NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION

A
Consultation Paper*
on

PROBITY IN GOVERNANCE

August 21, 2001

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Advisory Panel

on

Strengthening of the institutions of Parliamentary Democracy;
(Working of the Legislature, Executive and Judiciary;
their accountability; problems of Administrative,
Social and Economic Cost of Political Instability;
Exploring the possibilities of stability
within the discipline of
Parliamentary Democracy)

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ACKNOWLEDGEMENT

This Consultation Paper on 'Probity in Governance' is based on a paper prepared by Justice Shri B.P. Jeevan Reddy, Member of the

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The Commission places on record its profound appreciation of and gratitude to Justice Shri B.P. Jeevan Reddy for his contribution.

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1. Introduction

1.1 Probity in governance is an essential and vital requirement for an efficient and effective system of governance and for socio-economic development. An important requisite for ensuring probity in governance is absence of corruption. The other requirements are effective laws, rules and regulations governing every aspect of public life and, more important, an effective and fair implementation of those laws, etc. Indeed, a proper, fair and effective enforcement of law is a facet of discipline. Unfortunately for India, discipline is disappearing fast from public life and without discipline, as the Scandinavian economist- sociologist, Gunnyar Myrdal, has pointed out, no real progress is possible. Discipline implies *inter alia* public and private morality and a sense of honesty. While in the West a man who rises to positions of higher authority develops greater respect for laws, the opposite is true in our country. Here, the mark of a person holding high position is the ease with which he can ignore the laws and regulations. We are being swamped by a culture of indiscipline and untruth; morality, both public and private,

is at a premium. This paper explores whether some legislative measures can be designed to ensure probity in governance. It is true that instilling a sense of discipline among the citizens is more the function of the society, its leaders, political parties and public figures and less a matter which can be legislated upon. Even so, things have come to such a pass that measures need to be contemplated.

2. Menace of corruption in public life

2.1 Corruption is an abuse of public resources or position in public life for private gain. The scope for corruption increases when control on the public administrators is fragile and the division of power between political, executive and bureaucracy is ambiguous. Political corruption which is sometimes inseparable from bureaucratic corruption tends to be more widespread in authoritarian regimes where the public opinion and the Press are unable to denounce corruption. The paradox of India, however, is that in spite of a vigilant press and public opinion, the level of corruption is exceptionally high. This may be attributed to the utter insensitivity, lack of shame and the absence of any sense of public morality among the bribe-takers. Indeed, they wear their badge of corruption and shamelessness with equal élan and brazenness. The increase of opportunities in State intervention in economic and social life has vastly increased the opportunity for political and bureaucratic corruption, more particularly since politics has also become professionalized. We have professional politicians who are politicians on a full time basis, even when out of office. India is rated at 73 out of 99 countries in the corruption perception index prepared by a non-governmental organisation, Transparency International. Corruption today poses a danger not only to the quality of governance but is threatening the very foundations of our society and the State. Corruption in defence purchases, in other purchases and contracts tend to underme the very security of the State. Some of the power contracts are casting such financial burden upon some of the States that the very financial viability of those States has fallen into doubt. There seems to be a nexus between terrorism, drugs, smuggling, and politicians, a fact which was emphasized in the Vohra Committee Report.

2.2 Corruption has flourished because one does not see adequately successful examples of effectively prosecuted cases of corruption. Cases, poorly founded upon, half-hearted and incomplete investigation, followed by a tardy and delayed trial confluence a morally ill-deserved but a legally inevitable acquittal. The acceptance of corruption as an inexorable reality has led to silent reconciliation and resignation to such wrongs. There needs to be a vital stimulation in the social consciousness of our citizens – that is neither has a place in the personal nor social[♠]. It is true that the present process of withdrawing the State from various sectors in which it should have never entered or in which it is not capable of performing efficiently may reduce the chances of corruption to some extent but even if we migrate to a free market economy, there has to be regulation of economy as distinct from restrictions upon the industrial activity. The requirements of governance would yet call for entering into contracts, purchases and so on.

2.3 The Scandinavian economist-sociologist, Gunnyar Myrdal, had described the Indian society as a 'soft society'. He also clarified what the expression 'soft society' means. According to him, a soft society is: (a) one which does not have the political will to enact the laws necessary for its progress and development and/or does not possess the political will to implement the laws, even when made, and (b) where there is no discipline. In fact, he has stressed the second aspect more than the first. According to him, if there is no discipline in the society, no real or meaningful development or progress is possible. It is the lack of discipline in the society - which expression includes the administration and structures of governance at all levels - that is contributing to corruption. Corruption and indiscipline feed upon each other. One way of instilling the discipline among the society may be to reduce the chances of corruption and to deal with it sternly and mercilessly wherever it is found. For this purpose, the inadequacies in the criminal judicial system have to be redressed. Corruption is also anti-poor. Take, for example, the Public Distribution System (PDS) and the welfare schemes for the poor including Scheduled Castes (SCs) and Scheduled Tribes (STs). It is well-known that a substantial portion of grain, sugar and kerosene oil meant for PDS goes into black-market and that hardly 16% of the funds meant for STs and SCs reach them – all the rest is misappropriated by some of the members of the political and official class and unscrupulous dealers and businessmen. The famous economist, Late Mehbub-Ul-Haq succinctly and poignantly set out the ill-effects of corruption in a South Asian country like ours. He said:

> "Corruption happens everywhere. It has been at the center of election campaigns in Italy and the United Kingdom, led to the fall of governments in Japan and Indonesia, and resulted in legislative action in Russia and the United States. But, if corruption exists in rich, economically successful countries, why should South Asia be worried about it? The answer is simple: South Asian corruption has four

key characteristics that make it far more damaging than corruption in any other parts of the world.

First, corruption in South Asia occurs up-stream, not down-stream. Corruption at the top distorts fundamental decisions about development priorities, policies, and projects. In industrial countries, these core decisions are taken through transparent competition and on merit, even though petty corruption may occur down-stream.

Second, corruption money in South Asia has wings, not wheels. Most of the corrupt gains made in the region are immediately smuggled out to safe havens abroad. Whereas there is some capital flight in other countries as well, a greater proportion goes into investment. In other words, it is more likely that corruption money in the North Asia is used to finance business than to fill foreign accounts.

Third, corruption in South Asia often leads to promotion, not prison. The big fish – unless they belong to the opposition – rarely fry. In contrast, industrialised countries often have a process of accountability where even top leaders are investigated and prosecuted. For instance, former Italian Prime Minister Bettino Craxi was forced to live in exile in Tunisia to escape extradition on corruption charges in Rome. The most frustrating aspect of corruption in South Asia is that the corrupt are often too powerful to go through such an honest process of accountability.

Fourth, corruption in South Asia occurs with 515 million people in poverty, not with per capita incomes above twenty thousand dollars. While corruption in rich rapidly growing countries may be tolerable, though reprehensible, in poverty stricken South Asia, it is political dynamite when the majority of the population cannot, but to massive human deprivation and even more extreme income meet their basic needs while a few make fortunes through corruption. Thus corruption in South Asia does not lead to simply Cabinet portfolio shifts or newspaper headlines inequalities. Combating corruption in the region is not just about punishing corrupt politicians and bureaucrats but about saving human lives. There are two dimensions of corruption. One is the exploitative corruption where the public servant exploits the helpless poor citizen. The other is collusive corruption where the citizen corrupts the public servant by a bribe because he gets financially better benefits. Collusive corruption depends on black money."[Z]

2.4 It may be recalled that the Supreme Court had given certain directions in the case of Vineet Narain vs. Union of India (AIR 1998 SC 889) for conferring statutory status upon the Central Vigilance Commission and to insulate the Central Bureau of Investigation and the Enforcement Directorate from political control and pressures. In the said decision, the Supreme Court referred with approval the recommendations of Lord Nolan Committee[0] on Standards in Public Life in the United Kingdom. The following principles of public life, of general application, were commended by the court:

"Principles of public life[ϕ]:

5. The general principles of conduct which underpin public life need to be restated. We have done this. The seven principles of selflessness, integrity, objectivity, accountability, openness, honesty and leadership are set out (later on).

Codes of conduct:
6. All public bodies should draw up codes of conduct incorporating these principles.

Independent scrutiny:
7. Internal systems for maintaining standards should be supported by independent scrutiny.

Education:
8. More needs to be done to promote and reinforce standards of conduct in public bodies, in particular through guidance and training, including induction training."

The Seven Principles of Public Life are stated in the Report by Lord Nolan, thus -

"**The Seven Principles of Public Life**:
Selflessness:
Holders of public office should take decisions solely in terms of the public interest. They should not do so in order to gain financial or other material benefits for themselves, their family, or their friends.

Integrity:
Holders of public office should not place themselves under any financial or other obligation to outside individuals or organizations that might influence them in the performance of their official duties.

Objectivity:
In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.

Accountability:
Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.

Openness:
Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.

Honesty:
Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.

Leadership:
Holders of public office should promote and support these principles by leadership and example.".

2.5 The Supreme Court observed further:

> "These principles of public life are of general application in every democracy and one is expected to bear them in mind while scrutinizing the conduct of every holder of a public office. It is trite that the holders of public offices are entrusted with certain powers to be exercised in public interest alone and, therefore, the office is held by them in trust for the people. Any deviation from the path of rectitude by any of them amounts to a breach of trust and must be severely dealt with instead of being pushed under the carpet. If the conduct amounts to an offence, it must be promptly investigated and the offender against whom a prima facie case is made out should be prosecuted expeditiously so that the majesty of law is upheld and the rule of law vindicated. It is the duty of the judiciary to enforce the rule of law and, therefore, to guard against erosion of the rule of law." (*see* AIR 1998 SC 889, at page 917)

2.6 An instance and consequence of the adverse effects of corruption on Indian economy can be gauged from the following statement by Prem Shankar Jha, a keen observer of Indian economy:

> "So far, despite adopting some of the most liberal foreign investment laws in Asia, India has not succeeded in seducing even one major international corporation into using it as a global production platform. All the Foreign Direct Investment that has come has been bent upon exploiting the domestic market for consumer goods and durables. In a frank discussion in Singapore, fund managers and corporate executives revealed that the main reason why they were not prepared to mesh India into their global production plans was that even after they had obtained all the clearances from the Central and State Governments, they remained at the mercy of local bureaucrats and politicians. Any one of them could stop their operations, and threatened to do so if they were not given an adequate 'inducement'. Every change of government in a state led to a fresh set of demands and a fresh set of negotiations with the new incumbents. To sum it up, the Chinese took larger bribes, but delivered security of investment in return. Petty bureaucrats who transgressed this principle received a bullet in the back of the head in a football stadium. In India, by contrast, they prospered while the enterprise sickened or died.".

3. Certain measures required to be taken for ensuring probity in governance:

3.0 For ensuring probity in governance, several measures are necessary, some of which are mentioned hereinbelow:

A. <u>Need for enforcing section 5 of the Benami Transactions (Prohibition) Act, 1988:</u>

3.1.1 While many provisions of the Benami Transactions (Prohibition) Act, 1988 are salutary, it is necessary to take note of some of the anachronisms in the said Act. The expression "benami transaction" is defined in clause (a) of section 2 of the said Act. The said clause reads as under:-

> '(a) "benami transaction" means any transaction in which property is transferred to one person for a consideration paid or provided by another person;'.

3.1.2 This definition appears to be susceptible to unchartered application taking in *bona fide* transactions which do not injure public interest – say, a father buying a flat for his child, paying the price in instalments. If the money for purchase is accounted for and it is a transaction of advancement, it should not be voided. This is the true meaning and purport of the definition. The Act, a statute containing nine sections, perhaps **requires to be modified and strengthened**. Section 3 prohibits a person from entering into any benami transaction. Be that as it may, the Act prohibits "benami transactions" and disables any person from claiming that though the property stands in another's name, he himself is the real owner. This Act, enacted as far back as 1988 by Parliament, contains a very salutary and much desired provision in section 5 which reads thus:

> "**5. Property held benami liable to acquisition**:- (1) All properties held benami shall be subject to acquisition by such authority, in such manner and after following such procedures, as may be prescribed.
>
> (2) For the removal of doubts, it is hereby declared that no amount shall be payable for the acquisition of any property under sub-section (1).".

3.1.3 It is evident from a reading of section 5 that it can become effective and operational only when rules are made under section 8 prescribing the authority, the manner and procedure following which benami properties can be acquired by the State (without paying any compensation). In fact, section 8 expressly contemplates rules being made by the Central Government for carrying out the purposes of the Act. It is surprising that the Central Government has not so far thought it fit to make rules for the above purpose. The Act is of general application; it applies to every benami transaction, whether the persons concerned are public servants or not. It is imperative that this is done forthwith, thus fulfilling the legislative mandate.

3.1.4 Perhaps, it may be safer to have a separate and exhaustive law relating to public servants. A law in relation to "public servants" as defined by section 2(c) of the Prevention of Corruption Act, 1988 and section 21 of the Indian Penal Code is a prime necessity. Such an Act must be comprehensive in nature and must also deal with acquisition of assets of public servants. The law must provide the manner in which properties can be held by the wife, minor children, near relations of a public servant and should stipulate that if circumstances show that they are benamidars of the public servants (which expression should be defined in the same manner as in section 2(c) of the Prevention of Corruption Act, 1988 and section 21 of the Indian Penal Code), the same should warrant a special provision which would declare the effects of holding of such assets. The statute may also provide that if proper statutory procedures of reporting and verification are not followed, the burden of proof may be placed on the holder of the property to show that the same was not acquired by him benami. It is also suggested that amendments to the Transfer of Property Act, 1882 and the Registration Act, 1908 should be made by which acquisition or transfer of property in favour of or by a public servant would only be through registered instruments warranting prior scrutiny or post-transaction scrutiny. (In Delhi, majority of property transactions are done only on the basis of power of attorney and wills; no registered documents are ever executed- which incidentally means a substantial loss of public revenue by way of stamp duty and registration charges). This may be made applicable even in relation to transactions by which even though a final conveyance may not be executed, yet interest in property may be sought to be passed *de facto*. The provisions may cover not only the public servants but all those within the family of the public servant. There must exist a clear definition of the family of the public servants. The Companies Act, 1961, which has enabled the near and dear ones of the corrupt to float fabulously rich companies through complex cyclical money in poring also needs to be amended. The status - financial and property matters - of a public servant needs to be brought under the proposed comprehensive law relating to public servants. We suggest that in the law, there should be a monitoring mechanism not composed of officials of the executive government (since the executive government can misuse such provisions to retaliate against unwilling civil servants) but an independent Ombudsman who will regulate the civil service. It is needless to add that in addition to stringent provisions relating to public servants, public opinion should encourage concurrent inward digestion of the principles (*See* The Executive and the Constitution, page 94).

3.1.5 It may be recalled that the Benami Transactions (Prohibition) Act, 1988 was made by Parliament about thirteen years ago. It conferred the rule-making power upon the Central Government for the purpose *inter alia* to make rules prescribing the requisite matter contemplated by section 5. The Government has singularly failed in discharging the duty placed upon it by Parliament. It is true that Parliament has not prescribed any time limit for the purpose, but this is no answer. It is never done. In any event, the Central Government must have made the rules within a reasonable time. A period of thirteen years is too long. Central Government cannot frustrate the intent and object of the Parliament by its inaction. Indeed, it is under a statutory obligation to take measures to effectuate the said provision, if the same has not yet been done.

3.1.6 We must also clarify that the principle of the decision of the Supreme Court in A.K. Roy has no application here. Firstly, that was a case of 'conditional legislation' (power to bring a constitutional provision/enactment into force). Secondly, the matter related to the constitutional amendment (to Article 22) effected in 1979 and the case before the Supreme Court came up in 1981 i.e., within about two years. But when the very same question came up before the Supreme Court in 1994 in A.G. of India vs Amratlal Prajivandas, the nine-Judge Constitution Bench made certain pertinent observations. While observing that it was not necessary to decide the said question for the purpose of that case, the Court noted with approval the argument of the Counsel that such delay on the part of Central Government was not reasonable and that the Parliament while enacting the said amendment Act could never have contemplated that it would be converted into a dead letter by the Central Government by its inaction – deliberate or otherwise.

3.1.7 We are, therefore, of the opinion that at least now the **Central Government should enact a comprehensive law on public servants**. Such a measure would act as a salutary check-a deterrent - upon corrupt public servants and would certainly be a measure to ensure probity in governance.

3.1.8 In this connection, it is necessary to point out the inadequacies in the existing law, namely, the Prevention of Corruption Act, 1988 and the Indian Penal Code. Mere prosecution under the IPC or the Prevention of Corruption Act (PCA) is not sufficient, apart from the fact that such prosecutions are very rarely launched and even when they are, the conviction is much too rare. Unless the fruits of corruption are taken away, you would not be fighting the corruption truly and effectively. A law for forfeiture of property of corrupt public servants otherwise then through the route of conviction is absolutely essential. In other words, wherever a public servant is found to have screened the illegally acquired assets in the name of a benamidar, action should be taken under this

Act and the Rules framed thereunder, and those assets acquired by State without any compensation, as indeed provided for expressly by the Act. For this purpose, the appropriate authority (like the one specified under section 5 of PCA) should be clothed with the necessary powers of investigation, verification, enquiry and the power to gather and receive information from any source, authority, institution or organization. So far as the public servants are concerned, different authorities may be specified in the States and at the Centre. So far as Union and State Ministers are concerned, appropriate authorities have to be created. For non-public servants, appropriate authorities may also have to be specified. The only obligation of such authorities should be to observe the principles of natural justice. It would not be a case of conviction by criminal courts – it would be a purely civil remedy – against corruption. The burden of proving that the property is not held 'benami' should be placed upon the holder of such property/asset.

B. Misfeasance in Public Office – A Remedy

3.2.1 The Supreme Court in an innovative exercise, examined executive actions of two former Union Ministers. It found that one of them allotted petrol pumps in favour of fifteen persons which were plainly vitiated by lack of transparency, nepotism and arbitrariness. The allotments made mostly in favour of the relations of the Ministers or members of his staff. In the case of the other Minister, the Court found that illegal allotments had been made in relation to occupation of Government accommodation. The Court, while taking the view that no public servant could arrogate himself the power to act in a manner which was plainly arbitrary, observed:

> "It is high time that the public servants should be held personally responsible for their mala fide acts in the discharge of their functions as public servants. With the change in socio-economic outlook, the public servants are being entrusted with more and more discretionary powers even in the field of distribution of government wealth in various forms. We take it to be perfectly clear, that if a public servant abuses his office either by an act of omission or commission, and the consequence of that is injury to an individual or loss of public property, an action may be maintained against such public servant. No public servant can say "you may set aside an order on the ground of mala fide but you cannot hold me personally liable". No public servant can arrogate to himself the power to act in a manner which is arbitrary."Ω.

3.2.2 On the question of allotments, the Court opined how the Minister who was executive head of the department held a position of trust. The court observed:

> "The government today – in a welfare State – provides large number of benefits to the citizens. It distributes wealth in the form of allotment of plots, houses, petrol pumps, gas agencies, mineral leases, contracts, quotas and licences, etc. Government distributes largesse in various forms. A Minister who is the executive head of the department concerned distributes these benefits and largesse. He is elected by the people and is elevated to a position where he holds a trust on behalf of the people. He has to deal with the people's property in a fair and just manner. He cannot commit breach of trust reposed in him by the people.... A transparent and objective criteria/procedure has to be evolved....".[1]

3.2.3 The Supreme Court directed one Minister to pay a sum of Rs. Fifty lakhs by way of exemplary damages to the government. Likewise, the other Minister was asked to pay a sum of Rs. Sixty lakhs by way of exemplary damages. The Court, in both the cases, concluded that the actions of the Ministers amounted to a misfeasance of public property.

3.2.4 The Supreme Court relied upon the well stated position in Ramana Deyaram Shettey and Lucknow Development Authority to hold that in the matter of grant of largesse, the Government and its officials were expected to act in a fair, just and transparent manner and that if they acted in a malicious and deliberate manner causing injury to the citizens of the State, they could be held liable for damages. Rookes v. Barnard was relied upon to hold that exemplary damages could be awarded for "oppressive, arbitrary and unconstitutional action by the servants of the government.". The Supreme Court then concluded:

"We are of the view that the legal position that exemplary damages can be awarded in a case where the action of a public servant is oppressive,

arbitrary or unconstitutional is unexceptionable" [para 12 at page 598 of the decision in 1996 (6) SCC 593]. The same principle was reiterated in the decision concerning the other Minister. It would not be out of place to mention that the Supreme Court followed several other English decisions besides Rookes v. Barnard in arriving at its decision. Indeed the Court pointed out that the principle of Rookes v. Barnard was expressly affirmed by the House of Lords in Broome v. Cassell (1972 AC 1027). The Court also referred to the decision of the Court of Appeals in A.B. v. South West Water Services Ltd. (1993 (1) All E.R. 609) as following and affirming the rule in Rookes v. Barnard. It may also be mentioned that as late as 1996, the U.K. High Court has held in Three Rivers District Council v. Bank of England (1996 (3) All E.R. 558), following earlier decisions that:

> "The tort of misfeasance in public office was concerned with a deliberate and dishonest wrongful abuse of the powers given to a public officer and the purpose of the tort was to provide compensation for those who suffered loss as a result of improper abuse of power. It was not to be equated with torts based on an intention to injure, although it had some similarities to them. The tort could be established in two alternative ways: (a) where a public officer performed or omitted to perform an act with the object of injuring the plaintiff (i.e. where there was targeted malice); and (b) where he performed an act which he knew he had no power to perform and which he knew would injure the plaintiff. Accordingly, malice, in the sense of an intention to injure the plaintiff or a person in a class of which the plaintiff was a member, and knowledge by the officer both that he had no power to do the act complained of and that the act or omission would probably (but not that it would necessarily or inevitably) injure the plaintiff or such a person, were alternative, not cumulative, ingredients of the tort. To act with such knowledge was to act in a sufficient sense maliciously.".

3.2.5 This statement of law is indeed a faithful reiteration of the law laid down by the Court of Appeals in Bourgoin S.A. v. Ministry of Agriculture (1985 (3) All E.R. 585).

3.2.6 These decisions, certainly, were welcome and enhanced the image of the Supreme Court in the public eye. The decisions established that courts were concerned with public servants and ministers could not escape consequences of their mala fide acts and orders. The decisions, in substance, demonstrated the adage that "howsoever high you may be, the law is above you". The decisions reinforced the rule of law and not that of men and further that public servants must develop a respect for public property and, above all, that public office is a trust and not a charter of corruption, nepotism and personal gain.

3.2.7 However, the principle enunciated in the above decisions were overruled in a subsequent decision of the Supreme Court in a review petition filed by one of the Ministers. A reading of the judgment (reported in AIR 1999 SC 2979) discloses that the review petition was allowed on the following grounds:

The petitioner before the court "Common Cause", a registered society, was not one of the applicants for allotment of petrol outlets and therefore has not suffered any legal injury by the unlawful allotments made by the Minister. If so, "how could then a finding of commission of misfeasance in public office by the petitioner (the Minister) be recorded in proceedings under Article 32 and that too at the instance of "Common Cause" on the basis of a Press report". Maybe, Common Cause was justified in agitating the said question by way of public interest litigation but that effort has already succeeded inasmuch as the 15 illegal allotments were quashed. But the Court was not entitled to go further and hold that the Minister has committed the tort of misfeasance in public office and to award exemplary damages on that basis.

Damages can be awarded for a tortious act to a particular plantiff who has suffered loss on account of the said tortious action; "mere allotment of petrol outlets would not constitute 'misfeasance' unless other essential elements were present". True, it is that allotment of 15 outlets by the Minister was wholly unjustified and was an instance of wanton misuse of power, yet "it falls short of 'misfeasance in public office' which is a specific tort and the ingredients of that tort are not wholly met in the case". Hence, there was no occasion to award exemplary damages.

Exemplary damages can no doubt be awarded against the public servants in certain situations but not in a case like this. The decision of the House of Lords in Rookes v. Bernard as affirmed in Broome v. Cassell cannot be accepted; "if we were to apply the rule in Rookes v. Bernard as upheld in Cassell and Company Limited v. Broome invariably and unhesitatingly and were to award exemplary damages in every case involving government officers or government servants, the result would be appalling".

The Court further observed: "The petitioner does not on becoming the Minister.... assume the role of a 'trustee' in the real sense nor does a 'trust' come into existence in respect of the government properties".

Examined from the point of view of criminal breach of trust as defined in section 405 of the Indian Penal Code, the 'power to allot' cannot be treated as 'property' within the meaning of section 405 IPC that is capable of being misutilised and misappropriated.

The direction to initiate criminal proceedings against the Minister concerned was violative of the right to life and liberty guaranteed to him by article 21 of the Constitution.

In exercise of its powers under Article 32 of the Constitution, it was not permissible for the Supreme Court "to direct the government to pay the exemplary damages to itself". (This was so held obviously on the footing that a Minister of the government is part of the Government and therefore the Government cannot be directed to pay damages to itself.)

3.2.8 While the moral vigour of the decisions rendered in the aforesaid cases needs to be respected. Whether the principle of damages for a tort of misfeasance must necessarily involve an ingredient of injury to an agreed individual needs to be re-examined. The principle on which liability can be placed on public servants must be clear and must also be a fair principle consistent with need to act fearlessly and must not be capable of comprehending *bona fide* actions, though may be concerned, of civil servants. It is necessary that the principle must promote good governance. By way of example, we may refer to the Andhra Pradesh Cooperative Society's Act, 1964. Section 60 thereof provided that when an office bearer who was entrusted with the organization, affairs of management of the society, misappropriated or fraudulently retained any money or was guilty of any breach of trust, his conduct could be inquired into and an order requiring him to repay or restore the money or property by way of compensation would follow. It is necessary to enact as a part of a comprehensive law relating to public servants, the principles on the basis of which misfeasance can be rendered punishable. The principle must ensure that the wrong-doing is palpably evident, and given the barest standards of foreseeability, no two views are possible. It is then, and then alone, that the public servant is exposed to damages. Likewise, the principle may deal with both the situations, i.e., a situation where a definite injury had been caused to a third person and secondly where a declaration of wanton abuse of power can be arrived at by satisfying judicially manageable standards. Public servants in both the cases must be visited with the imposition of damages. Likewise, the principles of quantification of damages need to be defined since arbitrariness in arriving at figures may well become an area (of non-liquet) where 'no human law and justice may ever reach'. While drafting the legal provisions, there must be an examination of the basic power structure, the composition of the elite, of their fundamental structures in [see W. Michael Reisman, Folded Lies: Bribery, Crusades and Reforms, 69-73 (1973)]. It is necessary that the principles must be clear and achieve the desired result since there have been far too many moral crusades but few successful prosecutions. While adjusting the *bona fide*s or mala fides of an executive act, the matter should be one which is determinable contemporaneously with reference to clear standards of foreseeability.

3.2.9 Section 60 of the Andhra Pradesh Cooperative Societies Act, which carries the heading "Surcharge" reads as follows:

> "60. **Surcharge.-** (1) Where in the course of an audit under section 50 or any inquiry under section 51 or an inspection under section 52 or section 53, or the winding up of a society, it appears that any person who is or was entrusted with the organization, affairs or management of the society or any past or present officer or servant of the society has misappropriated or fraudulently retained any money or other property or has been guilty of breach of trust in relation to the society or has caused any deficiency in the assets of the society by breach of trust or wilful negligence or has made any payment contrary to the provisions of this Act, the rules or the bye-laws, the Registrar himself, or any person specially authorized by him in this behalf, of his own motion or on the application of the committee, liquidator or any creditor or contributory, may inquire into the conduct of such person or officer or servant and make an order requiring him to repay or restore the money or property or any part thereof with interest at such rate as the Registrar or the person authorized as aforesaid thinks just or to contribute such sum to the assets of the society by way of compensation in respect of the misappropriation, misapplication of funds, fraudulent retainer, breach of trust or wilful negligence as the Registrar or the person authorized as aforesaid thinks just:

Provided that no order shall be passed against any person referred to in this sub-section unless the person concerned has been given an opportunity of making his representation.

(2) This section shall apply notwithstanding that such person or officer or servant may have incurred criminal liability by his act."

3.2.10 It may be remembered that a cooperative society has an elected managing committee to run and manage its affairs/business and also staff appointed to assist the persons in management in their duties. Both elected members and the employees so appointed are within the ambit of the above section. There is no reason why this principle cannot be extended to the governing machinery at the Union and State level, where too elected members form the government and run and manage the affairs of the State with the assistance of a permanent bureaucracy. Even the statutory authorities should be within the purview of this rule. The protective clauses usually found in enactments only save the authorities from any suit or prosecution in respect of acts done by them in 'good faith'. The protection does not and should not extend to acts done mala fide. Where the mala fide action causes loss to the State, i.e. people as such, the State must be entitled to recover the loss from the concerned official/ authority.

3.2.11 Several other enactments concerning the cooperative societies enacted by the various States too contain similar provisions.

3.2.12 A comprehensive law needs to be enacted to provide that where public servants cause loss to the State by their mala fide actions or omissions of a palpable character to be defined, they should be made liable to make good the loss caused by him to the State and, in addition, would be open to the imposition of exemplary damages. The principles must include cases of misuse of official position and acts outside authority. The expression 'public servant' must be extended to 'all public servants as defined in the Indian Penal Code and in the Prevention of Corruption Act, 1988, which expression has been interpreted to include Members of Parliament, Members of State Legislatures and Councils and Ministers. Such a law would have the merit of obviating several questions like whether Government can be asked to pay damages to itself, whether the power to grant or allot some benefit can be called 'property', whether such action of the public servant constitutes a 'tortuous action', whether damages/ exemplary damages can be awarded for such acts, and if so, on what basis and to what extent, whether public office is a trust and questions of 'locus standi' and so on. It would also contribute to avoidance of multiplicity of proceedings and would be more effective than a mere criminal prosecution, whether under IPC or PC Act. The law must, however, provide that proceedings thereunder can be taken on the basis of information received including an audit report or a report of any commission, committee or body competent to examine the relevant facts. The authority empowered to take proceedings must be an independent high level officer/agency whose tenure, conditions of service and independence should be firmly and fully guaranteed as has been done in the case of Central Vigilance Commissioner. Different authorities may be prescribed for different classes of public servants. For example Ministers and Legislators may constitute one category, Group A officers may constitute another category and so on. Classification can also be done department-wise. This is, however, a matter for the Parliament/Legislature to decide. It may be appropriate for the Parliament and also State Legislatures on similar lines to enact a new comprehensive law to deal with public servants with reference to their public functions, relationship with the State as well as the examination of their personal effects and private properties. The fact, however, remains that such a course has become absolutely essential and urgent. The public servants must be put on notice that they will be responsible to make good the loss caused by them to the State by their mala fide acts, to use a comprehensive expression to done the grounds mentioned herein above – that they should no longer be under the cosy impression that all that would happen in such a case is that their mala fide order or action would be set aside by the Court but that nothing would happen to them personally. They should be made aware that a mala fide act or action on their part carries the liability for damages/compensation. Creating personal liability of this kind would contribute greatly to good governance and would emphasise the need for transparent, fair and honest exercise of power. It would in no way dampen the initiative of the Ministers or officials nor would it inhibit them in any manner in effective discharge of their functions. A responsible government and the concept of accountability are not anti-thetical to good governance; on the contrary they promote it – they contribute to public good. Mere errors of judgment or *bona fide* mistakes would certainly not expose the public servants to such a consequence but where their actions are mala fide, i.e., falling within any of the six grounds mentioned hereinabove, they should be held responsible. If such acts result in loss to the State, they must be made liable to make good the same.

C. Necessity for a law providing for confiscation of illegally acquired assets of public servants

3.3.1 In the decision reported in Delhi Development Authority v. Skipper Construction Co. (P) Ltd. (AIR 1996 SC 2005), the Supreme Court made the following observations:

> "… a law providing for forfeiture of properties acquired by holders of 'public office' (including the offices/posts in the public sector corporations) by indulging in corrupt and illegal acts and deals, is a crying necessity in the present state of our society. The law must extend not only to – as does SAFEMA – properties acquired in the name of the holders of such property but also to properties held in the names of his spouse, children or other relatives and associates. Once it is proved that the holder of such office has indulged in corrupt acts, all such properties should be attached forthwith. The law should place the burden of proving that the attached properties were not acquired with the aid of monies/properties received in the course of corrupt deals upon the holder of that property as does SAFEMA whose validity has already been upheld by this Court in the aforesaid decision of the larger Constitution Bench. Such a law has become an absolute necessity, if the canker of corruption is not to prove the death-knell of this nation. According to several perceptive observers, indeed, it has already reached near-fatal dimensions. It is for the Parliament to act in this matter, if they really mean business."

3.3.2 Indeed, in the above case the Supreme Court followed the law laid down by a nine-judge Constitution Bench in Attorney General of India v. Amratlal Prajivandas [1994 (5) SCC 54] while dealing with the constitutional validity of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (13 of 1976) which provided a similar forfeiture of illegally acquired assets of smugglers and foreign exchange violators. The nine-judge Bench, in a unanimous decision observed that the laudable object behind the said enactment was:

> "to forfeit the illegally acquired properties of the convict/detenue irrespective of the fact that such properties are held by or kept in the name of or screened in the name of any relative or associate as defined in the said two Explanations. The idea is not to forfeit the independent properties of such relatives or associates which they may have acquired independently but only to reach the properties of the convict/detenue or properties traceable to him, wherever they are, ignoring all the transactions with respect to those properties.".

3.3.3 SAFEMA, it may be pointed out, placed the burden of proof squarely upon the smuggler and foreign exchange manipulator to establish that the assets owned by him or by the members of his family have been lawfully acquired. It was pointed out in the said nine-judge Bench decision that such a course was inevitable in the light of the fact that only the person who acquired properties can explain how he has come to acquire those properties and that it is not possible for the authority to do so. It was observed in the said decision:

> "… The violation of foreign exchange laws and laws relating to export and import necessarily involves violation of tax laws. Indeed, it is well known fact that over the last few decades, smuggling, foreign exchange violation, tax evasion, drugs and crime have all got mixed-up. Evasion of taxes is integral to such activity. It would be difficult for any authority to say, in the absence of any accounts or other relevant material that among the properties acquired by smuggler, which of them or which portions of them are attributable to smuggling and foreign exchange violations and which properties or which portions thereof are attributable to violations of other laws (which the Parliament has the power to make). It is probably for this reason that the burden of proving that the properties specified in the show cause notice are not illegally acquired properties is placed upon the person concerned. May be this is the case where a dangerous disease requires a radical treatment. Bitter medicine is not bad medicine. In law it is not possible to say that definition is arbitrary or is couched in unreasonably wide terms…."

3.3.4 It is, therefore, quite appropriate that even in the proposed legislation to forfeit the properties of corrupt public servants, the burden of proof should be placed upon the holders of the property. This indeed is the principle of section 106 of the Indian Evidence Act. 1872. The said section along with the illustration appended to it reads as follows:

> "**106**. **Burden of proving fact especially within knowledge**: When any fact is especially within the knowledge of any person, the

burden of proving that fact is upon him.

Illustrations:

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with traveling on a railway without a ticket. The burden of proving that he had a ticket is on him."

3.3.5 It is on this principle that in prevention of corruption statutes, the burden of proof is very often laid upon the accused. It has been held by the Supreme Court in C.S.D. Swami *versus* State (AIR 1960 SC 7) that "… the Legislature has, thus, deliberately cast a burden on the accused not only to offer a plausible explanation as to how he came by his large wealth, but also to satisfy the Court that his explanation was worthy of acceptance". This case was decided with reference to section 5(3) of Prevention of Corruption Act, 1947. The Court observed further "… section 5(3) of the Act does not create a new offence but only lays down a rule of evidence, enabling the Court to raise a presumption of guilt in certain circumstances" – and thus an exception to the general rule of burden of proof in criminal cases. To the same effect is the decision in State of Maharashtra *versus* Wasudeo (1981 SC 1186). Construing section 5, the Court held: "When section 5(1)(e) uses the words "for which the public servant is unable to satisfactorily account", it is implied that the burden is on such public servant to account for the sources for the acquisition of disproportionate assets", and that if he fails to satisfactorily account for his assets, he is liable to be convicted.

3.3.6 It is pointed out by some that where the property has been acquired several years ago, the person called upon to prove the sources of such acquisition may be under a severe handicap, inasmuch as he may not have kept or preserved the records relating to sources of such acquisition. This is however an aspect which the Court or Tribunal would certainly keep in mind while determining whether the person has discharged the burden that lay upon him.

3.3.7 The philosophical basis for such confiscation was explained by the Supreme Court in, the Attorney General of India, by invoking the concept of 'implied trust'. The relationship between the government and the public servant is of a fiduciary nature. In such a case, it was held, any benefit obtained by a fiduciary through a breach of duty belongs in equity to the beneficiary. It was further observed that a gift accepted by a person in a fiduciary position as an incentive for breach of his duty constituted a bribe and although in law it belonged to the fiduciary, in equity he not only became a debtor for the amount of the bribe to the person to whom the duty was owed, but he also held the bribe and any property acquired therewith on 'constructive trust' for that person. Any increase in the value of such property belonged to the person injured/beneficiary and that in case of any diminution in the asset, the wrong-doer was liable in person. It was also observed that unless there is a law providing for prompt forfeiture of illegally acquired assets, they would be spirited away beyond our shores to safe havens and numbered accounts.

3.3.8 Acting upon the observations of the Supreme Court in the above two judgments, the Law Commission of India submitted its 166th Report on "the Corrupt Public Servants (Forfeiture of property) Bill" recommending to the Central Government to introduce a Bill in Parliament for forfeiture of illegally acquired properties of corrupt public servants. A draft Bill was also enclosed to the said Report. It is again a matter of regret that the government has not thought it fit to take the desired steps.

3.3.9 We are of the opinion that a law as recommended hereinabove, has become absolutely inescapable in today's situation. It would clothe the State with an effective means of checking corruption. Nobody suggests that such an enactment would by itself check corruption. But even if a handful of cases concerning some notoriously corrupt persons are dealt with under such enactment, it will have a sobering effect upon other wrong-doers.

D. Enactment of a Public Interest Disclosure Act

3.4.1 One of the measures adopted in several western countries to fight corruption and mal-administration is enactment of Public Interest Disclosure Acts, which are popularly called Whistle-blower Acts. The object of such enactments is to improve accountability in government and public sector organizations by encouraging people not to turn a blind eye to mal-practice taking place in their organizations and to report the same to the specified authority. The motto of the British Act (Public Interest Disclosure Act, 1998) is "Address the message rather than the messenger; and resist the temptation to cover up serious mal-

practices". The Act provides for protection of Whistle-blowers from dismissal and victimization by making appropriate provisions in that behalf.

3.4.2 An experienced corrupt public servant knows how to circumvent internal control proceedings. Such person indulges in such activity either by himself or in collusion with others, whether employees or outsiders. Even so, wherever corruption or mal-practice takes place, it cannot but be that some or the other person in the organization knows it or comes to know of it. The Act enables such person to lay such information before the specified authority and thus promote public interest. It is true that such Whistle-blowing has been looked upon until now with some kind of disfavour, but recently a growing recognition has dawned upon all concerned that the persons who sound the alarm of serious mal-practice, corruption or fraudulent activity in government or public sector organizations deserve public thanks and support rather than punished and humiliated for being 'disloyal' to their employers or colleagues.

3.4.3 The Act is really aimed at improving accountability within the government and public sector by allowing the employees to inform the appropriate authorities of organizational or individual wrong-doing either in a confidential manner or by a public report. The Act should provide that the authority receiving such information should be an independent person and not be a part of the concerned government or public sector organization. If any information is received by him confidentially containing some allegations, he must investigate the same without publicly humiliating the suspect or the Whistle-blower. He must adopt appropriate methods to ensure the same. It must also be ensured that the persons who lay correct and true information about such illegalities should be rewarded which need not necessarily be financial in nature. It is equally necessary to ensure that this Whistle-blowing facility is not abused by malicious employees, out to achieve their personal grievance or vendetta.

3.4.4 Indeed, it is now believed that the law and the society must help create a culture wherein honest interchanges are respected and valued rather than punished. The Act must ensure that the informants are protected against retribution and any form of discrimination for reporting what they perceived to be wrong-doing, i.e., for *bona fide* disclosures which may ultimately turn out to be not entirely or substantially true.

3.4.5 It must be recognized, at the same time, that there are certain pitfalls in such a measure in the sense that it is liable to be abused by persons out of vindictiveness or for the purpose of retaliation or for claiming rewards. It must, however, be left to the appropriate authority to determine whether information laid before him confidentially is substantially correct information or whether the informant was acting *bona fide* or whether it is a totally false information actuated by malice or vindictiveness. There must be a provision for punishing persons who lay false information out of such inadmissible motives.

3.4.6 It is believed in many developed countries that while there are certainly some risks inherent in such a legislative measure, it is better to run these risks rather than allow corruption and fraud to continue or to leave the Whistle-blower to go to an outside agency. Undoubtedly, the balance between asking people to blow the whistle and telling them that they themselves could be subject to proceedings for laying incorrect information, is a fine one. The situations arising under such a legislative measure, if handled sensitively, may certainly prove a step forward rather than a step backward in the fight against corruption and mal-administration.

3.4.7 In the British Act, the person/authority specified to receive complaints of the above nature is called a regulator.

3.4.8 As the London Borough, Lambeth says in its Whistle Blowing Charter, "if you believe something is wrong, speak out".

3.4.9 In this connection, it would not be out of place to refer to an organization in U.K., "Public Concern At Work", active in this field which has received the recognition of the government of the U.K. In their White Paper, 'The Governance of Public Bodies', the government has accepted the important role Whistle-blowing can play in ensuring probity and accountability and in that connection referred to the said organization as 'the leading organization in this field'. The said organization has published a number of papers espousing the cause of Whistle-blowing including some case studies. It is stated in one of their papers as below:

"Standards in Public Life

> In policy terms the most important development in recent years has been the Nolan Committee's endorsement of whistle-blowing as a means of ensuring and demonstrating high standards in public bodies. Nolan's 1996 recommendations, which are reproduced on the back cover, were accepted by the Major Government in its 1997 White Paper on The Governance of Public Bodies. The work of the Committee has also clarified the meaning of whistle-blowing. As the White Paper remarks, "The Nolan Committee used the term 'whistle-blowing' to mean the confidential raising of problems within an organization or within an independent review structure associated with that organization, not in the popular pejorative sense of leaking information to the media."

3.4.10 We have also looked into the whistle-blower Acts enacted by various countries viz., U.K., Australia, State of Michigan (USA) and Canada. We find that the Australian Act can serve as a model for our country, no doubt, with appropriate changes.

3.4.11 In this connection, we may refer to the episode relating to "Pentagon Papers" which ultimately resulted in the decision of the U.S. Supreme Court in New York Times v. United States (1971) 403 U.S. 713 = 29 L.Ed. 2d. 822. One of the employees, Daniel Ellsberg, working in the defence department, came across a classified study entitled "History of the U.S. Decision-making Process on Vietnam Policy". The study disclosed that the U.S. government has been withholding from public true and correct information regarding its involvement in Vietnam and that it has been guilty of misrepresenting to the American people the issues and the facts relating to their involvement in Vietnam conflict and other relevant facts vitally affecting the American lives and interests. He did not know whom to complain. There was no authority outside the government to whom he could turn. He therefore approached the two leading U.S. dailies, The New York Times and The Washington Post with the material (he had secretly made copies of it). The employee was arrested and harassed for allegedly compromising the national security. The government tried unsuccessfully to block the publication of the said study, popularly known as 'Pantagon Papers' in the aforesaid dailies. The affair turned out to be a serious embarrassment to the U.S. government, and to its successive Presidents responsible for the American involvement in Vietnam.

3.4.12 It is obvious that had there been an independent authority ('Regulator') to whom the employee could have turned with the information in his possession and had such authority been empowered to enquire into the matter and make necessary orders – and if called for in public interest, gone public with it, the proceedings would have ended in an orderly manner and public interest served much better and more promptly. It could also have saved many lives, both American and Vietnamese. It goes without saying that these disclosures led to public disenchantment with – nay, opposition to – Vietnam war in U.S. and to its ultimate withdrawal from Vietnam on 30th April, 1975.

3.4.13 It is understood that the Law Commission of India is in the process of drafting a Public Interest Disclosure Bill, for forwarding it to the Government of India.

E. Enactment of a Freedom of Information Act

3.5.1 Right to receive and the right to impart information has been held to be a part of freedom of speech and expression guaranteed by sub-clause (a) of clause (1) of article 19 of the Constitution subject of course to the reasonable restrictions, if any, that may be placed on such right in terms of and to the extent permitted by clause (2) of the said article. It has been held by the Supreme Court in Secretary, Ministry of I&B v. Cricket Association of Bengal (1995 (2) SCC 161) that:

> "The freedom of speech and expression includes right to acquire information and to disseminate it. Freedom of speech and expression is necessary, for self-expression which is an important means of free conscience and self-fulfillment. It enables people to contribute to debates on social and moral issues. It is the best way to find a truest model of anything, since it is only through it that the widest possible range of ideas can circulate. It is the only vehicle of political discourse so essential to democracy. Equally important is the role it plays in facilitating artistic and scholarly endeavours of all sorts. The right to communicate, therefore, includes right to communicate through any media that is available whether print or electronic or audio-visual such as advertisement, movie, article,

> speech, etc. That is why freedom of speech and expression includes freedom of the press. The freedom of the press in turn includes right to circulate and also to determine the volume of such circulation. This freedom includes the freedom to communicate or circulate one's opinion without interference to as large a population in the country, as well as abroad, as is possible to reach.".

3.5.2 The fundamental values underlying the concept of freedom of speech, and the functions that the freedom serves in a democratic society, are widely accepted. They can be summarized in the following form:

(i) First, freedom of speech is essential to the development of the individual personality. The right to express oneself and to communicate with others is central to the realization of one's character and potentiality as a human being. Conversely, suppression of thought or opinion is an affront to a person's dignity and integrity. In this respect freedom of speech is an end in itself, not simply an instrument to attain other ends. As such it is not necessarily subordinate to other goals of the society.

(ii) Second, freedom of speech is vital to the attainment and advancement of knowledge. As John Stuart Mill pointed out, an enlightened judgment is possible only if one is willing to consider all facts and ideas, from whatever source, and to test one's conclusion against opposing views. Even speech that conveys false information or maligns ideas, has value, for it compels us to retest and rethink accepted positions and thereby promotes greater understanding. From this function of free speech, it follows that the right to express oneself does not depend upon whether society judges the communication to be true or false, good or bad, socially useful or harmful. All points of view, even a minority of one, are entitled to be heard.

(iii) Third, freedom of speech is a necessary part of our system of democratic government. Sovereignty resides in the people; in other words, the people are the masters and the government is their servant. If the people are to perform their role as sovereign and instruct their government, they must have access to all information, ideas, and points of view. This right of free speech is crucial not only in determining policy but in checking the government in its implementation of policy. The implication of this position is that the government has no authority to determine what may be said or heard by the citizens of the community.

(iv) Fourth, freedom of speech is vital to the process of peaceful social change. It allows ideas to be tested in advance before action is taken, it legitimizes the decision reached, and it permits adaptation to new conditions without the use of force. It does not eliminate conflict in a society, but it does direct conflict into more rational, less violent, channels. In the words of Justice William J. Brennan in New York Times v. Sullivan (1964), speech may often be "uninhibited, robust, and wide-open".

3.5.3 It would not be out of place to quote from the oft-quoted judgment of Brandies J. in Whitney v. California, the following observation:

> "… that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the … government.".

3.5.4 It must be recognized at the same time that today the freedom of expression and in particular the freedom of information is under a grave threat. The "free market-place of ideas" – an expression used in several U.S. Supreme Court judgments to denote freedom of speech and expression – is analogous to the more general argument for a "free market economy", as is opined by Milton Friedman and Jane Friedman in their book "Free to Choose". As indeed pointed out by Jerome Barron (Access to Press – A new First Amendment Right – 80 Harvard Law Review 1641-1967) "… if ever there were a self-operating market place of ideas, it has long ceased to exist…. There is inequality in the power to communicate ideas just as there is inequality in economic bargaining power; to recognize the latter and deny the former is quixotic…. Changes in the communications industry have destroyed the equilibrium in that market place. While it may have been still possible in 1925 to believe with Justice Holmes that every idea is "acted on unless some other belief outweighs it or some failure of energy stifle the movement at its birth", it is impossible to believe it now. Yet the Holmesian theory is not abandoned, even though the advent of Radio and television has made even more evident that philosophy's unreality…." Another jurist Herbert Marcuse similarly argues that "under the rule of monopolistic media – themselves the mere instruments of economic and political power – a mentality is created from which right and wrong, true and false are pre-defined whenever

they affect the vital interests of society" (Repressive Tolerance by Herbert Marcuse).

3.5.5 How much more true all this sounds today when the television and other means of mass communication have become all-pervasive and all-encompassing. What they represent passes for information and truth and our ideas and views are imperceptibly formed by what we hear on television or read in newspapers.

3.5.6 It is true that Press and media perform an important and essential function in a democratic society and that notwithstanding their ownership being in the hands of business tycoons and notwithstanding their dependence on government-sponsored advertisements, they are performing a highly valuable and useful function as guardian of the citizens' right to know and their right to impart their ideas and views to the government and the public. As has been rightly observed:

> "The functions that freedom of the press performs in a democratic society are, in general, the same as those served by the system of freedom of expression as a whole. Freedom of the press enhances the opportunity to achieve individual fulfillment, advances knowledge and the search for understanding, is vital to the process of self-government, and facilitates social change by the peaceful interchange of ideas. More particularly the press has been conceived as playing a special role in informing the public and in monitoring the performance of government. Often referred to as the "fourth estate," or the fourth branch of government, an independent press is one of the principal institutions in our society that possesses the resources and the capacity to confront the government and other centers of established authority. This concept of a free press was forcefully set forth by Justice Hugo L. Black in his opinion in New York Times Co. v United States (1971) (The Pentagon Papers case): "In the first Amendment, the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The government's power to censor the press was abolished so that the press would remain forever free to censure the government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.".

3.5.7 The Press is thus an important agent in ensuring the citizens' right to receive and impart information as a measure of ensuring probity in governance.

3.5.8 Realising the importance of the freedom of speech and expression including the freedom to receive and impart information, some of the advanced countries have enacted Freedom of Information Acts. The object behind these enactments is to ensure that the governmental activity is transparent, fair and open. Except in matters of defence, atomic energy and matters concerning the security of the country, there is no room for secrecy in the affairs of the government. Whether it is a matter of taking a decision affecting the people or whether it is a transaction involving purchase or sale of government property or whether the matter relates to entering into contracts - in all these matters, the government should act in a transparent manner which means that any and every citizen who wishes to obtain any information with respect to any of those matters should be entitled to receive it. In this connection, we may usefully refer to the Freedom of Information Act, 2000 enacted by the British Parliament on 30th November, 2000. The main purpose of the Act is to implement the principles set out in the White Paper insofar as it is appropriate to do so by primary legislation. Other matters will be dealt with in secondary legislation, codes of practice or by administrative action. The Act provides a right of access to recorded information held by public authorities, creates certain exemptions from the duty to disclose information and establishes arrangements for enforcement and appeal. The Act amends the Data Protection Act, 1998 and the Public Records Act, 1958. Since the Act purports to implement the principles set out in the White Paper which was issued in December 1997, it may be appropriate to briefly refer to them. In the White Paper entitled "Your Right to Know: the Government's Proposals for a Freedom of Information Act", the following scheme of the Act was indicated:

3.5.9 The new Act will provide for any individual, company or other body to have a right of access to records or information of any data held by a wide range of public bodies. Applicants need not state their purpose in applying for information. The authorities are bound to make certain information public as a matter of course.

3.5.10 Indeed, the authorities covered by the Act are required to make certain information publicly available without request (these include facts and analyses which the government considers important in framing major policy proposals, explanatory material on dealing with the public, operational information on costs, standards, targets and complaints procedures of public servants) and further give reasons for administrative decisions. There should be no ministerial veto to prevent disclosures.

3.5.11 What is more, there is no exclusion in favour of the Cabinet or Cabinet Committees from the purview of the Act. Access will be allowed to documents and not merely to information. Of course, security and intelligence services are excluded from the purview of the Act.

3.5.12 There is a similar exclusion – which has attracted a lot of criticism – in favour of criminal and civil enforcement proceedings and the investigation and prosecution functions of the police, prosecutors and "other bodies carrying out law enforcement work such as the Department of Social Security or the Immigration Service", as well as the public sector employment records. There are certain other exemptions too.

3.5.13 In view of the above scheme of the English Act, it may not be necessary to refer to its provisions at any length.

3.5.14 The Government of India too has recognized the importance of this right and has accordingly introduced a Bill called the Freedom of Information Bill, 2000 (Bill No.98 of 2000) in Lok Sabha on 25th July, 2000. The Bill, as it stands, does ensure to a large extent the freedom of information to citizens with respect to the functioning of the government. It casts an obligation upon public authorities to furnish such information wherever asked for. It would have been better if the said Bill had also provided for the government making information public, without a request therefor from anyone, concerning matters involving major policy proposals and the major multilateral agreements proposed to be entered into. This is for the reason that very often the people who are really going to be affected by such policies and agreements are not even aware of them. The experience of WTO Agreements signed by the Government of India in 1994, without taking the Parliament or the States or the people into confidence, and without a national debate on the pros and cons of the said Agreements, is a telling example. Purporting to exercise their power under article 73 read with article 253 and entry 14 of List I of the Seventh Schedule to the Constitution, the Union Government has concluded several agreements covering not only the subjects in Lists I and III of the said Schedule but also with respect to subjects in List II, which are in the exclusive domain of the States – for example, Agriculture and Public Health. The negative effects of the said Agreements are becoming evident with each passing day and are seriously eroding the viability of the domestic industries (which were built up with huge public funds), agriculture and trade. Be that as it may, the said Bill fills a great void though, it is true, several improvements are possible in it. It is understood that the said Bill has been referred to a Standing Committee. We are enclosing herewith a copy of the recently enacted South African Freedom of Information Act (the promotion of Access to Information Act, 2000) (Annexure) which covers both the public bodies and private bodies. It can indeed serve as a model enactment for any country committed to concept of freedom of information. The necessity and importance of an early enactment in terms of the said Bill - with some improvements - cannot be over-emphasised. It would be useful to notice the various provisions of the English Act and the South African Act before finalizing the draft of the proposed Indian legislation.

F. Necessity for enacting a Lok Pal Bill in addition to the Central Vigilance Commission Act

Institution of Lok Pal

3.6.1 Another measure for ensuring probity in governance is the enactment of a Lok Pal Act and a Central Vigilance Commission Act. It would be appropriate to deal with the Lok Pal Act first.

3.6.2 In their interim report on the "Problem of Redress of Citizens' Grievances" submitted in 1966, the Administrative Reforms Commission recommended *inter alia* the setting up of the institution of Lok Pal. To give effect to this recommendation, a Bill called the Lok Pal and Lokayukta Bill, 1968 was introduced in the fourth Lok Sabha in 1968. It was referred to a Joint Committee of the two Houses of Parliament and on the basis of its Report, the Bill was passed by Lok Sabha in 1969. But while the Bill was pending in the Rajya Sabha, the fourth Lok Sabha was dissolved with the result that the Bill lapsed.

3.6.3 In 1971, the Bill passed by the previous Lok Sabha was reintroduced in Lok Sabha under the same title but this Bill also lapsed on the dissolution of the fifth Lok Sabha.

3.6.4 The Bills introduced in 1968 and 1971 covered complaints in respect of not only allegations of misconduct but also grievances as to mal-administration. Lok Pal was thought of as a single member body who could be described roughly as a person who would combine in himself the functions of ombudsman as known to the western countries such as Norway, Sweden, UK and the functions of the Central Vigilance Commission as it was constituted under an administrative order of the Central Government. Complaints could be made under the said Bill against the union ministers, union civil servants, union territory ministers and persons in the service of local authorities and corporations, owned or controlled by the Central Government. However, Members of Parliament and the State Chief Ministers were not covered by the Bill. In short, these Bills were designed to check abuse of power, corruption and other instances of mal-administration; liberty was given to the aggrieved persons to approach specified authorities.

3.6.5 In the year 1977, a fresh Bill called the Lok Pal Bill, 1977 was introduced in Lok Sabha. It was again referred to a Joint Committee of both Houses of Parliament which submitted its Report in July, 1978. While this Bill was under consideration of the Lok Sabha, it was prorogued first and subsequently dissolved. Accordingly, this Bill also lapsed. It may be mentioned that the 1977 Bill did not take in grievances as to mal-administration; it was confined to complaints as to misconduct or corruption against specified categories of persons including Union Ministers, Members of Parliament, State Chief Ministers and so on. This Bill brought within its purview the Prime Minister and MLAs of Union Territories as well. Civil servants were excluded from its purview. The definition of 'misconduct' was widely worded to include instances of abuse of power wherein a public man - if we can use that expression to denote the persons brought within the purview of the Act - directly or indirectly, allows his position to be taken advantage of by his relatives or associates. The Bill also provided that a public man would be guilty of misconduct if he fails to act in accordance with norms of integrity and conduct which ought to be followed by the class of public men to which he belongs. Of course the Joint Committee to which this Bill was referred had recommended that the said requirement be omitted. Be that as it may, this Bill also lapsed.

3.6.6 In the year 1985, another Lok Pal Bill was introduced in Lok Sabha on the pattern of the 1977 Bill. However the office of the Prime Minister was excluded from its purview. The Lok Pal was to be a single member body and its jurisdiction was confined to cases of corruption leaving out mal-administration and grievances. Be that as it may, this Bill also lapsed for the same reason as in the case of other such Bills.

3.6.7 In the year 1989, another Lok Pal Bill was introduced. Under this, the Lok Pal was to be a three-member body and the office of the Prime Minister was also brought within its purview. There were some changes in the matter of eligibility for appointment and removal which it may not be necessary to mention here.

3.6.8 In the year 1996, yet another Lok Pal Bill was introduced in the Lok Sabha on 13th September, 1996. It was referred to the Department related Parliamentary Standing Committee on Home Affairs for examination. The Standing Committee submitted its report to the Parliament on 9th May, 1997. But before the government could finalise its thinking on the various recommendations of the Committee, the Lok Sabha was dissolved on 4th December, 1997. Consequently, the Bill lapsed.

3.6.9 Another attempt at enacting the Lok Pal Act was made by the introduction of a Lok Pal Bill in the Lok Sabha on 3rd August, 1998, being Bill No. 90 of 1998. This Bill sought to provide for setting up the office of Lok Pal with a chairperson and two members with a fixed term. To ensure the members of their independence, it is provided that they shall not be removed from their office except by an order made by the President on the ground of proved misbehaviour or incapacity after an inquiry made by a committee consisting of the Chief Justice of India and two other judges of the Supreme Court, next to the Chief Justice in seniority, in which inquiry the member has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. The chairman and members are to be appointed by the President on the recommendation of the committee consisting of the Vice President of India (chairman), Prime Minister, Speaker of Lok Sabha, Minister of Home Affairs, Leader of the House to which the Prime Minister does not belong, Leader of the

Opposition in the Lok Sabha and Leader of the Opposition in the Rajya Sabha. The jurisdiction of the Lok Pal under this Bill is to inquire into allegations constituting an offence punishable under the Prevention of Corruption Act, 1988. The Prime Minister, Union Ministers and Members of Parliament are within its purview. Clause 12 of the Bill provided that any person other than a public servant may make a complaint under that legislation to the Lok Pal (the expression 'complaint' is defined by sub-clause (c) to clause 2 to mean "a complaint alleging that a public functionary has committed any offence punishable under the Prevention of Corruption Act, 1988". The expression 'public functionary' means the Prime Minister, Union Ministers and Members of Parliament, both past and present). If it becomes necessary in the course of its inquiry, the Lok Pal is also empowered to inquire into any act or conduct of any person other than a public functionary insofar as it is necessary for an effective disposal of the matter within his jurisdiction. Clause 13 provides for preliminary scrutiny of complaints by Lok Pal whereas clause 14 provides for the procedure to be followed by Lok Pal in conducting any inquiry. Clause 15 clothes the Lok Pal with the power to summon any person or document from any person or authority. The Lok Pal is also vested with the powers of search and seizure by clause 16. Chapter IV of the Bill which contains only one clause, namely, clause 18, creates an obligation on every Member of Parliament to furnish a return of all assets owned by him and members of his family and all liabilities incurred by him and the members of his family, before the Lok Pal, within a period of 90 days from the date he enters upon his office and continue to do so every year within 90 days of the commencement of each financial year. The declaration has to be filed in the prescribed form. The expression 'family' is defined to include the spouse and dependent children of such member. This is certainly a defect. It would be more appropriate if the net is spread wider to include even major children and close relatives like father-in-law, mother-in-law, brothers, brothers-in-law and close associates.

3.6.10 While examining the provisions of the Bill, we have come to believe that while bringing the Prime Minister within the purview of the Lok Pal may be a desirable step, it is necessary at the same time to regulate and circumscribe that power. In our Constitutional system, i.e., under the parliamentary form of government, the Prime Minister occupies a unique position. He is the kingpin of the entire governmental structure. It is his image, his reputation and his personality that pervades the entire government. The image of the government is very often identified with the image of the Prime Minister. Because of the extraordinary power a Prime Minister wields in a parliamentary system like ours, it is sometimes referred to by jurists as 'prime ministerial form of government'. A Prime Minister is normally the leader of the majority party in the Lok Sabha or the leader of the coalition, if a coalition forms the government. Because of his very position and the power he wields, he attracts a good amount of opposition, criticism, allegations and what not. If a Lok Pal were to take up each and every allegation or accusation made against the Prime Minister by a political party or a group or a person, it would hobble the Prime Minister in an effective discharge of his functions. He can not afford to remain under a cloud all the time nor can the nation afford a Prime Minister under a cloud all the time. Probably for this reason, in some of the earlier Bills, the Prime Minister was kept out of the purview of the Lok Pal. But, as we have said earlier, while it may be a desirable step to bring the Prime Minister within the purview of Lok Pal, it should at the same time be provided that before the Lok Pal undertakes any investigation, inquiry or any other proceeding against the Prime Minister, he should first obtain the permission in writing of the President therefor. It means that the Lok Pal shall place all the relevant material before the President and must satisfy the President with the facts and circumstances which call for an investigation and inquiry into those allegations and charges. The requirement of obtaining President's permission would be in the nature of a check upon a routine or mechanical initiation of inquiry by Lok Pal against the Prime Minister. One has to keep in mind in this behalf the distinction between legitimacy and legality. Legitimacy is a political concept. The Prime Minister normally represents the will of the majority of the people, being the leader of the majority of elected representatives. The legitimacy to rule belongs to him and his Council of Ministers. As against this, Lok Pal, a mere appointee, cannot be so empowered as to erode the image, reputation and personality of the Prime Minister by seeking to investigate or inquire into each and every allegation. The requirements of President's prior permission or sanction as it may be called would ensure that an investigation or inquiry into an allegation against the Prime Minister is taken up only where it is backed by substantial and acceptable evidence. The nation cannot afford to have a Prime Minister under a cloud, unless there are real and substantial grounds to believe that he may have been guilty of some serious misconduct. There is also a belief that the Prime Minister of a country should not be subjected to Lok Pal as this would severely impair his independence and freedom of judgement. The Prime Minister should have a free hand and absolute independence which is most necessary. Even if a particular Prime Minister is inclined that he should be subjected to Lok Pal, his readiness should not weigh with the Commission. There is a need to reconcile national interest and public interest and keeping in view how prime ministerial discretion is exercised, it would be a retrograde step. Anyhow, a new Bill titled The Lok Pal Bill, 2001 covering the Prime Minister also was introduced in Lok Sabha on 14th August, 2001.

3.6.11 In this connection, it would not be out of place to refer to the institution of the Independent Counsel created by Title VI of the Ethics in Government Act in USA. The Independent Counsel Act provides for appointment of an "independent counsel" to investigate and if appropriate prosecute certain high ranking government officials for violations of federal criminal laws. The Act requires the Attorney General, if he is satisfied on receipt of information that it is "sufficient to constitute grounds to investigate whether any person (covered by the Act) may have violated any federal criminal law", to conduct a preliminary investigation of the matter. When the Attorney General has completed this investigation, or 90 days has elapsed, he is required to report to a special court (the Special Division) created by the Act "for the purpose of appointing independent counsels". If the Attorney General determines that "there are no reasonable grounds to believe that further investigation is warranted", he must notify the Special Division of this result. In such a case, "the Division of the court shall have no power to appoint an independent counsel". If the Attorney General determines that there are "reasonable grounds to believe that further investigation or prosecution is warranted," then, he "shall apply to the Division of the court for the appointment of an independent counsel". The Attorney General's application to the court shall contain sufficient information to assist the court in selecting an independent counsel and in defining that independent counsel's prosecutorial jurisdiction. Upon receiving such information, the Special Division "shall appoint an appropriate independent counsel and shall define that independent counsel's prosecutorial jurisdiction". The independent counsel's jurisdiction is very wide. He is vested with the full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General and any other officer or employee of the Department of Justice. He can conduct grand jury proceedings and other investigations, he can participate in civil and criminal court proceedings and litigation and is also empowered to file appeals against any decision in any case in which he has participated in an official capacity. His powers include initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing information and handling all aspects of any case in the name of the United States. He is entitled to call for assistance from any department or authority. Moreover, when a matter is referred to an independent counsel under the Act, the Attorney General in the Justice Department is required to suspend all investigations and proceedings with respect to the said matter.

3.6.12 The validity of the Independent Counsel Act was challenged in the federal courts. The matter ultimately reached the United States Supreme Court. While a majority of seven judges led by Rehnquist C.J. upheld the validity of the Act holding that it does not curtail or infringe the powers of the President vested in him by clause 2 of section 2 of Article II of the U.S. Constitution, Scalia J. dissented (another Judge Kennedy J. took no part in the decision of the case) – Morrison v. Olson, 487 U.S. 654 (1988). Though the dissenting opinion of Scalia J. was criticized at that time as highly conservative, the events since then have proved him right. The manner in which an independent counsel appointed to investigate the Whitewater affair allegedly implicating President Bill Clinton and his wife was hijacked to take in unrelated issues is an instructive instance. Not able to find any substance against the President in the Whitewater issue, the Independent Counsel picked upon a case of suicide by a member of the White House staff and finding nothing therein shifted to Paula Jones' affair. While investigating the Paula Jones' affair, the independent counsel, Kenneth Starr, stumbled upon the Monica Lewinsky affair and everyone knows how the whole thing was blown up beyond all sensible and reasonable proportions leading to the impeachment proceedings and trial of President Clinton in Senate. The following observations of Scalia J. in the aforementioned case are pertinent:

> "What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain. If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor; that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost everyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm – in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse or prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself…….. The mini-Executive that is the independent counsel, however, operating in an area where so little is law and so much is discretion, is intentionally cut off from the unifying influence of the Justice Department, and from the perspective that multiple responsibilities provide. What would normally be regarded as a technical violation (there are no rules defining such things), may in his or her small world assume the proportions of an indictable offense. What would normally be regarded as an

> investigation that has reached the level of pursuing such picayune matters that it should be concluded, may to him or her be an investigation that ought to go on for another year. How frightening it must be to have your own independent counsel and staff appointed, with nothing else to do but to investigate you until investigation is no longer worthwhile – with whether it is worthwhile not depending upon what such judgments usually hinge on, competing responsibilities. And to have that counsel and staff decide, with no basis for comparison, whether what you have done is bad enough, willful enough, and provable enough, to warrant an indictment…….. The notion that every violation of law should be prosecuted, including – indeed, especially – every violation by those in high places, is an attractive one, and it would be risky to argue in an election campaign that that is not an absolutely overriding value. Fiat justitia, ruat coelum. Let justice be done, though the heavens may fall. The reality is, however, that it is not an absolutely overriding value…..".

3.6.13 It is in the context of all the above circumstances, that we are inclined to suggest that there ought to be a proviso to clause 12 of the Lok Pal Bill in the following terms:

> **"Provided that before taking up any investigation or inquiry against the Prime Minister on the basis of any complaint or information received, the Lok Pal shall obtain the prior permission in writing of the President therefor."**

3.6.14 Coming back the Bill, it is difficult to predict whether the present Bill succeed in becoming an Act or would it meet the same fate as its predecessors. But so far as it goes, the Bill is welcome though in certain respects it requires to be strengthened. The Bill rightly provides that a proceeding before the Lok Pal shall to be deemed to be a judicial proceeding within the meaning of section 193 of Indian Penal Code (clause 15(2)) and further that it is not necessary for the Lok Pal to maintain secrecy or other restriction upon the disclosure of information as provided in the Official Secrets Act, 1923 or any other provision of law. But the Bill does not say that the conclusions arrived at by the Lok Pal shall be final and that if any public functionary is found guilty he should resign from his office including his membership of the Parliament/Legislature forthwith. Instead of doing that, section 17 merely speaks of the conclusions of the Lok Pal being communicated to the competent authority. (The expression "competent authority" is defined by sub-clause (b) in clause 2 of the Bill to mean (i) in the case of Prime Minister, the House of People; (ii) in the case of a member of the Council of Ministers other than Prime Minister, the Prime Minister and (iii) in the case of a Member of Parliament other than a minister, Rajya Sabha or Lok Sabha, as the case may be). Maybe, the Constitution may have to be amended to provide for an effective Lok Pal, with his own machinery of investigation.

Central Vigilance Commission

3.7.1 So far as the Central Vigilance Commission (CVC) is concerned, it has a long antecedent history. Pursuant to the recommendations of the Santanam Committee constituted by the Government of India to advise the government in respect of matters pertaining to maintenance of integrity in administration, the CVC was established in 1964. The jurisdiction of CVC extended to all public servants and employees of central public sector undertakings, nationalized banks and autonomous organizations *vide* the resolution dated February 11, 1964 of the Government of India, Ministry of Home Affairs. It continued to function as such but without much effect until the Supreme Court directed in Vineet Narain v. Union of India (1997 (7) SCALE 656) [AIR 1998 SC 889], on 18th December, 1997, to give a statutory shape to the CVC and to endow it with wider powers including supervision over Central Bureau of Investigation (CBI) and the Enforcement Directorate (ED). Indeed the Supreme Court, while giving the said directions had relied upon the report of the Independent Review Committee (IRC) comprising Shri B.G. Deshmukh, former Cabinet Secretary, Shri N.N. Vohra, Principal Secretary to the PM and Shri S.V. Giri, Central Vigilance Commissioner, which Committee was constituted under the Government Order dated 8th September, 1997. The directions of the Supreme Court are quite elaborate and they extend to the appointment, powers and functioning of CVC, CBI and ED, all designed to insulate the said institutions from political control and to invest them with good amount of independence coupled with accountability. (Those interested in perusing the said directions may refer to the aforementioned decision of the Supreme Court.) Pursuant to the said directions, the Central Government has drafted a Bill, being Bill No. 137 of 1999, called the Central Vigilance Commission Bill, 1999 and has introduced the same in Lok Sabha on 20th December, 1999. It appears to be still pending before the Parliament. Meanwhile, the CVC is acting under the authority of the decision of the Supreme Court referred to above. It is imperative that the Parliament passes the said Bill as early as possible, keeping in mind the directions contained in the decision of the Supreme Court in Vineet Narain.

Civil Services Commission Board

3.8.1 An ancillary suggestion in this behalf that can be implemented without much ado, but which may have extremely beneficial results, is the constitution of a Civil Services Commission Board for overseeing appointment and transfer to senior posts. The idea is to take away the power of transfer from the political executive which, according to the universally held opinion, has not only been abused but has also been used in such a manner as to make the bureaucracy, including the IAS, plaint, toothless and corrupt. Maybe a Constitutional amendment is called for to provide for the composition of such a Board. The composition of the Board need not be exclusively non-political. It can be headed by the Prime Minister or the Home Minister and its jurisdiction restricted to certain high-level posts in the bureaucracy.

Suggestions of Central Vigilance Commission

3.9 Yet another ancillary idea floated by Shri N. Vittal, Central Vigilance Commissioner is to make the corruption-free governance, a fundamental right of the citizen. He has suggested that an article be inserted in Part III declaring such a right of the citizens. At any rate, Shri Vittal suggests, a provision to that effect must be included in Part IV (the Directive Principles of State Policy). He is of the opinion that such a provision would enable the Central and State Governments to legislate standards of probity and the rules governing the delivery of services to consumers of those services and in the matter of transfer of public employees. He is also of the opinion that insertion of such a right will provide an avenue for the civil society to demand transparency, fair procedures and decent behaviour on the part of the officials as also to demand public involvement in all matters affecting the public.

Ethics in Government Act of the United States of America

3.10 In this context, it would not be out of place to refer to certain provisions of the Ethics in Government Act enacted by the US Congress in 1978. Section 101 which carries the heading “persons required to file” says that “(a) within 30 days of assuming the position of an officer or employee described in sub-section (f), an individual shall file a report containing the information described in section 102(b) unless the individual has left another position described in sub-section (f) within 30 days prior to assuming such new position or has already filed a report under this title with respect to nomination for the new position or as a candidate for the position. Sub-section (f) includes the President, the Vice President, each officer or employee in the executive branch, all government servants, members of the congress, officers or employees of the Congress, judicial officers and employees of the judiciary. Section 102 provides the matters which such declaration should contain. It is a very lengthy section and it is not feasible to extract the whole of it. Suffice it to mention that the section provides for a full, true and complete disclosure of all kinds of assets including mortgages, movable assets, benefits under trusts and so on. Section 103 prescribes the time within which the report should be filed and the person before whom they should be filed. Section 104 empowers the Attorney General to bring a civil action in an appropriate US district court against any individual who knowingly and wilfully files a false declaration. Section 105 provides for custody of the declarations; it expressly provides that public shall have access to such declarations. Any US citizen is entitled to use the said reports for any lawful purpose. Section 106 provides for review and scrutiny of these reports by specified authorities. Section 108 declares that the Comptroller General shall have access to financial disclosure reports filed under the Act for the purpose of effectively discharging his statutory functions.

It is a matter for consideration whether it would be advisable for the Parliament to enact a legislation similar to the said U.S. Act.

G. Strengthening of the Criminal Judicial System

3.11 This is one of the most important requisites for ensuring probity in governance. The criminal judicial system consists of the police/investigating agency, the prosecuting agency, the advocates, witnesses and finally the judiciary. Inasmuch as this topic is dealt with in another paper, the same is not being dilated upon in this Consultation Paper.

QUESTIONNAIRE
ON
PROBITY IN GOVERNANCE

1. What, according to you, are the precise reasons for the increasing menace of corruption in India?

2. Do you find that –

   (a) the laws are inadequate Yes No

   (b) the laws are adequate, but their implementation and enforcement are lagging behind Yes No

3. What are your suggestions for amendments to –

   (a) Indian Penal Code

(b) Prevention of Corruption Act, 1988

4. An essential requirement of an efficient and effective system of governance and for socio-economic development of the nation is probity in governance. Do you agree to this assertion?

Yes No

5. Do you agree that the control on public administration is fragile and the division of powers between the political, executive and bureaucracy is ambiguous?

Yes No

6. Do you agree that the present process of the State withdrawing from various sectors will reduce the chances of corruption?

Yes No

7. According to Scandinavian economist-sociologist Mr.Gunnyar Myrdal, India is a “soft society” that is where there is no discipline and which has neither the political will to enact the laws necessary for its progress and development nor has the political will to implement them. Do you agree to the above view?

Yes No

8. Though the Benami Transactions (Prohibition) Act, 1988 was enacted as far back as 1988, the Central Government has not yet framed any rules for the effective use of the provisions of the Act. Do you agree that by framing the requisite rules by the Central Government, the law will become sufficiently effective? If not, what are your specific suggestions for making the law effective in this regard?

Yes No

Suggestions:

9. Unless the fruits of corruption (that is the property acquired by corrupt means by public servants and others) are taken away by a law of forfeiture of property. it is difficult to effectively remove corruption. Do you subscribe to this proposition?

Yes No

10. Should the Benami Transactions (Prohibitions) Act, 1988 be amended specifically empowering the appropriate authority appointed under the said Act to forfeit the assets illegally acquired by a public servant and held by him or any one else as *Benami* and no compensation should be given to any body in such cases?

Yes No

11. Similarly the law should define appropriate authority in respect of property illegally acquired by ministers and other persons in public life other than public servants. Do you agree to this suggestion?

Yes No

12. Should civil remedies against corruption be provided?

Yes No

13. Should the burden of proof that a property is not held *benami* be placed on the holder of the property?

Yes No

14. Do you agree that the competent authorities need to observe only the minimum requirements of principles of Natural Justice in dealing with the forfeiture of *Benami* property acquired by corrupt means?

Yes No

15. In the matter of a review petition relating to the case against Satish Sharma in the Supreme Court of India, the court has held that a minister of the Government is a part of the Government and therefore, the Government cannot be directed to pay damages to itself. This decision gives rise to a situation which cry out for clarity. Should it not, therefore, be necessary to coherently lay down the principles on which damages could be levied upon the public servants for their acts of misfeasance, malfeasance and nonfeasance for promotion of good governance?

Yes No

16. Do you agree that with a view to putting an end to all kinds of legal controversies and technicalities, it is advisable to enact a law on the lines of

Section 60 of the Andhra Pradesh Co-operative Societies Act, 1964, which reads as under, with an additional provision for exemplary damages in case of abuse of power;-

> "60. Surcharge. - (1) Where in the course of an audit under section 50 or any inquiry under section 51 or an inspection under section 52 or section 53, or the winding up of a society, it appears that any person who is or was entrusted with the organization, affairs or management of the society or any past or present officer or servant of the society has misappropriated or fraudulently retained any money or other property or has been guilty of breach of trust in relation to the society or has caused any deficiency in the assets of the society by breach of trust or willful negligence or has made any payment contrary to the provisions of this Act, the rules or the bye-laws, the Registrar himself, or any person specially authorized by him in this behalf, of his own motion or on the application of the committee, liquidator or any creditor or contributory may, inquire into the context of such person or officer or servant and make an order requiring him to repay or restore the money or property or any part thereof with interest at such rate as the Registrar or the person authorized as aforesaid thinks just or to contribute to such sums to the assets of the society by way of compensation in respect of the misappropriation, misapplication of the funds, fraudulent retainer, breach of trust or wilful negligence as the Registrar or the person authorized as aforesaid thinks just:
>
> Provided that no order shall be passed against any person referred to in sub-section unless the person concerned has been given an opportunity of making his representation.
>
> (2) This section shall apply notwithstanding that such person or officer or servant may have incurred criminal liability by his act.".

Yes No

17. Do you agree that the principles of section 60 of the Andhra Pradesh Co-operative Societies Act, 1964 should be extended to the governing machinery at the Union and State levels where the elected members form the Government and run and manage the affairs of the state with the assistance of a permanent bureaucracy?

Yes No

18. Should it not be provided that in case malafide action by public servants, they should be made liable to make good the loss suffered by the state?

Yes No

19. In Satish Sharma and Sheila Kaul's cases, it is found that they are not mere cases of monitory loss to the state; they are much more grievous. They are cases of misuse of official positions, an act outside the authority. In such cases, the paper suggests, it may not be possible to prove actual corruption nor is it necessary to prove it. Hence, a law providing imposition of exemplary damages should be made. Such a law would have the merit of obviating several questions like whether the Government can be asked to pay damages to itself, whether the power to grant or allot some benefit can be called property, whether such action of the public servant "which term includes members of Parliament/legislators and ministers constitutes a tortious action, whether damages/exemplary damages can be awarded for such acts and if so, on what basis and to what extent; whether public office is a trust and questions of *locus standi* and so on. Do you agree with these suggestions? Please give your detailed views.

Yes No

Suggestions:

20. The violation of foreign exchange laws and laws relating to export and import necessarily involve violation of tax laws as well. Indeed, it is a well known fact that over the last few decades, smuggling, foreign exchange violation, tax evasion, drugs trafficking and crimes have all got mixed up. In these circumstances, it is felt that only a person who acquired properties can explain how he has come to acquire those properties and that it is not possible for the competent authority to do so. Hence it is suggested that the burden of proof that the property specified in the show cause notice are not illegally acquired properties should be placed upon the person concerned.

(a) Do you agree to the above suggestion?

Yes No

(b) If you do not agree, please specify your suggestions in this regard.

Suggestions

21. The Paper observes that unless there is a law providing for prompt forfeiture of illegally acquired assets, such assets would be spirited away beyond our shores to safe havens and numbered accounts. For this purpose, the Law Commission of India, vide its 166th Report, recommended to the Central Government for enactment of a legislation for forfeiture of illegally acquired properties by corrupt public servants. This would clothe the state with an effective means of checking corruption. What are your specific suggestions in this regard?

Suggestions

22. The Paper suggests that as a step to fight against corruption and mal-administration leading to probity and accountability in governance, the Government should undertake a legislation of a Public Interest Disclosure Act which is popularly called in the western countries as a **Whistle-blower's Act** encouraging persons to sound an alarm of serious malpractices, corruption or fraudulent activity in Government or public sector organization. The informants should be protected from any form of discrimination, punishment and humiliation for being disloyal to their employers or colleagues on this account. However, there must be a provision for punishing persons who lay false information actuated by or out of malice and vindictiveness. What, according to you, should be the broad framework of such a legislation in India?

Suggestions

23. The Press has been conceived as playing a special role in informing the public and in monitoring the performance of Government. It is often termed as the "Fourth Estate". The Press is, thus, an important agent in ensuring the citizen's right to receive and impart information as a measure of probity in governance. How far, according to you, the Press in India discharge their duties in this regard?

Suggestions

24. The Freedom of Information Bill, 2000 which was introduced in Lok Sabha on 25th July, 2000 has not yet been enacted. It may be seen that the Promotion of Access to Information Act, 2000 enacted by the Republic of South Africa, as annexed to the Consultation Paper is more comprehensive in nature than the Indian Bill. Would you like to suggest modifications of the Freedom of Information Bill, 2000?

Yes No

If your answer is in the affirmative, please give detailed suggestions in this regard.

Suggestions

24. Do you agree to the suggestion that except for matters relating to defence, atomic energy and matters concerning the security of the country, there is no room for secrecy in the affairs of the Government?

Yes No

25. Do you agree that the lack of freedom of information in Governmental activities especially relating to major multilateral agreements and policy proposals is a major cause which hinders national debate and leads to negative effects on the people?

Yes No

26. The Lok Pal legislation is pending before Parliament. Should the investigations/ inquiry in respect of allegations against the Prime Minister by Lok Pal be with the previous sanction of the President so as to ensure that such investigation or inquiry would be backed up by real, substantial and acceptable evidence and not on petty political rivalry?

Yes No

27. Do you agree to the suggestion to amend the Constitution of India for making the institution of Lok Pal as a Constitutional institution to make that office more effective and dignified?

Yes No

28. Do you consider it appropriate to amend the Constitution of India for constituting a Civil Services Commission Board for overseeing appointments and transfer of officers to senior posts so as to avoid frequent political interference in such matters?

Yes No

29. (a) Do you support the idea of making corruption free governance as a Fundamental Right of the citizens (by amending Part III of the Constitution); or

Yes No

(b) In case your answer to (a) is in the negative, do you support the idea of making a provision in Part IV (Directive Principles of State Policy) of the Constitution of India directing the state to endeavour to make a corruption-free governance paving way for the society to demand transparency, fair procedure and decent behaviour on the part of the officials and to demand public involvement in all matters affecting the public.

Yes No

30. The Ethics in Government Act by the U.S. Congress in 1978 provided for filing of financial disclosure statements by certain public authorities before assuming their office and that these statements are open for and use in evidence against them by the public. Do you agree with the suggestion that a similar legislation should be undertaken by Parliament requiring all persons aspiring for and holding public offices and their family members should make declaration of their assets?

Yes No

31. What are your suggestions for strengthening the criminal judicial system in the country for ensuring probity in governance?

Suggestions:

32. Do you have any further suggestions to make on the issues on probity in governance discussed in the Consultation Paper? Please give details.

Suggestions:

ANNEXURE

PROMOTION OF ACCESS TO INFORMATION ACT

REPUBLIC OF SOUTH AFRICA

ACT

To give effect to the constitutional right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights; and to provide for matters connected therewith.

PREAMBLE

RECOGNISING THAT—

* the system of government in South Africa before 27 April 1994, amongst others, resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations;

* section 8 of the Constitution provides for the horizontal application of the rights in the Bill of Rights to juristic

persons to the extent required by the nature of the rights and the nature of those juristic persons;

* section 32(1*)(a)* of the Constitution provides that everyone has the right of access to any information held by the State;
* section 32(1*)(b)* of the Constitution provides for the horizontal application of the right of access to information held by another person to everyone when that information is required for the exercise or protection of any rights;
* and national legislation must be enacted to give effect to this right in section 32 of the Constitution;

AND BEARING IN MIND THAT—

* the State must respect, protect, promote and fulfil, at least, all the rights in the Bill of Rights which is the cornerstone of democracy in South Africa;
* the right of access to any information held by a public or private body may be limited to the extent that the limitations are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom as contemplated in section 36 of the Constitution;
* reasonable legislative measures may, in terms of section 32(2) of the Constitution, be provided to alleviate the administrative and financial burden on the State in giving effect to its obligation to promote and fulfil the right of access to information;

AND IN ORDER TO—

* foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information;
* actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights,

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:—

♠ What a far cry from Sir Warren Fisher's remarks that the Civil Service exacted from itself "a higher standard than that required by normal standards of personal honesty and integrity,' because it recognizes that the State is entitled to demand that its servants shall not only be honest in fact, but beyond the reach of suspicion of dishonesty. Civil Servants are not meant to allow their judgement or integrity to be compromised in fact or by reasonable implication (See The Executive in the Constitution, Terrence Dainfith & Alan page, Oxford, p.87)

Z Perhaps like a Marienthal study, a study needs to be undertake n what is the effects of prolonged corruption? Have not the capacities and morale of the citizen so greatly impaired by years of corruption? The relentless upward progression of fiscal deficit accentuated by the profligacy of the States, 13 State Governments unable to pay their bloated bureaucracies, is the backdrop in which corruption needs to be understood. See a telling passage: Upendra Baxi: Liberty & Corruption, p.3 (Eastern Book Company)

[0] *See* Vol. I of Lord Nolan's Report (1995).

ϕ *See* AIR 1998 SC 889 (at pages 916-917)

Ω *See* Common Cause, A Registered Society Vs. Union of India, AIR 1996 SC 3539 at page 3551 (paragraph 25)

1 *See* AIR 1996 SC 3538, at page 3550 (paragraph 21).