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Corruption and compliance: preventive legislations and policies in international business projects

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Abstract

This article seeks to provide an insight on the international phenomenon of corruption, dealing with its existence, and whether compliance is higher with Anti-Corruption laws or with corruption itself, resulting in anti-corruption laws being much less effective than the legislators intended it to be and the reasons for increasing demand worldwide for new governance standards and higher compliance controls and other effective anti-corruption laws and policies in light of rapid increase in corruption every year. This article further deals with the diagnosis and measures to deal with the cause of corruption – the short-comings in anti-corruption law – the reasons why corporations are willing to face continuing legal risks and adverse publicity but still indulge in corrupt practices and the extent of negative impact the prevailing levels of corruption ultimately have on international business and trade. Strict compliance controls are being introduced with increasing enforcement of anti-corruption laws internationally and nations have also started to focus on individual and corporate liability in cases of violation of anti-corruption laws, for both government and private organisations. In this context of far-reaching developments, whether European and South-east Asian Countries like India and International Business Organisations can act in ignorance or buck up and accept this trend, slowly and steadily moving towards a less corrupt nation and International business projects – if not towards a totally corruption free one, keeping in mind the growth of international trade and Commerce and its sustainability.

Keywords: Corruption, Corruption-Causes, Consequences and Measures , Corrupt practices International Business, International Business Projects, Anti-Corruption Laws, International Legislation, Indian Laws.

JEL Classification: K14, K22, K33

Introduction

“..Just as fish moving under water cannot possibly be found out either as drinking or not drinking water, so government servants employed in the government work cannot be found out (while) taking money (for themselves).”

'Kautilya' / Chanakya in Arthashastra (Economics) ,
Chapter IX. 370 -283 BCE

“.. It's Interesting that these themes of crime and political corruption are always relevant.”

Martin Scorsese

In light of the ever increasing international trade and business, one major concern is corruption growing alongside it. In a race to be at a leading position,

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ethics and morals take a backseat and the hunger for power and money lead to invention of newer ways almost everyday to pay and receive bribes so as to put the person bribing in a position better than those not doing so, whether such a person is more capable or not is a question paid no attention to. As corporations and business entities grow larger, sometimes with a monetary turnover many times that of small countries, the threat of corruption in the business world, within the organization, in dealings with other organisations and in dealings with the government is a looming and growing threat. So is it that capability has little relevance as a qualifying factor in today's time and the race is only monetarily driven, the winner predetermined, on basis of the highest payer? It would certainly seem so.

Definition and meaning of corruption

Corruption has been defined as²:

Per Oxford Dictionary: "Dishonest or fraudulent conduct by those in power, typically involving bribery.

Per Black's Law Dictionary (2nd Edition): Illegality; a vicious and fraudulent intention to evade the prohibitions of the law. The act of an official or fiduciary person who unlawfully and wrongfully uses his station or character to procure some benefit for himself or for another person, contrary to duty and the rights of others.

As per Dictionary.com: The word corrupt (Middle English, from Latin corruptus, past participle of corrumpere, to abuse or destroy: com, intensive pref. and rumpere, to break) when used as an adjective literally means "perverted, made inferior, affected, tainted, decayed".³

Earlier corruption was believed to be prevalent only in public offices, giving corruption the meaning of use of public office for private gain⁴ but such a narrow meaning does not hold in today's time where corruption is prevalent in public offices, private offices and commercial spheres of business and one does not need any analysis or study in support of such contentions. One of the most popular of the definitions of corruption, namely, 'Corruption is the abuse of power by a public official for private gain' is too limited to be able to include the levels and spheres corruption and corrupt persons have invaded. Therefore, corruption maybe political, personal/private or commercial.

The basic difference is in the office, power and position, which are abused, and aim of abuses. Political corruption may include bribery, use of governmental offices for private enrichment and substitution by particularistic for universalistic

² U. S. v. Johnson (C. C.) 20 Fed. 082; State v. Ragsdale. 59 Mo. App. 003; Wight v. Rindskopf, 43 Wis. 351; Worsham v. Murchison, 00 Ga. 719; U. S. v. Edwards (C. C.) 43 Fed. 07.

³ Retrived on 14.10.2013

⁴ As defined in Maria Dakolias and Kim Thachuk, The Problem of Eradicating Corruption from the Judiciary: Attacking Corruption in the Judiciary: A Critical Process In Judicial Reform, 18 Wis. Int'l L.J. 353, 355 (2000).

norms of public decision-making⁵. Personal corruption may include violations of fiduciary duty, untruthfulness with friends for personal gains. Commercial corruption may include suppliers bribing agents to sell their products over other suppliers' products, organisations bribing media agencies for better publicity, et al. Corruption is a crime of calculation, where the benefit received by the briber outweighs the amount paid as bribe, which is the most prominent seducing factor for everyone ready to indulge is paying bribe. On the other hand, the receiver of bribe has nothing to lose and all to gain from the bribe so received as if it is not this person upon whom the benefit is vested by him then it would be so vested upon someone else, who may not have paid bribe for it, leading to corruption.

In the International projects another aspect of corruption is the scale of corruption. Corruption can occur on many different scales. There is petty corruption that occurs as small favours between a small number of people within established social frameworks and governing norms, usually occurring in developing nations where public servants are significantly underpaid. Then there is the corruption that affects the government on a large scale, i.e., grand corruption or political corruption, occurring at the highest levels of government in a way that requires significant subversion of the political, legal and economic systems. Such corruption is commonly found in countries with authoritarian or dictatorial governments and in those without adequate policing of corruption by anti-corruption agencies. Then there is corruption that is so prevalent that it is part of the everyday structure of society, i.e., systemic corruption⁶, which is primarily due to the weaknesses of an organization or process. It can be contrasted with individual officials or agents who act corruptly within the system. Factors which encourage systemic corruption include conflicting incentives, discretionary powers; monopolistic powers; lack of transparency; low pay; and a culture of impunity.⁷ Specific acts of corruption include "bribery, extortion, and embezzlement" in a system where "corruption becomes the rule rather than the exception."⁸ Scholars distinguish between centralized and decentralized systemic corruption, depending on which level of state or government corruption takes place; in countries such as the Post-Soviet states both types occur.⁹

The difference between bribery and corruption in international business projects is almost always ignored, corruption being broader in scope than bribery. Bribery, as an act of corruption, always deals with obtaining of illegal payments with abuse of public or commercial office.¹⁰ The payment need not always involve the exchange of money (could be other gifts or advantages, such as membership of

⁵ Id. at 356

⁶ "Glossary". U4 Anti-Corruption Resource Centre. Retrieved on 14-10-2013.

⁷ Lorena Alcazar, Raul Andrade (2001). *Diagnosis corruption*. pp. 135–136.

⁸ Znoj, Heinzpeter (2009). "Deep Corruption in Indonesia: Discourses, Practices, Histories". In Monique Nuijten, Gerhard Anders. *Corruption and the secret of law: a legal anthropological perspective*. Ashgate. pp. 53–54.

⁹ Legvold, Robert (2009). "Corruption, the Criminalized State, and Post-Soviet Transitions". In Robert I. Rotberg. *Corruption, global security, and world orde*. Brookings Institution. p. 197.

¹⁰ See John T. Noonan, *Bribe* (1987) for discussion of bribery.

an exclusive club or promises of scholarships for children, special favours or influence).¹¹ As an act, despite the form it takes, corruption is always a two-way transaction; it requires a supply side (the briber) and a demand side (the one who receives the bribe).¹²

Due to globalisation and economic liberalisation in the European and Asian countries, there came the time of economic growth, globalization, new developments in technology and possibilities of doing business around the world and along came the obstacles of organised crime and corruption in almost all parts of the world, which came to be ignored by some international businesses, desperate only to enter new markets and establish themselves there, paying whatever price asked of them, assuming that as long as they ultimately recovered all price paid, along with profit, all such acts of bribery with money and other things as justified, with no thought for future consequences and damages. These acts not only impacted such notorious international businesses willing to be corrupt but also the honest businesses, even more so, as they were left high and dry, not being able to explore and take advantages of the growing international trade and business. Now when the international business community has finally come to realise the situation, that the influence of corruption is ultimately negative, the problem of corruption has reached a level where it is extremely difficult to curb and control it, nonetheless, it is always better late than never and hence there is urgent need, leading to urgent demand, for legislative actions and sanctions to control the evil of corruption, especially in international business.

Corruption and World Map Corruption Perception Index 2012¹³



¹¹ Enery Quinones, What is Corruption, OECD Observer, (April 1, 2000), p. 23.

¹² Id.

¹³ Can be found at <http://www.transparency.org/cpi2012/results>. (retrieved on 14.10.2013)

Since 1995, Transparency International (TI) publishes the **Corruption Perceptions Index (CPI)** annually ranking countries "by their perceived levels of corruption, as determined by expert assessments and opinion surveys."¹⁴ The CPI generally defines corruption as "the misuse of public power for private benefit."¹⁵ The CPI currently ranks 176 countries "on a scale from 100 (very clean) to 0 (highly corrupt)."¹⁶ The 2012 corruption perceptions index measures the perceived levels of public sector corruption in 176 countries and territories around the world. Upon perusal of this index, it is clear that no part of the world is devoid of the evil of corruption but the South-East Asian Countries are much higher up on the scale of corruption. So this implores us to re-think as to how effective any anti-corruption legislation can be and how aggressive the penalty will have to be to force corrupt people and organisations to think before indulging in such practices as clearly, expecting ethical, moral values and integrity to be doing the job has failed, hence, the urgent need for penal legislation.

Causes of Corruption

Causes of corruption, in the author's opinion, are so many that may not be easily divided into limited groups. Low income, overburdening tax system, weak law, no strict action taken against corruption due to corrupted people's popularity, no transparency in dealing, low morals and integrity of people, lust for power and money, and it can go on and on.... Specifically the author will herein discuss two categories - socio-political and economic as being the most affecting.

- i. Socio-political causes of corruption are following: (a) weak governance of a country; (b) dysfunctional government's budgets; (c) delays in the release of budget funds, especially when this involves pay; (d) closed political systems dominated by narrow vested interests; (e) use of public office for private gain by senior officials and political leaders; (f) divergence between the formal and the informal rules governing behaviour in the public sector; (g) weak accountability, (h) eroded ethical values, (i) inoperative financial management systems resulting in no formal mechanism to hold public officials accountable for results; (j) low and declining civil service salaries and promotion unconnected to performance and a public service long dominated by patron-client relationships, in which the sharing of bribes and favours has become entrenched; (k) civil services receive inadequate supplies and equipment; (l) lacking adequate legislative controls; (m) unenforced rules of conduct and conflict of interest with ineffectual watchdog institutions such as ombudsmen, auditors, and the media or their

¹⁴ Transparency International (2011). "Corruption Perceptions Index". Transparency International. Transparency International. Retrieved 14-10-2013.

¹⁵ CPI 2010: Long methodological brief, p. 2.

¹⁶ Transparency International (2012). "Corruption Perceptions Index 2012: In detail" Transparency International. Transparency International. Retrieved 14-10-2013.

- absence in toto; (n) international sources of corruption associated with major projects or equipment purchases.¹⁷
- ii. Economic causes of corruption are closely connected with political ones. They are following: (1) existence of trade restrictions leads to payments to governmental officials in order to get import licenses which are in limited quantity; (2) existence of a big number of government subsidies regulate industrial policy, governmental officials strongly involved in price controls; (3) existence of multiple exchange rate practice and foreign exchange allocation schemes leads to attempts to gain the most advantageous rates by bribing governmental officials; (4) low wages in civil services leads to extortion bribes by civil servants to improve their financial situation; (5) natural resources endowments leads to bribes of governmental official to get the best prices in avoidance of government regulations.¹⁸

Consequences of Corruption

Corruption has very strong effect at political, social and economic life of a country where it takes place. The existence of corruption in this case puts some costs and some benefits of political, judicial, and bureaucratic actions to different members of the society.¹⁹ In the field of International business transactions the corruption has an impact at both sides: countries where corruption takes place suffer from social, political and economic losses and foreign companies, which are doing or trying to do business in those countries, suffer from commercial losses.

In these countries there exist problems of undermined democracy by effecting rights of ordinary people and small entrepreneurs, harm to the environment, retarded development, eroding moral values of people, disregard for the rule of law, increase in organised crime and money laundering, lowers investment and retarded economic growth to significant extent, loss of tax revenue, lower quality of infrastructure and public services, distortion in the allocation of resources, wreaking trade with other countries; lowers growth²⁰.

Commercial losses for the companies are that entrepreneurs suffer higher risks and increased costs of doing business, international bribery results in lost exports for those who play by the rules and seek to win contracts through fair competition, the ability of businesses to operate in a transparent, honest and

¹⁷ James P. Wesberry Jr., *International Financial Institutions Face the Corruption Eruption*, 18 J. INTL. L. BUS, 498, 509 (1998).

¹⁸ Paolo Mauro, *Why Worry About Corruption?* 4-6 (1997).

¹⁹ See Henry R. Luce, *The Role of The World Bank in Controlling Corruption*, 29 Law and Pol'y Int'l Bus. 93, 95-97 (1997) for 6 situations where bribery plays role of the distributor of costs and benefits.

²⁰ See Vito Tanzi, *Roads to Nowhere: How Corruption in Public Investment Hunts Growth* (1998).

predictable environment is lost, corruption hurts suppliers of exporters and impedes international trade.²¹

Measures Taken by International Organizations

On May 21, 1997, the **European Commission** adopted a Communication to the Council and to the European Parliament on a Union Policy Against Corruption²². The Communication provides member states with a consistent and coherent policy on corruption in international trade and commerce well as in other pertinent area. But the Communication does not have legal effect of corruption. The Convention criminalizes bribery of E.U. officials as well public officials of E.U. member states, but does not concern transnational bribery with foreign officials of countries that are not members of the European Union.²³ The Convention on the Fight against Corruption involving Officials of the European Community or Officials of Member States of the European Union²⁴, adopted on May 26 1997, criminalized active and passive corruption of officials even where financial damage to the Union was not at issue. The Joint Action of 22 December 1998 adopted by the Council on the Basis of article K.3 of the Treaty on European Union, on corruption in the private sector, constituted another important instrument.²⁵

Other international organisations have also been actively fighting against growing corruption. The **United Nations** (U.N.) has drafted three very important documents to deal with issues of corruption: United Nations Declaration against Corruption and Bribery in International Commercial Transactions²⁶, International Code of Conduct for Public Officials²⁷, and Code of Conduct for Law enforcement Officials²⁸. The Draft United Nations Convention against Transnational Organized Crime, in its article 4 ter²⁹ envisages the criminalization of corruption when an

²¹ DONALD J. JOHNSTON, *Honesty is the Best Policy*, OECD Observer (April 1, 2000), p. 3.

²² European Union, Resolution on the communication from the Commission to the Council and the European Parliament on a Union policy against corruption, (May 21, 1997), COS/1997/2116, also available at <http://www.db.europarl.eu.int/>

²³ Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union, May 26 (1997), O.J.C. 195, 26.5.1997.

²⁴ Id.

²⁵ See, European Union, Joint Action of 22 December 1998 Adopted by the Council on the Basis of Article K.3 of the Treaty on European Union, on Corruption in the Private Sector, 1998 O.J. (L358), also available at http://www.consilium.eu.int/ejn/vol_b/5_actions_communes/corruption/13909en.html

²⁶ United Nations Declaration Against Corruption and Bribery in International Commercial Transactions, U.N. GAOR, 51st Sess., U.N. Doc. A/RES/51/191 (Dec. 16, 1996).

²⁷ United Nations International Code of Conduct for Public Officials, U.N. Doc A/RES/51/59 (Dec.12, 1996).

²⁸ Code of Conduct for Law enforcement Officials General Assembly Resolution, U.N.Doc A/34/196 of (Dec. 17 1979).

²⁹ Draft United Nations Convention against Transnational Organized Crime, U.N. Doc. A/AC.254/4/REV.6.

organized criminal group is involved. The Convention includes following acts: corrupt activities involving an international civil servant, a foreign public official, a judge or other official of an international court. The draft convention is aimed at corrupt activities towards international officials. Additional international measures were proposed for further combating corruption the 10th U.N. Congress³⁰ included “develop, ratify and incorporate international instruments to encourage strengthen anti-corruption programs at the national level” and “Consider the development of a comprehensive United Nations convention against corruption”³¹.

In 1996, president of the **World Bank**, James Wolfensohn, made combating bribery a top priority. In 1997, with help of Transparency International, the bank adopted a comprehensive program, including strong controls to prevent bribery on World Bank-financed projects and assistance to governments to promote reforms.³² It was decided that bank will fight corruption by following means: (a) preventing fraud and corruption in World Bank-financed projects; (b) assisting countries fight corruption, if and when they request it; (c) seriously considering corruption in the World Bank's internal planning, in the design of its projects and in its analysis and policy dialogue with countries which lead to agreeing upon strategies; (d) supporting international efforts against corruption.³³

Transparency International is a non-governmental organization established in 1993 in Berlin. It has former governmental officials and business people as its members. The main aim of this organization is to increase governments' accountability and curbing both international and national corruption.³⁴ The most important actions by the Transparency International are information gathering and raising public awareness. For this purpose, it publishes a Corruption Perceptions Index³⁵ that scores countries on ten-point scale, a score of ten indicating a highly clean country and zero indicating a highly corrupt country.³⁶ TI also publishes a Bribery Index of Leading Exporting Nations³⁷ to uncover the

³⁰ 10th United Nations Congress on the Prevention of Crime and The Treatment of Offenders, Vienna, 10-17 April 2000, International cooperation in combating transnational crime: new challenges in the twenty-first century. Background paper for the workshop on combating corruption prepared by the United Nations Interregional Crime and Justice Research Institute. U.N. DOC A/conf.187/9, available at <http://www.uncjin.org/Documents/10thcongress/10thcongress.html>

³¹ Id.

³² John Brademas and Fritz Heimann, Tackling International Corruption; No Longer Taboo, Foreign Affairs, October, 1998, Pg. 17

³³ James P. Wesberry Jr., International Financial Institutions Face the Corruption Eruption, 18 J. INTL. L. BUS, 498, 509 (1998). at 501-502.

³⁴ Transparency International, Welcome! at <http://www.transperency.de/welcome.html> (visited 20 April 2001)

³⁵ See Transparency International Corruption Perception Index/Bribe Payers Index at <http://www.transparency.de/documents/cpi/index.html>

³⁶ See Id.

³⁷ See Id.

sources of bribery by scoring countries on a ten-point scale with a score of ten indicating negligible bribery and zero indicating very high levels of bribery.³⁸

The **International Monetary Fund** has been emphasizing the need for transparency and other steps to curb corruption.³⁹ On August 4, 1997, the IMF Executive Board released guidelines, which instructed IMF staff to consider corruption and accountability issues in its relations with borrowing countries. The IMF guidelines are worded in the language of economists, which makes them difficult to understand for laypersons. The Guidelines do, however, officially recognize the problem of corruption for the first time. More importantly, they call the attention of IMF staff to the threat that corruption poses to international lending for development. The IMF guidelines specifically seek to provoke greater attention to involvement in governance issues by advocating policies and development of institutions and administrative systems with aim to eliminate opportunity for corruption and fraud. It also expresses great concern that corruption issues be addressed only based on economic considerations within its mandate prohibiting IMF adopt the role of an investigative agency or guardian of financial integrity in member countries.⁴⁰

The **International Chamber of Commerce** in Paris plays an important role in encouraging the international business community to become active in fighting corruption. The Chamber's focus is on improving corporate self-regulation programs. The biggest Chamber's achievement is the "Rules of Conduct to Combat Extortion and Bribery".⁴¹ On 26 March 1996, the ICC's Executive Board updated the Rules⁴² and expanded them to cover a broader range of corrupt practices. The Rules deal with such issues as payments to sales agents and other intermediaries, business entertainment and gifts, and political contributions. They cover not only bribery of public officials but bribery within the private sector as well. The basic approach of the Rules is the need for action by international organizations, governments and by enterprises, nationally and internationally, to meet the challenging goal of greater transparency in international trade. The rules have also been revised in 1999. Thus, extortion and bribery in judicial proceedings, in tax matters, in environmental and other regulatory cases or in legislative proceedings are now covered by the Rules.

World Trade Organization has also recently mobilized its efforts against corruption. So far the only one legal action was taken by the WTO: the 1996 WTO

³⁸ See Id.

³⁹ John Brademas and Fritz Heimann, Tackling International Corruption; No Longer Taboo, Foreign Affairs, October, 1998

⁴⁰ James P. Wesberry Jr., International Financial Institutions Face the Corruption Eruption, 18 J. INTL. L. BUS, 498, 509 (1998).

⁴¹ International Chamber of Commerce, Rules of Conduct to Combat Extortion and Bribery (revised) at http://www.iccwbo.org/home/statements_rules/rules/1999/briberydoc99.asp, (Visited 15-10-2013)

⁴² International Chamber of Commerce, Rules of Conduct to Combat Extortion and Bribery at http://www.iccwbo.org/home/statements_rules/rules/1996/1996/briberydoc.asp, (Visited 15-10-2013).

Ministerial Declaration⁴³ which included a provision establishing the Transparency in Government Procurement working Group to study transparency in government procurement practices. In 1999 the Group has issued its first report⁴⁴. Within the WTO the most feasible possibility is to revise the Agreement on Government Procurement⁴⁵, focusing on anticorruption aspects. This agreement entered in force on January 1, 1996, but only a few courtiers, mostly in industrial world, have adopted its provisions.

The **Foreign Corrupt Practices Act, 1977 (United States of America)**, prohibits American companies from making corrupt payments to foreign officials for the purpose of obtaining or keeping business. The Congress enacted the FCPA to bring a halt to the bribery of foreign officials and to restore public confidence in the integrity of the American business system. FCPA was amended in 1988 and in 1998.⁴⁶

Corruption and Asia, India in particular

The prevalence of corruption in Asia, and the public attention that it has been receiving can be gauged from the Centre for Media Services analysis that during 2005 to 2010, corruption coverage in prime-time bulletins showed almost a four times increase in percentage of time given for news stories on corruption.

Corruption and Compliance (Indian Perspective):

India was ranked **94th** out of 176 countries in Transparency International's 2012 Corruption Perceptions Index. Both Sri Lanka and China were ranked better in the Corruption Perceptions Index. Further, a series of recent reports by consultancies including have highlighted the fact that there are many systemic and cultural challenges facing anti-corruption compliance in India.

Anti-Corruption Activism in India:

The public reporting of corruption cases in allotment of natural resources and concessions resulted in the issue being raised in the Indian Parliament many times. In the recent past, a number of sensational cases have grabbed media headlines, including those involving the politicians, bureaucrats and top management of the corporations, either been arrested or are under investigation on

⁴³ See WTO Singapore Ministerial Declaration (Dec. 13 1996) at http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec.htm (last updated 18/10/2000)

⁴⁴ See WTO Report (1999) to the General Council (Oct.12, 1999) at http://www.wto.org/english/tratop_e/grpoc_e/tran99_e.htm, (Visited 15-10-2013).

⁴⁵ See WTO Text of the Agreement on Government Procurement at http://www.wto.org/english/tratop_e/gproc_e/agrmnt_e.htm (Visited 15-10-13).

⁴⁶ See Barbara Crutchfield George and Kathleen A. Lacey, A Coalition of Industrialized Nations, Developing Nations, Multilateral Development Banks, and Non-Governmental Organizations: A Pivotal Complement to Current Anti-Corruption Initiatives, 33 Cornell Int'l L.J. 547 (2000) for discussion of the amendments. See also Stuart H. Deming, Foreign Corrupt Practices, 33 Int'l Law. 507 (Summer, 1999).

charges of bribery. Practically, prosecutions against companies, officials on the rise. This can result in continuing legal risks and adverse publicity for the corporations involved.

Anti Corruption Laws in India:

India has the following anti-corruption legislation in force:

- The Indian Penal Code, 1860
- The Prevention of Corruption Act, 1988.
- The Benami Transactions (Prohibition) Act, 1988.
- Foreign Exchange Management Act, 1999.
- The Prevention of Money Laundering Act, 2002.
- The Right To Information Act, 2005.
- India is also a signatory to the UN Convention against Corruption since 2005.

Indian Penal Code 1860 (IPC 1860)

Section 161 to 165 of IPC deals with various offences of corruption and this is the first step to fight against corruption committed by the public servants. Section 409 as Criminal Breach of Trust, Section 420 as Cheating and Section 120B as conspiracy are the main provisions in IPC against the Public Servant and Private Individuals or organization in corruption cases.

Prevention of Corruption Act, 1988 (PCA 1988)

In 1988, the present Prevention of Corruption Act was passed, replacing the earlier statute, subsequent amendments, as well as the sections of the Indian Penal Code which dealt with corruption. This brought the anti-corruption laws within one statute, and provided for increased penalties, and also broadened the definition of 'public servant'.

Under the PCA, there are broadly **three sets** of offenders who are covered:

- a. A **bribe taker** who is a public servant.
- b. The **giver of a bribe**.
- c. Any **middlemen** who **influences a public servant**. (either by a payment or personal influence).

As per the statute and judicial pronouncements ingredients of 'Bribery' under the PCA 1988 are:

- a. The receiver must be a public servant.
- b. He must solicit or receive illegal gratification.
- c. He must have received the same as a motive or reward.*
- d. It should be other than legal remuneration.

*Motive is for doing a future act. Reward is for a past act.

The definition of 'public servant' under the PCA is wide, and includes employees of government-owned and statutory corporations. Punishment ranges between 6 months and 5 years along with a fine. In certain cases of habitual offenders imprisonment could be 7 years. There is no limit on the maximum fine

payable. Liability could be attributed to a company, if an employee/agent acted within the scope of employment, to obtain benefit for the company.

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.

The Prevention of Money Laundering Act, 2002, (PMLA 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.

Improper accounting has a host of implications under Indian law, leading to violation of PMLA2002. There is an obligation under the Companies Act 2013 to state 'true and fair accounts', which could be violated in these cases, entailing personal criminal liability for officers of the company. Payments with an illegal purpose cannot be deducted as expenses under Indian Tax laws. Therefore, recording such payments as expenses, and recording fictitious expenses, could be construed as tax evasion.

Right to Information Act, 2005 (RTI 2005)

Democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed. RTI has emerged as A major transparency and accountability tool against corruption in India since 2005.

PCA Comparison with Foreign laws:

Facilitation payments are illegal under the PCA, while the Foreign Corrupt Practices Act (FCPA) has a specific exemption for them. Definition of "foreign official" is broader than "public servant", foreign official includes officers of public international organizations. The FCPA applies to payments made to political parties and candidates, while the PCA does not. The FCPA, apart from making bribery an offence, also casts certain obligations upon corporations under the 'books and accounts' provisions. The following issues are commonly observed with respect to accounting treatment of improper payments:

- Incorrect invoicing of sales.
- Creation of fictitious expenses/ incorrect booking of expenditure/routing of payments through agents/ consultants.

Landmark Judgments in India

The Hon'ble Supreme Court of India has observed that⁴⁷:

- a. Causing wrongful loss to the Government to obtain pecuniary advantage for a third party falls under abuse of Power (**M Narayanan Nambiar Vs State of Kerala AIR 1963 SC 1116**).
- b. If one possesses assets beyond his legitimate means, it goes without saying that the excess is out of ill-gotten gain. The assets are not drawn like Nitrogen from the air. (**K. Veera Swami v/s Union of India (1991) 3 SCC 655**).
- c. Issue of contracts to the bidders at higher rates would also fall under abuse of powers (**Narbahadur Bhandari Vs State 2003 Cr.LJ 2799 Sikkim, Ghulam Din Butch Vs State of Jand K AIR 1996 SC 1568**).
- d. Sting operation by a private television channel for detection of crime was also accepted (**Sri Bharadwaj Media Pvt. Ltd. v/s State 2008 (2) Crimes 244 Delhi**).

International Laws Compliances:

Trans-national organisations are eager to spur growth by taking advantage of economic growth, especially that of developing economies like those of South-East Asia. Well-educated and lower-cost workforce and its promising markets, may have little choice but to take a vigorous approach to Anti Corruption Law compliance.

What next at Legislative Level:

Urgent need for accountability of Judiciary, legislative and executive branches, as always was intended by the fore-fathers of nations wherein the government system is divided into the legislative, executive and judiciary branches in an attempt to provide independent services that are less prone to corruption due to their independence. Therefore, need for establishing an effective mechanism for dealing with complaints made with regard to corruption with penalty that acts as a deterrent and not merely a paper tiger. Anti-corruption legislation needs to cover not only monetary bribes but also gifts, valuables, extended hospitality and other benefits derived by acts of corruption. Anti-corruption legislation needs to cover bribe as "speedy money" regularly paid for routine governmental action.

Steps towards compliance:

Transnational /National organisation(s) in international business projects should create a culture of integrity and compliance by:

- 1) Due diligence;
- 2) Business Plan;
- 3) Anti Corruption compliance policy;

⁴⁷ Can be found at <http://www.supremecourtfindia.nic.in/>

- 4) Internal monitoring mechanism;
- 5) Regular compliance training;
- 6) Whistleblower policy;
- 7) Conduct due-diligence on prospective business/partner.
- 8) Ensure that a comprehensive business plan is put in place at the start, to ensure that unanticipated regulatory hurdles do not result in incentive to engage in illegal activities.
- 9) Lay out a comprehensive anti corruption compliance policy with respect to all dealings with public servants, including guidelines for giving gifts and offering hospitality.
- 10) Set up an effective internal monitoring mechanism to check illegal acts by employees, and also ensure that incentives do not exist to engage in such illegal acts.
- 11) Conduct regular compliance training for employees of all levels, to sensitize them to anti-corruption laws and their consequences.
- 12) Establish and publicize a whistleblower policy to encourage reporting of illegal activities.

Conclusion

The paradigm is “...*Corruption exists in the world, but world is not a corrupt society.*” Clearly most people in the world are living in ignorance and are not realising the urgency and cry for immediate action to control and curb corruption, failure of which will be nothing less than a catastrophe. In order for the anti-corruption legislation to work effectively, it is imperative that people be made aware of the long-term consequences of such acts. When even in a place like Europe, where people are generally found to be more honest, with higher integrity and morals as compared to say South-east Asian countries, the problem of corruption persists, one can easily imagine the affect that corruption has on the people of these South-east Asian countries, and if imagination is not enough, there is enough data in support, easily available, which should be a lesson learnt by developed nations to control the evil as early and as effectively as possible, so as to avoid an uncontrollable situation. Corruption mostly affects developing countries in political, social and economic aspects but at the same time it has a very strong influence on foreign businesses as well.

The nature of the causes of corruption is already understood to a great extent and the degree of effectiveness of the various measures initiated by the political leaders to combat corruption is lagging behind. Even though Anti-corruption is gaining more relevance as, simultaneous with increasing enforcement of anti-corruption laws, nations have started to focus on individual and corporate liability in cases of violation of anti-corruption laws, the problem of corruption still persists enough to have adverse affects on the general public all over the world.

Positively speaking, in the context of the far-reaching developments internationally to curb corruption in international projects , it appears unlikely that

the more corrupt nations can act very differently and buck this trend, in the current context wherein all these nations have entered into mutual obligations with several countries to extend cooperation in respect of investigations and legal proceedings and maybe it is only a matter of time but it a question that too will have an answer in time. The public reporting of corruption cases is on the rise and it seems the best time to put anti-corruption legislations and mechanisms in place to control and eliminate the evil of corruption. In the recent past, a number of sensational cases have grabbed media headlines, including those involving the politicians, bureaucrats and top management of the corporations, either been arrested or are under investigation on charges of bribery. Practically, prosecutions against companies, officials on the rise. The continuing legal risks and adverse publicity for the corporations involved should be used as an advantage to encourage anti-corruption attitude.

Corruption is an ancient concept but always contemporary. Corruption is a manifestation of administrative malpractices for purported economic gains due to lack of political will and reforms. When a concept like corruption is put in to practice, its bad for the socio-economic health of the nation and warrants a determined politico-administrative intent to eliminate such practices from the system, not merely to regulate. As nations and regional groupings seek to implement stricter laws with respect to bribery and corrupt practices, the legal risks faced by trans-national corporations are becoming more complex. Scope and operation of anti-corruption laws is not restricted to territorial boundaries. Anti-corruption compliance is a hot-button issue in developing countries where trans-national corporations are increasing presence.

As Chanakya Said.....

Chanakya, is considered as the pioneer of the field of economics and political science in India. Authored the ancient Indian political treatise called Arthshastra (Economics), credited for establishment of the Maurya Empire, the first empire in archaeologically recorded history to rule most of the Indian subcontinent. Chanakya is often called the "Indian Machiavelli", although his works predate Niccolo Machiavelli's by about 1,800 years. Without a corruption-free system, the Mauryan empire – which was the largest in Indian history and the largest (in relative terms) the world has ever seen, could never have arisen. ...“You can't build a MEGA EMPIRE if your ministers, officials, police, and army is corrupt. TOTAL integrity is the minimum requirement and high quality governance.”

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The privatization of public tasks and ownership transformation in Poland – the outline of the issue

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Abstract

The following paper focuses on the discussion on the two issues – the privatization as the transfer of ownership rights to the public wealth onto a private entity and the privatization of public tasks as the manifestation of the deviation of public law entities to perform tasks for the benefit of private entities. The two institutions cause a lot of interest. The two concepts are very often used as synonyms thus interfering with the proper perception of the changes carried out in the economy. The reasons for this state of affairs may be sought in at least two aspects, firstly, the all the action performed by the state regarding the “public” property are in the area of common interest. The more the disposition of the property – the forfeiting of the ownership right for the benefit of a private entity – tends to be “on the carpet”. Furthermore, the emotions are aroused when it comes to the public and private collaboration due to the fear of the allegation of corruption. On the other hand, the unawareness and improper understanding of the meaning of both concepts leads to the erroneous perception of the institutions which play a significant however different roles of each in the state. It should be emphasized that between the concepts of „privatization as the ownership transformation” and „privatization of public tasks” may not be put an equals sign. The political, economic and social changes taking place cause adequate changes to the public administration. Thus the roles and duties are also changed which manifests in e.g. enabling the engagement of the public sector in the cooperation with a private partner (as in private and public partnership for example). The aim of the paper is to indicate the elements defining the objective institutions, factors allowing to distinguish the regulations and primarily allowing to answer the question why the two concepts may not be treated as identical. To explain the aforementioned I shall use a few methods – firstly to explain the concept of “privatization”, “privatization of public tasks” I shall use the historical method. Then to indicate the possibility of the performance of the public tasks in the EU law I shall use the comparative method. The following method used to discuss the objective issue is the analytical method – the aim of the two regulation will be analyzed in order to clarify the inability to consider the privatization process as the model for public and private collaboration.

Keywords: privatization, public tasks, public-private partnership, public administration.

JEL Classification: K23

Introduction

The paper is devoted to the discussion on the two issues – the privatization understood as the transfer of rights to the public property to a private entity and the privatization of public tasks – understood as the manifestations of public entities refraining from performing a task for the benefit of private entities.

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