among the highest salaries. While the salary of a federal judge of a district court in the United States is not commensurate with what a judge might have earned in private practice, it is higher than most government employees and the prestige of the post makes it an attractive position. The salary difference between different branches of government can be galling in some countries. In addition to low salaries, judges often assume their positions with a significant financial burden. Judges in some countries are for sale and the cost can be many times the official annual salary of a judge.

Poor training and lack of rewards for ethical behavior

In some countries, judges who make judgements based on the facts and applicable law have no assurance they will receive a positive evaluation. Ethical behavior is punished, rather than rewarded. In corrupt judiciaries, judges who make correct judgements can see their judgements routinely overturned by corrupt appellate judges, thereby giving the impression that the lower court judge is inexperienced. Court presidents, who have the power to assign cases, can punish an honest judge by assigning a heavy caseload, causing a major case delay that can be grounds for admonition. In Sri Lanka, judges who have the audacity to rule against the government's interests are allegedly ignored by the Chief Justice who has broad foresight concerning the composition of Supreme Court panels. Those judges who are unshaken in their independence can be the subject of fake charges or can face early retirement.

REMEDIES TO CORRUPTION IN THE JUDICIARY

It is possible to mitigate the factors that contribute to judicial corruption, but solutions must be tailored to national, sub-national, realities, and are successful when part of an integrated reform plan. Increasing judicial salaries will not stop judges and court staffs from taking bribes, though coupled with additional accountability mechanisms it may lead to improvements. Also important to note is that while judges have an important role in the decision making in a judicial process, they are one part of a long chain of people with

³ (see 'Judicial corruption in the context of legal culture', page 99, and 'Informality, legal institutions and social norms', page 306).

⁴ (See 'When are judges likely to be corrupt?' page 296 for an empirical analysis of possible determinants of judicial corruption, including salary levels.)

influence over a law suit; anti-corruption efforts need to encircle lawyers, police, prosecutors and the agencies responsible for enforcing judicial decisions. Increasing the independence of the judiciary, one of the major remedies to corruption is to improve the governance structure of the judiciary so that it has complete authority, if not control, over the administration and budget of the courts, and the appointment and promotion methods of judges. In corrupt countries, judges are often beholden to the president, Ministry of Justice and other government officials whose undue influence can detrimentally affect the quality of services. Judicial councils can forward the independence of the judiciary by assuming responsibility for *selecting and promoting judges*. If consisted of a majority of judges elected by their peers, rather than by individuals within the other branches of government, and if the appointment procedures are transparent and based on criteria that are not supported by political considerations, judicial councils can enhance the integrity of the judicial appointment process⁵. Overbearing *control over the budgetary process* of the courts insulates judges from the deleterious influence that other branches of government have on the operations of the courts. According to international standards on judicial independence, a judiciary should be able to control the amount of money the government allocates it and control its own budget and expenditures.

A suitable remedy is to ensure that *disciplinary procedures* for judges are rigorous, but fair and transparent. Judges cannot be removed from office for anything other than misconduct or incapacity to carry out their functions, including removal and pursuit for corrupt acts. Because security of tenure is so important the process for removing judges must carry exacting standards, and a decision to remove a judge must be based on a rigorous and fair investigation. Kenya, where the names of judges identified in an anti-corruption drive by the executive were published in the national media before they were even informed of the allegations against them, provides a recent example of the risk of overzealous anti-corruption purges⁶. Another important set of remedies that increase the independence of judges and court staff, making it easier for them to resist external pressures, aims to *professionalize the judicial career*. A key step is to extend the term of service since judges who are appointed for a term of less duration and who are not eligible for tenure have little defence against political and societal expectations. Although life appointments are not essential, judges' terms should be long enough to reassure them that ignoring external influence will not impede their professional advancement. A number of experts on the independence of judges and lawyers recommended a term of 10 to 12 years, which should not be renewed, since towards the end of the term judges tend to tailor their judgements and conduct in anticipation of renewal. In countries where corruption exists, abuse of the *case-assignment system* is a major cause of incorrect influence. Where case assignment is not regular, a court president who seeks to control the outcome of a case can readily assign a case to a docile judge. If not randomly assigned, cases should be given according to requirements that take account of the subject and complexity of the case, the judge's expertise and workload. Also important is to *increase the salary* of court staff. Salaries

⁵ (see 'Corruption, accountability and the discipline of judges in Latin America', page 44).

⁶ (see "'Radical surgery' in Kenya's judiciary").

should be commensurate with the responsibilities of judges and court staffs and the country's cost of living. Salaries should be published to allow the public to monitor the lifestyle of judicial employees. Finally, one of the best defences against improper control is *full knowledge of applicable law*. Judges are often in no position to arguments presented by individuals seeking improperly to influence the outcome because, in many countries, they do not have ready access to current laws and their amendments.

JUDICIAL ACCOUNTABILITY IN INDIA

Definition of Judicial Accountability

The word 'accountable' as defined in the Oxford Dictionary means 'responsible for your own decisions or actions and expected to explain them when you are asked'. Accountability is indispensable in a Democratic State. Transparency facilitates accountability. Every public institution or public functionary is under scrutiny and liability may be enforced for their accountability to the public, although the manner in which they are held liable may vary according to the nature of the office and manner in which duties are discharged by the office holder. The judiciary being a vital cornerstone of the State is also accountable. Judicial accountability is different from the accountability of the executive or the legislature or any other public institution. The faith of the common man in the eminence, integrity and efficiency of the judiciary has severely degraded since its inception. The common man usually looks up to the judiciary to grant him justice, whenever his rights are violated, as his last bastion of hope. But lately, the judiciary has not been performing its duty in a diligent manner making one lose his faith in the judiciary. The makers of the Constitution guaranteed a free and impartial judiciary, by imbibing the Doctrine of Separation of Powers in the Constitution, which stand as the pillars of a democratic form of Government. A judiciary abridged of these essentials cannot provide justice and equality without fear and favour. The independence of the judiciary is indemnified by the many privileges provided by the constitution of India. The Preamble of the Constitution in itself states the intention of the makers of our Constitution of securing to every citizen, JUSTICE: Social, Economic and Political, which is regarded as the reflection of the spirit and aspirations of the people. The Constitution treats each and every citizen with equality, irrespective of how high his status is. No person or institution can be excused from being accountable. This also includes the Judiciary. The accountability of the judiciary, with respect to its judicial functions, is bestowed by way of provision for appeal, review, reversion, etc. The Constitution also provides for a mechanism for enforcing accountability for judicial misconduct and disciplining errant judges. If a judge of the Supreme Court or the High Court is found guilty of misbehavior or incapacity, he may be removed by a process which is popularly known as Impeachment, under which, two thirds of the member of each House of the Parliament can vote for the removal of the judge. Up till now, only the proceeding for Impeachment has been initiated against a judge of the Supreme Court. However, it failed due to abstention by Congress (the ruling party of that time) to vote on the matter concerned. The process of Impeachment being time consuming, complex and vulnerable to politics, needs urgent reformation.

LACK OF JUDICIAL ACCOUNTABILITY IN INDIA

The makers of the Indian Constitution would disbelieve, that the Indian judiciary has emerged as the most powerful wing of the State, 60 years after framing of the Constitution. The Constitution being the supreme law of the land provided for watchdogs in the form High Courts and Supreme Court, free from the control of the Legislature or the Executive, with the intent of not only administering justice, but at the same time keeping a check that the Legislature and Executive do not abuse the power conferred upon them by the Constitution. The judiciary has been assigned with the duty of interpreting the Constitution and other laws. It also has the power to declare an action of the executive as ultra vires and strike it down as being violative of fundamental rights. At the same time it also has the power to declare any law made by the parliament as ultra vires and void, if it is not in consonance with the Constitution. In fact, in 1973, the Supreme Court by giving a creative interpretation to the Constitution acquired the power to strike down amendments to the Constitution which here held to violative of the basic structure of the Constitution. Quite a few constitutional amendments and a number of laws have been struck down by the Courts in the recent time. Through this process of judicial activism and judicial intervention, the Indian judiciary is categorized as perhaps one of the most active judiciary, exercising virtually, imperial and unchecked powers. While the courts are empowered to strike down legislative and executive actions, it has been noticed that at certain times, the same has been done by the arbitrary use of power or without any reasonable explanation. The executive and legislature have to conform to such directions, to prevent from being charged with contempt of court. These powers used to be exercised wisely to correct gross executive inaction. As the Judicial system was creating a subtle dominance over the other wings of the State, by even more inventive or purposive interpretation, the court took over the power of appointment of Judges from the government. It established the collegiums system of appointment by which the Judges of the Supreme Court and High Courts were appointed by the Collegiums of senior judges of the Supreme Court. In other terms, the judiciary has now become a self perpetrating oligarchy. The system of appointment of judges is closed, and without any transparency or scrutiny. The appointment is made without considering the records and credentials of the judges, or their ideological adherence to the constitutional ideals of democracy, secularity, or their sensitivity towards the common man, who are suffering from poverty and not able to get their rights enforced. The judiciary in India is in a very privileged position as regards to power with respect to the judiciary in any other part of the world. In such a scenario, it is absolutely necessary to hold the judiciary accountable for their conduct (misconduct) irrespective of the reason, be it corruption or disregard to the Constitution of the country or the rights of the citizens, especially the higher judiciary. Neither the Constitution, nor any other law provides for the establishment of an institution or examine the performance of the judges or examine complaints against them. The only process for the removal of the Judges of the Supreme Court and High Courts is the process of Impeachment. The process of Impeachment essentially requires the signatures of 100 members of the lower house and 50 members of the upper house, in order to initiate the process. If there is a charge of misconduct against

the judge in the form of a motion, supported by the required number of signatures of the Member of Parliament, the same is submitted to the speaker of the Lok Sabha or the Chairperson of the Council of States. An inquiry committee is then established to hold the trial of the judge. If the judge is found guilty, only then is the motion is put to vote in front of both the houses of Parliament where it has to be passed by a majority of 2/3 majority of each House. History tells us that it is literally impossible to remove a judge via impeachment, even if there is incriminating evidence available against the judge of severe misconduct. The reason behind this shortcoming is the refusal or reluctance of the members of the Parliament, and their affiliation to political parties, that all have cases pending against them in various courts. The judiciary is quite similar to trade union and does not take kindly to brethren being accused of misconduct. Thus, unless the matter has received media attention and is a major issue in the eyes of the public, it is very difficult to get and impeachment off. The only case in which the Impeachment process was initiated against a Supreme Court Judge was the case of *Justice v. Ramaswami* in 1990's. After the presentation of the motion, he was found guilty by the Judges Inquiry Committee on several charges of misconduct. When the matter was presented in the Parliament for voting, the Congress Party (ruling party at that time) directed all its MPs to abstain from voting. Even though the motion was unanimously passed, it failed as it did not get the support from the majority of the membership of the House. Justice Ramaswami continued in his office till his actual retirement, but did not preside over any judicial work during his remaining tenure. In July, 2011, the second motion against a Judge of the Calcutta High Court was passed in Rajya Sabha after finding him guilty under the charge of misappropriation of funds. Justice Soumitra Sen is the first Judge to have been impeached after the framing of the Constitution. Allegations and charges against a Judge are rarely brought into the light of the media due to fear of being charged with contempt of Court, even if the charges are supported by documentary evidence. The Contempt law in India is ab an arbitrary power in the hands of the judges. It allows the judge of the Supreme Court or the High Court to charge anyone with contempt of court and send them to jail on the ground that he/she has "scandalized the Court or lowered the authority of the Court". What "scandalizes or lowers" the authority of a Court is also the subjective judgment of each Judge. In Arundhati Roy's (the well-known writer) case, a bench of 2 judges of the Supreme Court charged her with contempt and sent her to jail merely because she criticized the Court in her affidavit.

It is for the judiciary to realize that public confidence in the Court is not eroded by the baseless allegations of disgruntled litigants, but by their own actions in the discharge of their duty of administering justice. However, observing such reluctance in the judiciary against the removal of obsolete law, the legislature did not have the courage to delete the provision from the Contempt of Courts Act. In another case involving Justice Veeraswami (father-in-law of Justice Ramaswami), the Chief Justice of the Tamil Nadu High Court, who was caught with assets vastly disproportionate to his income, stated that "no judge of a superior court shall be subjected to a criminal investigation without the permission of the Chief Justice of India.

CONCLUSION

The Judiciary holds the great responsibility of 'trust'. This is the trust that people hold when they have given up on all other organs of the country's administration. Thus the judiciary has the extra burden over its head to live up to all of its expectations. It is however accepted that there exist the evil of corruption which has not pardoned the judiciary even. But the acceptance should not become an excuse for remorse but shall be taken up as a problem and dealt with tools to counter it. Thus the correction of the flaws such as corruption that may unavoidably act up should be diminished and eradicated through

Legislations, policies and implementation of such other rules and regulations that shall help the cause. The legislators should be encouraged to come up with laws for example the Judicial Standards and Accountability Bill and make it to be the best possible form of legislation that would head-on be able to curb this nuisance of corruption. Such legislations would not just contribute to the judiciary or the legal fraternity, but to the whole society, because, a just system will make a just society. Therefore, all persons at all levels must endeavor to contribute their part by acting against corruption.