Social Science in Perspective Vol. 4 No. 3&4 July-Sep & Oct-Dec2012

Ethics in Governance

V. Ramachandran

Ethics in governance has a much wider impact than what happens in the different arms of the government. Such an effort needs to include corporate ethics and ethics in business; in fact, there should be a paradigm shift from the pejorative 'business ethics' to 'ethics in business'. There is also a vital need for ethics in every profession, voluntary organization and civil society structure as these entities are now vitally involved in the process of governance. Finally, there should be ethics in citizen behaviour because such behaviour impinges directly on ethics in government and administration and, therefore, governance.

Introduction

Ethics is a set of standards that a society place on itself and which helps guide behaviour, choices and actions. Standards do not, by themselves, ensure ethical behaviour; which requires a robust culture

Note: The Second Administrative Reforms Commission of the Government of India functioned from 2005 to 2009. It submitted fifteen (15) comprehensive Reports on different aspects of governance. The Forth Report submitted in January 2007 was on 'Ethics in Governance'. It is a detailed Report running to 262 pages. Had some of it at least been followed, perhaps much of the unsavory developments of the last two years could have been avoided. The sad fact is that very little was done.

of integrity. The crux of ethical behaviour does not lie only in standards, but in their adoption in action and in sanctions against their violations.

In our society, corruption and abuse of office have been aggravated by three factors. First, there is a colonial legacy of unchallenged authority and propensity to exercise power arbitrarily. Second, there is enormous asymmetry of power. Nearly 90% of our people are in the unorganized sector. And nearly 70% of the organized workers with job security and regular monthly wage are employed by the state directly or through public sector organizations. Such asymmetry of power reduces societal pressure to conform to ethical behaviour. Third, as a conscious choice, the Indian state in the early decades after Independence chose a set of policies whose unintended consequence was to put the citizen at the mercy of the State. Over regulation, severe restrictions on economic activity, excessive state control, near-monopoly of the government in many sectors and an economy of scarcity all created conditions conducive to the spread of corruption.

It is generally recognized that monopoly and discretion increase corruption while competition and transparency reduce it. This has been witnessed in India in the wake of liberalization in many sectors, but new forms of corruption have arisen in a big way.

The more remotely power is exercised from the people, the greater is the distance between authority and accountability. For a large democracy, India still probably has the smallest number of final decision makers.

In the ultimate analysis, the state and a system of laws exist in order to bring out compliance and promote desirable behaviour. Therefore, increased compliance with law in the Society, enforcement of rule of law and deterrent punishment against corruption are critical to build an ethically sound society.

Perhaps the most important determinant of the integrity of a society or the prevalence of corruption is the quality of politics. If politics attracts and rewards men and women of integrity, competence and

passion for public good, then the society is safe and integrity is maintained. But if honesty is incompatible with survival in politics, and if public life attracts undesirable and corrupt elements seeking private gain, then abuse of authority and corruption become the norm.

Ethics in governance has a much wider impact than what happens in the different arms of the government. Such an effort needs to include corporate ethics and ethics in business; in fact, there should be a paradigm shift from the pejorative 'business ethics' to 'ethics in business'. There is also a vital need for ethics in every profession, voluntary organization and civil society structure as these entities are now vitally involved in the process of governance. Finally, there should be ethics in citizen behaviour because such behaviour impinges directly on ethics in government and administration and, therefore, governance.

The Report deals with this vital subject in this wider sense and comprises analysis and suggestions regarding ethics in politics, civil service and judiciary; the need for changes in laws on anti-corruption, institutional arrangements and in procedures.

Ethical Framework

Ethics and Politics

Introduction

While it is unrealistic and simplistic to expect perfection in politics in an ethically imperfect environment, there is no denying the fact that the standards set in politics profoundly influence those in other aspects of governance. Excess in elections (in campaign-funding, use of illegitimate money, quantum of expenditure, imperfect electrical rolls, impersonation, booth-capturing, violence, inducements and intimidation), floor-crossing after elections to get into power and abuse of power in public office became major afflictions of the political process over the years. Political parties, governments and more importantly the Election Commission and the Supreme Court have taken several steps since the late 1980s yet much more needs to be done to cleanse our political system.

Criminalization of Politics

'Participation of criminals in the electoral process'- is the soft underbelly of our political system. Flagrant violation of laws, poor quality of services and the corruption in them, protection for law-breakers on political, group, class, communal or caste grounds, partisan interference in investigation of crimes and poor prosecution of cases, inordinate delays lasting over years and high costs in the judicial process, mass withdrawal of cases, indiscriminate grant of parole, etc., are the more important of the causes. The opportunity to influence crime investigations and to convert the policemen from being potential adversaries to allies is the irresistible magnet drawing criminals to politics. The elected position and the substantial protection that it can give, helps him either to further and expand his activities or to evolve into an entity with higher political ambitions. As for political parties, such individuals bring into the electoral process, their ability to secure votes through use of money and muscle power. This is a short-term win-win situation for all, except for public good and good governance. All this has not taken place everywhere, but to the extent that it did, it has led to a situation when the Election Commission formally stated that one in six legislators in India faced grave criminal charges.

Large, illegal and illegitimate expenditure in elections is another root cause of corruption. Abnormal election expenditure has to be recouped in multiples to sustain the electoral cycle! Cleansing election is the most important route to improve ethical standards in politics, to curb corruption and rectify mal administration.

Recent Improvements

Despite all the flaws in the functioning of a democracy, it has a measure of self correction. A number of measures have been taken by the Election Commission and some judgments of the Supreme Court have also led to new laws being enacted.

Issues in Political Reforms

Despite the measures taken, the improvements are marginal as

regards important problems of criminalization, the use of money in elections, subtle forms of inducements and patronage in the form of chairmanships and memberships of public units and the anomaly of legislators functioning as disguised executives.

In order to eradicate one of the major sources of political corruption, there is a compelling case for state funding of elections. As recommended by the Indrajit Gupta Committee on State Funding of Elections, the funding should be partial state funding mainly in kind for certain essential items.

The Election Commission has recommended that the question of disqualification of members on the ground of defection should also be decided by the President/Governor on the advice of the Election Commission. Such an amendment to the law seems to be necessary in the light of the long delays seen in some recent cases of obvious defection.

There is need for a fair reconciliation between the candidate's right to contest and the community's right to good representation. On balance, in cases of persons facing grave criminal charges framed by a trial court after a preliminary enquiry, disallowing them to represent the people in legislatures until they are cleared of charges seems to be a fair and prudent course. But care must be exercised to ensure that no political vendetta is involved in such charges. It also seems reasonable to disqualify persons facing corruption charges, provided the charges have been framed by a judge/magistrate after prima facie evidence. The Election Commission has suggested that as a precaution against motivated cases, it may be provided that only cases filed six months before an election would lead to such disqualification.

The ethics of coalition government is seriously strained when the coalition partners change partnership mid-stream and new coalitions are formed, primarily driven by opportunism and craving for power in utter disregard of the common minimum programme agreed to the common programme, which has been explicitly mandated by the electorate prior to the election or implicitly after the election but before the formation of

the government, becomes non-existent. To maintain the will of the people, it is necessary to lay down an ethical framework to ensure that such exercises in opportunism through redrawing of coalitions between elections, do not take place.

Appointment of the Chief Election Commissioner/Commissioners

In recent times, for statutory bodies such as the National Human Rights Commission (NHRC) and the Central Vigilance Commission (CVC), appointment of Chairperson and Members are made on the recommendations of a board based Committee. Given the far reaching importance and critical role of the Election Commission in the working of our democracy, it would certainly be appropriate if a similar collegium is constituted for selection of the Chief Election Commissioner and the Election Commissioners.

Expediting Disposal of Election Petitions

The Commission is of the view that given the huge existing case load in the High Courts, it would be possible to ensure speedy disposal of election petitions – within six months as provided in the law – only by setting up special tribunals under Article 323B of the Constitution, for a period of one year only, extendable for six months in exceptional circumstances.

Grounds of Disqualification for Membership

While sub-sections (a) to (d) of Article 102 of the Constitution list the grounds for disqualification, sub-section (e) empowers Parliament to pass any law to include further conditions for such disqualification. So far, no such law has been enacted. In view of recent developments, it may be desirable to comprehensively spell out the circumstances under which the Members of Parliament can be disqualified.

Ethical Framework for Ministers

Government of India has prescribed a Code of Conduct which is applicable to Ministers of both the Union and State Governments. The Code of Conduct is a starting point for ensuring good conduct by

Ministers. However, it is not comprehensive in its coverage and is more in the nature of a list of prohibitions; it does not amount to a code of Ethics. It is therefore necessary that in addition to the Code of Conduct, there should be a Code of Ethics to provide guidance on how Ministers should uphold the highest standards of constitutional and ethical conduct in the performance of their duties. The Code should be based on the overarching duty of Ministers to comply with the law, to uphold the administration of justice and to protect the integrity of public life. It should also lay down the principles of minister-civil servant relationship. The Commission has examined the code of conduct in other countries and is of the view that a Code of Ethics and a Code of Conduct for Ministers should include the following.

a. Ministers must uphold the highest ethical standards;
b. Ministers must uphold the principle of collective responsibility;
c. Ministers have a duty to Parliament to account, and be held to account, for the policies, decisions and actions of their departments and agencies;
d. Ministers must ensure that no conflict arises, or appears to arise, between their public duties and their private interests;
e. Ministers in the Lok Sabha must keep separate their roles as Minister and constituency member;
f. Ministers must not use government resources for party or political purposes; they must accept responsibility for decisions taken by them and not merely blame it on wrong advice.
g. Ministers must uphold the political impartiality of the Civil Service and not ask civil servants to act in any way, which would conflict with the duties and responsibilities of civil servants;
h. Ministers must comply with the requirements which the two Houses of Parliament lay down from time to time;
i. Ministers must recognize that misuse of official position or

information is violation of the trust reposed in them as public functionaries;
j. Ministers must ensure that public moneys are used with utmost economy and care;
k. Ministers must function in such a manner as to serve as instruments of good governance and to provide services for the betterment of the public at large and foster socio-economic development; and
l. Ministers must act objectively, impartially, honestly, equitably, diligently and in a fair and just manner.

Enforcement of Ethical Norms in Legislatures

While the enunciation of ethical values and codes of conduct puts moral pressure on public functionaries, they need to be backed by an effective monitoring and enforcement regime. Legislatures the world over have adopted different models for this purpose. The Canadian Conflict of Interest and Post-Employment Code for public office holders (2006) relies on an Ethics Commissioner to oversee the Code and to provide advice. The Ethics Commissioner is an Officer of Parliament appointed under Section 72.01 of the Parliament of Canada Act. The Commissioner reports on the inquiries he conducts pursuant to the Members' Code and makes annual reports to the House of Commons on his activities in relation to its Members. Based on the recommendations of the Nolan Committee, the House of Commons in U.K. has established the office of Parliamentary Commissioner for Standards. The constitution of the Office of Parliamentary Commissioner for Standards has helped the House by bringing greater transparency in matters relating to ethical standards. It has also helped the Members by providing them timely advice in matters relating to the Code of Conduct. The Commission is of the view that both Houses of Parliament may consider creation of a similar office. It is envisaged that this Office would function under the Speaker. It could also assist the Ethics Committee in the discharge of its functions, provide advice to the Members when required and maintain records.

Office of Profit

There is need to re-examine the definition of office of profit. Articles 102 and 191 of the Constitution relating to office of profit have been violated in spirit over the years even when the letter is adhered to. Each time a legislator is appointed by the executive to an office which might be classified an office of profit, a law is enacted including that office in the list of exempted categories.

Often, the crude criterion applied is whether or not the office carries remuneration or perks. In the process, the real distinction of whether executive authority is exercised in terms of decision making or direct involvement in deployment of public funds is often lost sight of.

Several constitutional experts and legal luminaries have pointed out the unconstitutionality of the MPLADS and MLALADS schemes. Apart from infringing on the rights of the local governments, the most serious objection to the scheme is the conflict of interest that arises when legislators take up executive roles. Therefore, it seems necessary to sharply define office of profit to ensure clearer separation of powers.

Given these circumstances, it would be appropriate to amend the law on the following lines:

- All offices in purely advisory bodies where the experience and insights of a legislator would be inputs in governmental policy will not be treated as offices of profit, irrespective of the remuneratin and perks associated with such an office.
- All offices involving executive decision making and control of public funds, including positions on the governing boards of public undertakings and statutory and non-statutory authorizes directly, deciding policy or managing institutions or authorizing or approving expenditure shall be treated as offices of profit, and no legislator shall hold such offices. (Discretionary funds at the disposal of legislators or the power to determine specific projects and schemes, or select the beneficiaries or authorize expenditure shall constitute discharge of executive functions

and will invite disqualification under Articles 102 and 191, irrespective of whether or not a new office is notified and held).

- If a serving Minister, by virtue of office, is a member or head of certain organizations like the Planning Commission, where close coordination and integration between the Council of Ministers and the organization or authority or committee is vital for the day-to-day functioning of government, it shall not be treated as office profit.

The Supreme Court has held that members of legislatures are public servants under the Prevention of Corruption Act. The Commission feels that Members of Parliament and the Members of State Legislatures should be declared as 'Public Authorities' under the Right to Information Act when they are discharging non-legislative functions.

Code of Ethics for Civil Servants

The code of behavior as enunciated in the Conduct Rules, while containing some general norms like 'maintaining integrity and absolute devotion to duty' and not indulging in 'conduct unbecoming of a government servant', is generally directed towards cataloguing specific activities deemed undesirable for government servants. There is no Code of Ethics prescribed for civil servants in India although such codes exist in other countries. What we have in India are several Conduct Rules, which prohibit a set of common activities. These Conduct Rules do serve a purpose, but they do not constitute a Code of Ethics. There is, of late, a concern that more 'generic norms' need to be added to the list of accepted conduct. In this context, conflict of interest is an important area which should be adequately addressed in these codes.

After the 73rd and the 74th Amendments of the Constitution, the local bodies now have an important role to play in the nation's development and have major executive powers. It is essential that the need for relevant codes for these bodies and their employees, and for any public authority, is recognized.

The Commission is of the view that there should be a set of Public

Service Values which should be stipulated by law. There should be a mechanism to ensure that civil servants constantly aspire towards these values.

The Commission feels that the prevailing practice of nominating serving officers – or immediately after retirement – on the boards of public bodies may compromise with the desired objectivity and independence necessary for decision making in these bodies. It would be unrealistic and imprudent for an official to sit in judgment of a decision taken by a Board of which he is a Member.

Code of Ethics for Regulators

In spite of the existence of a plethora of Codes of Conduct for almost all important professions, it is sad that adherence to ethical norms has been generally unsatisfactory. Decline in ethical values in the professions has adversely impacted on the governance of the country and is an important reason for increasing corruption in public life. The Commission feels that there should be a Code of Ethics and a comprehensive and enforceable Code of Conduct for all major professions. The role of external regulations would also increase as government's functions are thrown open. In such cases, prescribing ethical norms for the regulators themselves as well as for the service providers would become essential.

Ethical Framework for the Judiciary

The issue of appointment and removal of judges was examined by the National Commission to Review the Working of the Constitution. The Commission recommended the constitution of a National Judicial Commission which would have the effective participation of both the executive and the judicial wings of the State "as an integrated scheme for the machinery for appointment of judges".

A National Judicial Council should be constituted in line with universal practice to ensure greater judicial accountability. The composition of the Council needs to be broad based, and its powers enhanced so that it can exercise the necessary oversight of the judiciary.

The Commission is of the considered view that appointment of judges in higher courts should be with the participation of the executive, legislature and the Chief Justice and it should be a bipartisan process above day-to-day politics. Therefore, the proposed National Judicial Council should comprise representatives of all three organs of State – the legislature, the judiciary and the executive. Such a body can devise its own procedures in identifying and screening the candidates for the higher judiciary.

The Commission is also of the considered view that the NJC should be entrusted with the responsibility of recommending removal of judges of higher courts. Such recommendations should be binding on the President, and Articles 124 and 217 of the Constitution should be amended accordingly. This revised procedure for removal of judges is necessitated by the failure of the impeachment process in India.

Legal Framework for Fighting Corruption

The Prevention of Corruption Act, 1988

Defining Corruption

The Prevention of Corruption Act does not provide a definition of 'Corruption'. Experience of the past decades shows that 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 is gross perversion of the Constitution and democratic institutions, including, willful violation of the oath of office. The second such class of offences is abuse of authority unduly favouring or harming someone, without any pecuniary consideration or gratification. Third, obstruction or perversion of justice by unduly influencing law enforcement agencies and prosecution is a common occurrence in our country. Finally, squandering public money, including ostentatious official life-styles, has become more common.

There is therefore need for classifying the following as offences under the Prevention of Corruption Act:

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

Collusive Bribery

The Commission is of the view that 'collusive' corruption, which is widespread, needs to be dealt with by effective and suitable legal measures so that both the bribe-giver and the bribe-taker do not escape punishment. The punishment for collusive corruption should be double that of other types of bribery. In cases of collusive corruption, the 'burden of proof' should be shifted to the accused.

Sanction for Prosecution

Section 19 of the Prevention of Corruption Act provides that previous sanction of the competent authority is necessary before a court takes cognizance of the offences defined under Sections 7, 10, 11, 13 and 15 of the Act. The objective of this provision is to prevent harassment of honest public servants through malicious or vexatious complaints. Such a protection is not required for offences which are basically based on the direct evidence of:

i. Demand or / and acceptance of bribes,

ii. Obtaining valuable things without or with inadequate consideration, and

iii. Cases of possession of assets disproportionate to the known source of income.

There is a case for excluding the protection given in the above mentioned circumstances.

The Commission feels that there is need for amending the Prevention of Corruption Act to ensure that sanctioning authorities are not summoned as witnesses and if a trial court desires to summon the sanctioning authority, it should record the reasons for doing so. This should be at the first stage, even before framing of charges by the court.

The Commission is of the view that the Authority for according sanction for prosecution under Section 19 of the Prevention of Corruption Act, should be stipulated in case of elected representatives. This Authority, in case of Members of Parliament should be the Speaker or Chariman, as the case may be. A similar procedure may be adopted by State Legislatures.

An issue that has come up in many cases is that of protection to those persons who have ceased to be public servants at the time of taking cognizance of the offence by the court. The interpretation given by the courts in such cases 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 retired public servants can also get the same level of protection, as a serving public servant.

Expediting sanctions

The Commission is of the view that the procedure for granting sanction, where government is the competent authority, needs to be streamlined so that the present delays in processing such cases are avoided. The Commission would like to recommend that at the level of the Union government, the sanction for prosecution should be processed by an Empowered Committee consisting of a Vigilance Commissioner and the Departmental Secretary to Government. In case of a difference of opinion between the two, it could be resolved by placing the subject before the full Central Vigilance Commission. In case sanction is sought against a Secretary to Government, the Empowered Committee would comprise the Cabinet Secretary and the Chief Vigilance Commissioner.

Liability of Corrupt Public Servants to Pay Damages

The Commission is of the view that in cases where public servants cause loss to the State or citizens by their corrupt acts, they should be made liable to make good the loss so caused, and in addition, should be made liable for damages. It should also be ensured that adequate safeguards are provided so that bona fide mistakes should not end in award of such damages, otherwise public servants would be discouraged from taking decisions in a fair and expeditious manner.

Speeding up Trials under the Prevention of Corruption Act

The Commission feels that there is need to fix a time limit for various stages of trial in corruption cases. This could be done through an amendment to the CrPC. More importantly, the existing provisions for conducting trials on a day-to-day basis should be meticulously adhered to.

Corruption Involving the Private Sector

The Companies Act provides the statutory framework which governs the internal processes of a Company. In case of non-compliance, the penal provisions are invoked against the Company and its officers in default. Though the offence of corruption or bribery is not specified under the Companies Act, 1956, instances of wrong doing by Companies and their officers are addressed through the mechanisms of Accounts and Audit (Section 211), Inspection under Section 209A, Technical Scrutiny of Balance Sheet (Section 234), Investigation under Section 235/237 or Section 247, special audit under Section 233A, reference to Company Law Board (CLB) under Section 388B etc. The Commission feels that corruption in the private sector should be addressed by effective enforcement of 'Regulations on Corporate Governance.'

The Commission is further of the view that confiscation of the property of a public servant convicted for possession of disproportionate assets, the law should shift the burden of proof to the public servant who is convicted. The presumption, in such cases, should be that the disproportionate assets found in the possession of the public servant

were acquired by him through corrupt means and a proof of preponderance of probability should be sufficient for confiscation of property.

Prohibition of 'Benami' Transactions

The Benami Transactions (Prohibition) Act, 1988 was passed in 1988. The Act precludes the person who acquired the property in the name of another person from claiming it as his own. Unfortunately, Rules have not been prescribed by the government with the result that the government is not in a position to confiscate properties acquired by the real owner in the name of his benamidars. Strict enforcement of the Benami Transactions (Prohibition) Act, 1988, could unearth such properties and make property accumulation difficult for corrupt officers and also work as a deterrent for others. The Rules have, therefore, to be framed without further delay. (A new piece of legislation has since been introduced).

Protection to Whistleblowers

The Law Commission in its 179th Report has proposed a Public Interest Disclosure (Protection of Informers) Bill, which provides protection to whistleblowers. The Bill has provisions for providing safeguards to the whistleblowers against victimization in the organization. It also has a provision that the whistleblower may himself seek transfer in case he apprehends any victimization in the current position. In order to ensure protection to whistleblowers, it is necessary that immediate legislation be brought on the lines proposed by the Law Commission

Serious Economic Offences

Economic Offences, called frauds in common parlance (the term itself has been defined in the Indian Contract Act 47) have become a matter of concern because of an increasing trend both in terms of size and complexity. This worrying trend has its roots in the rapid pace at which the Indian economy is growing and the financial sector is diversifying. It is felt that the punishment provided under the existing laws is not enough of a deterrent; as a result these offences have become a high gain – low risk activity.

The Mitra Committee Report (The Report of the Expert Committee on Legal Aspects of Bank Frauds 2001) submitted to the Reserve Bank of India pointed out that criminal jurisprudence in India based on proof beyond doubt was too weak an instrument to control bank frauds. The Committee recommended a two-pronged strategy for systemic reforms through strict implementation of Regulator's Guidelines and obtaining compliance certificates. Second, a punitive approach by defining scams as a serious offence with the burden of proof shifting to the accused and with a separate investigative authority for serious frauds, and special courts and prosecutors for trying such cases was recommended.

The Commission is of the view that the current provisions in the Banking Regulation Act, 1949; SEBI Act, 1992 and the Companies Act, 1956 are not strong enough to prevent large scale fraudulent practices nor are they deterrent enough.

There is need to define 'Serious Economic Offence' under a statute and prescribe deterrent punishment for it. The complex and multi-disciplinary nature of 'Serious Economic Offences' would require the constitution of an empowered body to investigate and prosecute the cases under all such offences. This would require the establishment of a new and adequately empowered Serious Frauds Office (SFO) which would, necessarily, subsume the existing SFIO. The Serious Frauds Office thus constituted should be under the control and supervision of a Serious Frauds Monitoring Committee chaired by the Cabinet Secretary with representatives from the financial sector, capital and futures markets, commodity markets, accountancy, direct and indirect taxation, forensic audit, criminal and company law, investigation and information technology.

As getting conviction for economic offences under the existing laws is difficult and since these offences, often generate funds for other organized crimes and terrorists activities, the Commission agrees with the suggestion made by the Mitra Commission that for 'Serious Frauds' the Court may presume the existence of mens rea.

Prior Concurrence for Registration of Cases : Section 6A of the Delhi Special Police Establishment Act, 1946.

The Commission on balance is of the view that it would be necessary to protect honest civil servants from undue harassment, but at the same time in order to ensure that this protection is not used as a shield by the corrupt, it would be appropriate if this permission is given by the Central Vigilance Commissioner in consultation with the Secretary to Government concerned and if the Secretary is involved, a committee comprising the Central Vigilance Commissioner and the Cabinet Secretary may consider the case for granting of permission. In case of Cabinet Secretary such permission may be given by the Prime Minister.

Immunity Enjoyed by Legislators

The National Commission to Review the Working of the Constitution recommended (Para 5.15.6) that Article 105(2) may be amended to clarify that the immunity enjoyed by Members of Parliament under parliamentary privileges should not cover corrupt acts committed by them in connection with their duties in the House or otherwise. Such a recommendation was made because corrupt acts include accepting money or other valuable considerations to speak and / or vote in a particular manner and, for such acts, they should be liable for action under the ordinary law of the land.

Right to equality and equal protection of law is a fundamental right and the Constitution enshrines this principle of equality. The Ruling in P.V.Narsimha Rao Vz. State creates an anomalous situation wherein the Members of Parliament are immune from prosecution for their corrupt acts if they are related to voting or speaking in the Parliament. It is, therefore, necessary to amend the Constitution to remove this anomaly.

Removing Article 311

The Commission believes that the rights of a civil servant under the Constitution should be subordinate to the overall requirement of public interest and the contractual right of the State. It cannot be an argument that a corrupt civil servant's rights are more important than the need to ensure an honest, efficient and corruption-free administration.

Articles 309, 310 and 311 form a continuum. If the whole gamut

of "conditions of service" is codified as required by the substantive part of Article 309, this can include matters such as disciplinary proceedings and imposition of penalties. Moreover, as noted above, with rule of law accepted as an integral part of the basic structure of the constitution, reasonable protection now attributed to Article 311 will continue to be available to satisfy the requirements of 'rule of law.'

Taking into account these considerations and a fairly common perception that explicit articulation of "protection" in the Constitution itself gives an impression of inordinate 'protection', the Commission is of the view that on balance Article 311 need not continue to be a part of the Constitution. Instead appropriate and comprehensive legislation under Article 309 could be framed to cover all aspects of recruitment and service, even with regard to dismissal, removal or reduction in rank.

Disciplinary Proceedings

At present, the proceedings are dilatory and time consuming. The Commission is of the view that the existing regulations governing disciplinary proceedings need to be simplified and the following broad principles should be followed in laying down the new regulations.

a. The procedure needs to be made so that the proceedings could be completed within a short time frame.

b. Emphasis should be on documentary evidence, and only in case documentary evidence is not sufficient, recourse should be made to oral evidence.

c. An appellate mechanism should be provided within the department itself.

d. Imposition of major penalties should be recommended by a committee in order to ensure objectivity.

Institutional Framework

The Lok Pal

The first Administrative Reforms Commission had recommended

the establishment of the institution of Lok Pal. The Lok Pal Bill has been introduced several times but due to various reasons it has not be enacted into law.

The Commission is of the view that the Lok Pal Bill (redesignated as Rashtriya Lokayukta Bill) should become law with the least possible delay. As recommended in the Bill, the Lokpal should deal with allegations of corruption against Ministers and Members of Parliament.

Allegations of corruption against government officials are dealt with departmentally and also by the Central Bureau of Investigation under the Central Vigilance Commission. In some cases of corruption there may be collusion between the Ministers and the Officers. Therefore, there should be an organic link between the Lok Pal and the Central Vigilance Commissioner.

The Commission is of the view that the Lok Pal should be a three-member body. This would bring in the expertise and insight of more than one person which would be essential for transparency and objectivity.

In constitutional theory, according to the Westminster model, the Prime Minister is the first among equals in a Council of Ministers exercising collective responsibility. Therefore, whatever rules apply to other Ministers, should apply to the Prime Minister as well.

However, there are deeper issues The Prime Minister's unchallenged authority and leadership are critical to ensure cohesion and sense of purpose in government, and to make our Constitutional scheme function in letter and spirit. The Prime Minister is accountable to the Parliament, and if the Prime Minister's conduct is open to formal scrutiny by extra Parliamentary authorities, then the government's viability is eroded and Parliament's supremacy is in jeopardy.

Any enquiry in to a Prime Minister's official conduct by any authority other than the Parliament would severely undermine the Prime Minister's capacity to lead the government. Such weakening of Prime Minister's authority would surely lead to serious failure of governance. A Prime Minister facing formal enquiry by a Lok Pal would cripple the

government. One can argue that such an enquiry gives the opportunity to the incumbent to defend himself against baseless charges and clear his name. But the fact is, once there is a formal enquiry by a Lok Pal on charges, however baseless they might be, the Prime Minister's authority is severely eroded, and the government will be paralyzed. Subsequent exoneration of the Prime Minister cannot undo the damage done to the country or to the office of the Prime Minister. If the Prime Minister is indeed guilty of serious indiscretions, Parliament should be the judge of the matter, and the Lok Sabha should remove the Prime Minister from office.

It could be argued that since any Minister could be removed on Prime Minister's advice, or Parliament as well, the Lok Pal need not have jurisdiction on a Minister's conduct also. But Parliament does not really sit in judgement over a Minister's conduct. It is the Prime Minister and the Council of Ministers as a whole whose fate is determined by Parliament's will. And the Prime Minister does not have the time or energy to personally investigate the conduct of a Minister. The government's investigative agencies are controlled or influenced by the Ministers, and therefore it is difficult for the Prime Minister to get objective assessment of the Ministers' official conduct. Therefore, an independent, impartial body of high standing would be of great value in enforcing high standards of ethical conduct among Ministers. A similar reasoning applies to Members of Parliament, since Parliament's time and energy cannot be consumed by detailed enquiry into the conduct of a Member. But the final decision of removing the Member must vest in Parliament, and that of removal of a Minister must be on the advice of the Prime Minister. Parliament is responsible to the nation for its decisions, and the Prime Minister is responsible to the Parliament for his decisions. These responsibilities of Parliament and Prime Minister cannot be transferred to any unelected body.

The same principles and arguments also hold good in respect of the Chief Minister of a state. But, if the Chief Minister is brought under the jurisdiction of a federal institution of high standing, then the risks are mitigated. The Commission is of the view that once the Lok Pal or

equivalent institution is in place, all Chief Ministers should be brought under Lok Pal's purview. Such a provision would necessitate making Lok Pal (Rashtriya Lakayukta) a Constitutional authority and defining his jurisdiction in the Constitution while leaving the details of appointment and composition to be fixed by parliament through legislation.

The Lokayukta

The Commission is of the view that to insulate the institution of Lokayukta from the vagaries of political expediency, of the kind witnessed in the past, it would be necessary to give the Lokayutka, as in the case of the Lok Pal, a Constitutional status. It would be necessary to amend the Constitution to provide for the institution of Lokayukta in all states. This would also provide the opportunity to vest this authority with certain uniform powers, responsibilities and functions across all states. To this effect the Commission believes that the Lokayukta can be a state level equivalent of the Rashtriya Lokayukta with a similar constitution.

Ombudsman at the Local Level

The Commission is of the view that the Ombudsman should be appointed under the respective Panchayat Raj/Urban Local Bodies Acts in all States/UTs., for a group of connected districts. The Ombudsman should be empowered to investigate cases of corruption or maladministration by functionaries of local self government institutions. It is often argued that constitution of Local Ombudsman would lead to duplication of efforts since the Lokayukta is already there. The Commission has already recommended that the Lokayukta should investigate cases only against Ministers or equivalent rank public functionaries and legislators. Therefore, there would be no clash of jurisdiction between the Local Ombudsman and Lokayukta. However, in order to provide proper guidance to the Local Ombudsman, they should be placed under the overall guidance and superintendence of the Lokayukta.

Strengthening Investigation and Prosecution

Prosecution is often a weak link in the chain of anti-corruption

law enforcement and there are instances where prosecutors have facilitated the discharge of a delinquent officer. There is 'lazy' investigation and charging of one and all who may be remotely connected with a case, but not involved in the corruption. There is also the presumption amongst investigating agencies that for corruption to exist, the decision should be proved to be wrong, but more cases of corruption take place outside the official system through discounts and quid pro quo, when decisions themselves are right. It would be desirable that the Lokayuktas/ State Vigilance Commissions are empowered to supervise the investigation and prosecution of corruption related cases. This would provide the much needed oversight of the prosecutors on the one hand, and guidance to the prosecutors on the other.

Prevention of corruption and enforcement in an increasingly electronic environment both in government institutions and outside, requires specific measures to equip the investigating agencies with electronic investigating tools and capability to undertake such investigation.

In view of the complexities involved in investigating modern-day corruption, the investigating agencies should be equipped with economic, accounting and audit, legal, technical, and scientific knowledge, skills and tools of investigation. It would be advisable to have officials in the investigative agencies drawn from different wings of government,

Streamlined vertical corruption runs through several levels of the official hierarchy in corruption prone departments, and does not receive the attention it deserves. This calls for strengthening sources of information to specifically target officers involved in the chain of hierarchical corruption. Anti-corruption agencies should conduct systematic surveys of departments with particular reference to highly corruption prone ones in order to gather intelligence and to observe officers at the higher levels with questionable reputations.

There is need for a special investigation unit reporting to the proposed Lok Pal (Rashtriya Lokayukta) to investigate allegations of corruption against investigating agencies. This unit should be multi-

disciplinary and should also investigate cases of allegations of harassment against the investigating agency. Similar units should also exist in States under the State Lokayuktas.

Social Infrastructure

Citizens' Initiatives

The Commission feels that in order to make citizen's charters effective tools for holding public servants accountable, the charters should clearly spell out the remedy/penalty/compensation in case there is a default in meeting the standards spelt out in the charter. It would be better to have a few promises which can be kept rather than a long list of lofty declarations which are impractical. Citizens may be involved in the assessment and maintenance of ethics in major government offices and institutions with large public contacts. A mechanism needs to be put in place in government offices so that a data base of all visitors is maintained. The professional agency should contact these persons and get their feedback.

School awareness programmes can be very effective in bringing about attitudinal changes in the society. Such programmes are ideally taken up in high schools and should educate students about the role of citizens in a democracy, the role of civil society, harmful effects of corruption etc.

There are reward schemes in taxation departments where complainants are rewarded a percentage of the income unearthed based on the information. Such cases of rewards should also be offered where information is furnished about corrupt practices.

False Claims Act

The existing provisions in the Indian Penal Code and other enactments are not adequate to enable interested citizens and civil society groups to approach courts for recovery of the proceeds of corruption and provide for a share in the proceeds. In the United States, the False Claims Act makes it possible for interested citizens to approach any court in any judicial district for recovery of the proceeds of corruption.

There is need for legislation on the lines of the US False Claims Act, which will make it possible for interested citizens and civil society groups to seek legal relief for the recovery of the proceeds of corruption and claim a share. Such a law would help in curbing corruption where the fraud has been committed in collusion with a public servant. But more importantly, such a law would help in building a culture of fair play in private and public organizations.

Role of Media

A free media has a crucial role in the prevention, monitoring and control of corruption.

Investigative reporting by media or reporting of instances of corruption as they occur can be a significant source of information on corruption. Very often there is no systematic arrangement to take note of these allegations and to follow them up. The collation of reports appearing in different sections of the media and their follow up should be an integral part of complaints monitoring mechanism in all public offices.

Under pressure of competition, the media does not verify allegations and information before putting them in the public domain. There is considerable 'hype' and allegations are presented as facts. Sometimes, such allegations/complaints are motivated. It is essential to evolve norms and practices that all allegations/complaints would be duly screened, and the person against whom such allegations are made is given a fair chance to put forth his version.

Social Audit

The Commission, without entering into details of all these, would like to suggest that provisions for social audit should be made a part of the operational guidelines of all shemes.

Systemic Reforms

Promoting Competition

Most public services in India are provided by government in a

monopolistic setting. Introduction of an element of competition in the provision of public services is thus a very useful tool to curb corruption.

Clearly, ending government's monopoly in a large number of service sectors and allowing others to compete can play a major role in reducing corruption. However, deregulating in one area may increase corruption elsewhere. The process can itself be subverted and sometimes private agencies, which replace the government agencies in service delivery could be even more corrupt. It is, therefore, necessary that such demonopolisation and competition is accompanied by a 'regulation mechanism' to ensure performance as per prescribed standards so that public interest is protected.

Simplifying Transactions

The causal relationship between incidence and intensity of corruption and the complex nature of work methods needs no elaboration. Similarly, elaborate hierarchies not only breed complex work methods but also cause diffusion of responsibility.

A single window clearance of all requirements or one-stop service centres is a step which can cut down on corruption as it simplifies procedures and reduces layers. This requires not merely a single window but also fully automated back up of all related offices. Yet another administrative method is what is called 'positive silence' sanctions, an example of which is deemed sanction of an application upon expiry of the stipulated period for such sanction as in the case of deemed sanction of building permits.

Most of the procedures dealing with permissions, licenses and registration were laid down years ago. These procedures are quite complex and require documentation, which a common citizen finds difficult to complete and 'touts' came into play. It is, therefore, necessary to have a review of all such procedures so that unnecessary procedural requirements are eliminated.

Using Information Technology

Before any introduction of IT is attempted, it is necessary that

the existing procedures are properly re-engineered and made computer adaptable.

There have been several successes in introduction of e-governance. But the greatest challenge has been their replicability and up-scaling. There are very few examples of e-governance examples with a nationwide impact (the railway reservation system is one of them). The lack of good infrastructure and the inadequate capability of the personnel have proved to be major bottlenecks in the spread of e-governance. Much greater attention needs to be paid to familiarize Departmental officials with the relevant processes and their capabilities.

The National Informatics Centre (NIC) has played a useful role in facilitating e-Governance. The Commission feels that NIC may take concrete steps to build up skills and domain expertise among its personnel so that specific organizational needs are more fully understood by technology providers. The Ministry of Information Technology itself must assess new areas for computerization across the country.

Integrity Pacts

One mechanism that can help in promoting transparency and creating confidence in public contracting is the use of 'integrity pacts'. The term refers to an agreement between the public agency involved in procuring goods and services and the bidder for a public contract to the effect that the bidders have not paid and shall not pay any illegal gratification to secure the contract in question. An important feature of such pacts is that they often involve oversight and scrutiny by independent, outside observers.

The Commission understands that Government organizations in the country have so far not shown much interest in adopting this healthy practice. The reluctance is said to be also on account of uncertainty about the place of such pacts in our legal framework. The Commission feels that this mechanism must be encouraged and integrated into government transactions in as many sectors as possible.

Reducing discretion

Opportunities for corruption are greater in a system with excessive discretion in the hands of the official machinery particularly at lower levels.

There are a large number of governmental activities where discretion can be totally eliminated. All such activities could be automated and supported by IT. Where it is not possible to eliminate discretion, then the exercise of powers should be bound by well-defined guidelines to minimize discretion.

Supervision

There have to be effective checks and balances against the discretion vested in public functionaries. Supervision provides one such mechanism.

Each level should be responsible for taking preventive steps to minimize the scope of corruption for the levels below it. It is, therefore, suggested that reporting officers while evaluating the performance of their subordinates should clearly comment on the efforts made by the latter to check corruption.

It should be mandated that in case a reporting officer has given a 'clean chit' in his assessment of any officer and such an officer is charged with any offence under the Prevention of Corruption Act and the corrupt act took place wholly or partly during the year under report, then the reporting officer should explain why that officer was given the 'integrity certificate'.

Ensuring Accessibility and Responsiveness

Concentration of tasks which are corruption prone in a few hands should be avoided. These tasks should be, as far as possible, broken up into activities which are handled by different people. Public interaction should be limited to the head of office and some designated officers. This can be supported by a 'single window front office' for providing information.

Monitoring Complaints

Most public offices in India have a complaint monitoring system,

but more often than not, the system does not work, as the complaint ends with the official against whom the charges are alleged. While setting up deadlines in a country of our size and complexity may be difficult, some attempts in the direction are necessary. Complaints must be monitored, followed up and an end result achieved within a specified period to be given in general or by the supervising officer for a particular case.

Risk Management for Preventive Vigilance

Risk profiling of government officials poses a challenge in the sense that the present system of performance evaluation discourages a reporting officer from giving anything 'adverse'. Moreover, categorizing an official as 'high' risk based on an adverse rating by one reporting officer may not be fair (unless a glaring misconduct has come to notice). It would, therefore, be better if risk profiling of officers is done by a committee of 'eminent persons' after the officer has completed ten years of service, and then once in every five years. The committee should use the following inputs in coming to a conclusion:

a. The performance evaluation of the reported officer.

b. A self-assessment given by the reported officer focusing on the efforts he/she has made to prevent corruption in his/her career

c. Reports from the vigilance organization

d. A peer evaluation to be conducted confidentially by the committee through an evaluation form.

Integrity tests, like all tests, are imperfect, and can lead to wrong conclusions and are thus not a foolproof method to evaluate integrity of a person. Therefore, taking disciplinary action based on such a test would not stand the scrutiny by a court, but these can be used as one of the inputs while risk profiling an officer.

Audit

It would be desirable to make a standing arrangement with CAG

and the AG to report instances of serious irregularities as soon as they are unearthed in audit. A second innovation in this regard would be to equip the agency concerned in the mechanics of forensic audit so that aspects crucial for criminal investigation could be taken due care of. It would be in the fitness of things if the anti-corruption bodies are equipped to undertake such forensic audit of government departments where major irregularities come to their notice. To start with, a forensic audit training course could be conducted to develop expertise in this regard.

Proactive Vigilance on Corruption

The Commission feels that proactive measures should also be initiated by the departments/organizations themselves, as the inputs available with them about their officials and the tasks they perform are much more than with an external machinery.

Intelligence Gathering

Gathering intelligence about their own personnel is a practice followed by security and investigative agencies. Although all such measures may not always be desirable or practical, a supervisory officer should assess the integrity of his/her subordinates based on his/her handling of cases, complaints and feedback from different sources.

Vigilance Network

There are a large number of disciplinary cases and also criminal cases relating to corruption pending with various authorities. It would be desirable to create a national database of such cases, which should be in the public domain. The Central Vigilance Commission may take the lead in establishing such a networked database.

Protecting the Honest Civil Servant

The raison d'etre of vigilance activity is not to reduce but to enhance the level of managerial efficiency and effectiveness in the organization. Risk-taking should form part of government functioning. Every loss caused to the organization, either in pecuniary or non-pecuniary terms, need not necessarily become the subject matter of a

vigilance inquiry. The Central Vigilance Commission has recognized this possibility of genuine commercial decisions going wrong without any motive whatsoever being attached to such decisions.

But there are genuine apprehensions about the system's ability to protect an honest public servant. There are sufficient safeguards in the law and procedure to ensure protection of an honest civil servant against baseless, mala-fide, malicious and motivated complaints, but all this happens after years and meanwhile the career is damaged and the reputation is tarnished.

The Central Vigilance Commission has instituted a mechanism for screening cases of public sector executives within its jurisdiction. The question is one of exercising due discrimination to protect an honest civil servant from being dragged through investigative processes involving harassment and loss of prestige and causing enormous anguish.

There is a general perception among officers and managers that anti-corruption agencies do not fully appreciate administrative and business risks and that they tend to rope in everyone, misinterpret the motives where the decision has gone awry or where a loss is caused in a commercial transaction. Such a perception is not without foundation. It is essential for the investigating agencies to establish that their actions are designed in such a way as to protect honest officers.

The crucial question is one of ensuring a balance between equality before law and protection of an honest civil servant who has his reputation to safeguard, unlike a corrupt one. Such a balance could be achieved by an impartial agency which would screen cases of prior permission for investigation and sanction prosecution of public servants involved in corruption. The Commission has already recommended that the Central Vigilance Commission should be empowered to give such permission.