Private chor vs public thief

Corruption is not just a public office phenomenon

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The spate of scams that hit the body politic during the last few months and the startling public disclosures from the Radia tapes had already made discussions on corruption the most favourite national pastime. Now, Anna Hazare's fast, the constitution of the Lokpal bill drafting committee and the surge of popular support have firmly focused the spotlight on the issue of corruption. However, pre-conceived notions and insufficient knowledge about issues in corruption continue to remain the biggest stumbling blocks to raising the level of such discussions, whether in high-profile TV debates or in public fora, to that of informed analysis. One sincerely hopes that the scams, the Radia tape revelations and the Anna Hazare phenomenon will help to open many closed windows through which many pre-conceived notions can justifiably be thrown out.

Corruption is generally considered to be a 'public office' related issue and this perception allows the non-governmental part of society – industrialists, businessmen, activists and media – to assume a false moral superiority, as if corruption is a crime that can be committed only by holders of public offices. Perhaps this is an outcome of the extant law on corruption which equates public funds only with government funds. But are bank funds, which to a large extent are made up of deposits by the general public, not public funds? And why are funds accessed from the stock market through IPOs and FPOs not public funds?

As the Indian economy has grown manifold during the last two decades, the growth in tax revenues and government funds (and in the budgeted funds of government departments) has been evenly matched by the funds accessed by the private sector from banks, public financial institutions and the capital market. Surprisingly, a company or private body and its officials that misuse and divert such public funds (to their personal wealth) are culpable only under the provisions of the Indian Penal Code (IPC) or under the Prevention of Money Laundering Act and not under the Prevention of Corruption Act (PCA), 1988.

It is not that the punishment under the IPC is in any way less severe than that under the PCA but any offence alleged, even wrongly, under the PCA is viewed with far more seriousness and loathing than an offence alleged purely under the IPC or even under the Prevention of Money Laundering Act. A public servant accused of corruption under the PCA is a public 'chor' whereas a businessman or industrialist accused of misusing or even misappropriating public funds accessed from public financial institutions or from the capital market is only a private thief and, therefore, not the object of public derision. This perception must change and the anti-corruption laws must be revised to reflect this change. The point is that the fulcrum of corruption can be as much in the realm of 'private office' as in that of 'public office'.

It can be argued that private persons can be and are also charged with committing an offence under the PCA. However, the truth is that private persons are always charged as accomplices of

the ‘public servant’ charged (under section 13 of the PCA), who is the main accused, by bringing in Section 120-B (conspiracy) of the IPC. This perception that private persons are only subordinate actors in a corruption case has been totally shattered by the Niira Radia tape revelations which have established how private actors and not public servants can also be the fulcrum of the corrupt act.

In fact, Sections 8 and 9 of the PCA deal with situations in which private persons can be charged independently, with or without any public servant. However, the general perception of corruption, even of prosecuting agencies, is so much ‘public-servant’-centric that Sections 8 and 9 are never used to charge private actors even where they were the fulcrum of the alleged act.

The Niira Radia tape revelations shook up the media and the private sector and sent a chill down the spines of many prominent personalities of these two sectors as they found the reach of Section 8 and 9 staring at them in their eyes. However, nobody wants the debate on corruption to be anything but ‘public-servant’-centric and very soon the focus of tape revelations was conveniently shifted to violation of privacy issues. Potential crooks became victims and the spotlight was back on public servants, now accused of leaking the tapes to the media! The tapes were an eye-opener on corruption and rampant crony capitalism but the state, in a strange exercise in self-delusion, chose to shoot the messenger.
It is nobody’s case, and certainly not mine, that India is not home to large-scale corruption by public servants – ministers, legislators, bureaucrats and even lowly placed public functionaries. The problem lies as much in wrong remedy as in wrong identification of issues. The extant law and the way it is administered allows corruption to grow unchecked because it ends up achieving the wrong objectives – the main and the big perpetrators are never indicted, only the small fry are caught and that too in carefully orchestrated traps, a large number of cases are either false or politically motivated, particularly at the state level, and the way Section 13 of the PCA is used acts as a deterrent to honest and straight-forward decision-making.

It is not well understood that corruption is largely a by-product of inefficiency and feeds on poor governance and on a system that discourages decision-making. Section 13, which defines criminal misconduct by a public servant, contains a clause which is not only out of sync with the current economic philosophy but indirectly also acts as a rude warning to any public servant wanting to take individual responsibility for executive actions. Section 13(1)(d)(iii) says that any public servant who obtains for any person any valuable thing or pecuniary advantage (without any public interest), will be guilty of criminal misconduct (even though he himself may not have benefitted in any way). This is a dangerous clause rooted in an outdated philosophy looking with suspicion at any private enterprise and at any decision-making connected with it, and is theoretically capable of questioning any executive decision of a public servant having financial ramifications.

In today’s economy when the government is outsourcing most of the services to the private sector and public-private partnership (PPP) is the accepted mode of delivery, it is difficult to think of an executive decision by a public servant which does not ‘obtain for any person any valuable thing or pecuniary advantage’. Anti-corruption prosecuting agencies, particularly at the state level, have used this clause with unrestrained glee as it is the accused public servant who has to prove that the act was in ‘public interest’. The fact that he personally did not benefit is of

no consequence.
This gross misuse of Section 13(1)(d)(iii) has on the one hand done the maximum damage to the administration of anti-corruption laws and paralysed governance on the other. Simple executive decisions are either postponed indefinitely or taken only when a façade of collective (inter-departmental/ministerial) decision-making can be manufactured. Realising the harm that this clause was causing to governance, the department of personnel and training had proposed an amendment to the PCA in 2009, wherein this clause was to be deleted. However, in the face of sustained opposition from the CPI (M), an ally of UPA 1 at that time, the amendment bill could not be carried through. It is high time this amendment is revisited.

The reason why the PCA has failed to curb high-level corruption is that while it is prejudiced against the individual decision-maker in matters of award of contracts, it is toothless when favours are granted to interest groups under the garb of 'policy'. Here, the beneficiaries are multiple, while the decision-making is collective and imbued with the aura of 'policy'. It is in the exercise of the so-called policy decisions that big-ticket corruption takes place and Section 13 is powerless and worthless here.

Which anti-corruption agency of any state has ever challenged, for example, the 'excise policy' of that state, even though it is common knowledge that more often than not such policies are designed more to serve private interests? The same is true of a number of policies even at the central level. The 2G case, therefore, is a milestone because it is the first case where a 'policy' is at the centre of an anti-corruption investigation.
However, this has happened more because of the intervention of the supreme court and the pressure generated by the Radia tape revelations. It is unlikely that prosecuting agencies, either at the central or state levels, will challenge the policies of their political masters. The central vigilance commission (CVC) could have played this role but under successive unimaginative chiefs it chose to be another bureaucratic office, lording over its empire of chief vigilance officers and granting vigilance clearances for bureaucratic appointments. It failed to challenge even one suspect policy matter. This has been the biggest cause of our failure to check large-scale policy-level corruption. The biggest success or failure of the Lokpal, the subject matter of the current political debate, will be in checking big-ticket policy-level corruption. Surprisingly, hardly any activist or analyst has pointed this out till now.

While it is beyond the scope of this article to deal with all the issues relating to corruption or to Lokpal, there are two common issues that must be mentioned. The first is the requirement of 'sanction' by the competent authority under the relevant laws to prosecute a public servant. Over the years, a mistaken impression has taken root that this requirement is the biggest hurdle in prosecuting delinquent public servants and is responsible for corruption.
Investigating/prosecuting agencies and the Lokayuktas have been extremely vocal in demanding an end to the requirement of sanction. Nothing could be worse or more disastrous! It is not that a problem does not exist here but it relates to the way the requirement of sanction is administered by governments and not to the requirement per se.

Since the relevant laws (Section 197 of the Code of Criminal Procedure and Section 19 of the PCA) do not put any obligation on the governments to give or refuse sanction within a prescribed time limit, governments keep many such cases pending for years. While it is gross injustice to

those public servants in whose case sanction deserves to be refused (ex-CVC Thomas' case is a good example), it gives prosecuting agencies a chance to flay the requirement itself when they are unable to get sanctions even in simple cases.

The remedy does not lie in throwing the baby out along with the bathwater. The political theory of obligation says that the state (and the government) functions on the bedrock of mutual obligation between it and the citizen. The citizen obeys the state because the state protects him. This obligation casts an even stronger duty on the state to protect its own employees from false prosecution. It is not just public servants but judges of the lower and higher courts also, who enjoy this protection on the same philosophical foundation. Who will like to work for the state in the absence of this protection?

The remedy lies in amending Section 197 of the Code of Criminal Procedure and Section 19 of the PCA and introducing stringent time-limits within which governments and competent authorities must either grant or refuse sanction to prosecute. Since the exercise of grant or refusal of sanction is quasi-judicial which can also be challenged before the courts, it should also be made obligatory that such exercise should be in the nature of a speaking order.

The second issue concerns the view expressed by a few prominent personalities that the Lokpal should have its own dedicated police force for investigation and prosecution. The examples of the Karnataka and the Madhya Pradesh Lokayuktas are cited in favour of this argument. Without going into the details of the systems operating in Karnataka and Madhya Pradesh, it can be said without any hesitation that such a system is contrary to the principle of separation of powers and can lead to undesirable concentration of power (complainant-investigator-prosecutor-judge) which can be hijacked by police agencies to clothe themselves in the cloak of a judge. 'Power corrupts and absolute power corrupts absolutely' is a dictum that can apply to any wing of the state apparatus. Indian democracy, flailing and struggling as it is, can do without a new 'Ghasiram Kotwal'!

This piece first appeared in the June 16-30 issue of Governance Now *magazine.*