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Redefining Corruption- The Interplay of International Obligations & Domestic Inadequacies

Anmol Kaur Bawa

ABSTRACT

The issue of Corruption is seen as an old rust to the administrative machinery of India. However, while the evil of corruption has generated ripple effects on the question of accountability and efficiency of the government bodies, the very legislation governing the issue falls out on understanding the concept of corruption from the grassroot level. The researcher through this paper attempts to rethink the idea of corruption, the reason for a lousy accountability mechanism and the comparison between the International Obligations and domestic level implementation of the same. The powers of the Supreme Court under art.142 to do "complete Justice" are scrutinized to provide an apt solution to the existing glitch in the definition of "corruption" and thereby the procedure of accountability. The role played by the Doctrine of Pacta Sunt Servanda is instrumental to proving the argument on the need to modify the Prevention of Corruption Act 1988. The paper provides a wholistic framework on the history, problem and possible solution to amplify the urgency in bringing more cautious attitude in law-making.

INTRODUCTION: THE LAW AT PRESENT

The History of Anti-Corruption Laws dates back to 1944 in the pre-independence to codify corruption and attachment property enacted under Government Of India Act 1935 through Criminal law (Amendment) Ordinance 1944[1]which intended to prevent disposal or concealment of property procured through offences mentioned under the Indian Penal code[2]. However, with advent of war years and coming of the post-independence era, The Prevention of Corruption Act 1947 dealt with the aspect of post war reconstruction schemes, termination of contracts and disposal of excessive government surplus stores[3]. Perhaps having a short-sighted approach, the government brought in changes to law via the PCA of 1988 which further underwent changes to become its final form as of 2018 to be in tandem with India's International obligations towards United Nations Convention Against Corruption (UNCAC)[4]

Presently, the ambit of corruption as codified in the Prevention of Corruption Act (PCA) 2018 includes offences under s. 7-16 of the PCA where **a)** the form of corruption is exchange of monetary/ financial gains/ undue Advantage /intentional illicit enrichment in return of improper or dishonest performance of public duty **b)** the bribe "demander" is the public official and/or a middleman connected with the Public servant **c)** the bribe "supplier" is a third party, essentially any person other person not being a public servant . The definition of "public servant" under the act is given a wide scope to include : "any person in service/ pay of the government, local authority, statutory corporation, govt. owned company or other body owned or controlled or aided by the government, as well as judges, arbitrators and employees of institutions receiving state financial aid"[5].

Thus the legislative framework while intending to bring changes to anti-corruption laws has only analysed the crime from a one -dimensional approach, that is between a public servant and a private member belonging to the society, leaving out other crucial forms of corruption dealt under the UNCAC.

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[1] 254[Th] Law Commission Of India Report, *The Prevention Of Corruption (Amendment) Bill 2013*, 2015 , pg 1 http://lawcommissionofindia.nic.in/reports/Report_No.254_Prevention_of_Corruption.pdf, last seen on19/01/20

[2] Ibid

[3] Ibid, also see Statement of Objects and Reasons of the Bill preceding the enactment of the Prevention of Corruption Act, 1947.

[4] Ibid, pg 2

[5] PCA s.2(c)(1988)

ANALYSING THE LEGISLATIVE VACUUM

While the PCA 2018 makes efforts to have standardized checks and balances with regards to corruption in public sector, a major chunk of codification and recognition of corruption in private sector is forlorn. Let us review certain impending provisions of the UNCAC upon which India attempts to modify its PCA of 2018.

Article 12 of UNCAC states *" Each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures[6]",*

Article 18 states " *Trading in influence :*

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage for the original instigator of the act or for any other person;

(b) The solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage[7]."

Article 21 states "*Bribery in the private sector*

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities: (a) The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;

(b) The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or

[6] UNCAC art.12 , Dec 14, 2005
[7] Ibid art 18

for another person, in order that he or she, in breach of his or her duties, act or refrain from acting[8]."

Article 22 states "*Embezzlement of property in the private sector*

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally in the course of economic, financial or commercial activities, embezzlement by a person who directs or works, in any capacity, in a private sector entity of any property, private funds or securities or any other thing of value entrusted to him or her by virtue of his or her position[9]*."*

The above four provisions weave out three different forms of corruption, thereby breaking the conventional one-dimensional approach of seeing corruption purely in political terms. Article 12 highlights the corruption that occurs through internal mismanagement within the domestic governance of corporate bodies in the private sector, where the decision makers at the top managerial positions indulge in corporate fraud and insider trading, a classical example being the Satyam Scam.

On the contrary Article 18 discourages the use of influential positions held both in public and private sector to monopolize or patronise the government schemes/policies unduly towards itself , for instance the major national shocker of 2G Scam involving collusive corruption between private players of the telecom industry and the Telecom Minister A. Raja[10].

While article 21 and 22 deal with intra-private affairs of bribery where non-public servants belonging to private corporate bodies indulge in the act of bribery whereby the person working in the corporate body breaches his professional duties, this essentially involves practise of cartels and commercial bribery or collusion , for instance the recent most case of Builder's Association of India lodging a complaint to CCI against price fixing and restrictive trade practices by a group of cement firms and Cement manufacturer's Association (CMA)[11] .

Transparency International's 2014 publication "*How To Bribe : A typology of Bribe Paying and How to stop it*" streamlines bribery into several forms including gift-giving, favours to friends or relatives, excessive hospitality, direct cash payment, grease payments and bribes disguised as

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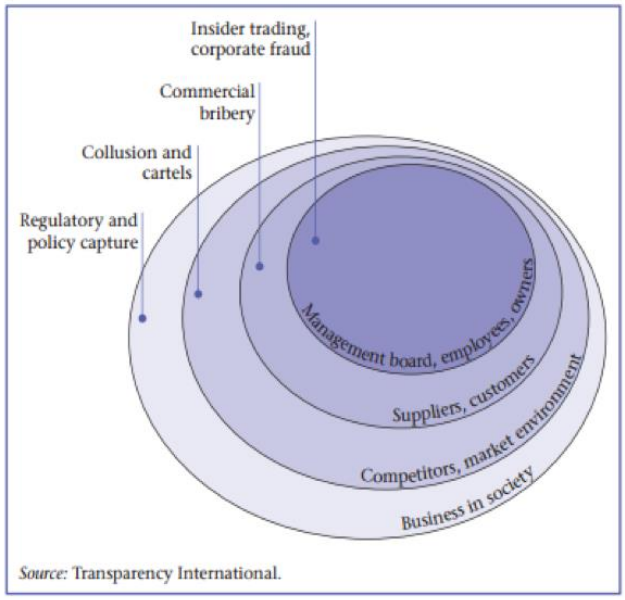
[8] Ibid,art 21

[9] Ibid, art 22

[10] Aman Sharma, "*Private sector also involved in corruption: Transparency report India Today (2012)";* https://www.indiatoday.in/india/north/story/government-industry-nexus-graft-transparency-international-96711-2012-03-22 (last visited Jan 19, 2020).

[11] Sushmi Dey, *Busted: 'Cartelising' cement firms Business Standard* (2012), https://www.business-standard.com/article/companies/busted-cartelising-cement-firms-112062600067_1.html (last visited Jan 19, 2020).

charitable donations, commissions[12]. Additionally, Transparency International's 2009 publication "*Corruption and The Private Sector*"[13] bring about the many facets of corruption in the private sector, where bribery can be clubbed into four rungs, essentially a)regulatory and policy capture – Private to Public involvement ; b) collusion and cartels- private to private involvement(competitors and industry environment); c) commercial bribery-Private to Private involvement (suppliers and customers) and d) insider trading and corporarte fraud- intra Private involvement (by internal management and employees), the following diagram well demystifies the same[14] :



While PCA 2018 adequately covers the outermost rung of the diagram, where the vacuum exists ,is the blatant absence of safeguards to deal with bribery purely within the private sector,that is the remaining three innermost rungs in the diagram shown above.

Khan in his "*Corruption and Private Sector Development: Bangladesh Case Study*"[15] , analyses the private sector corruption through "market restricting reforms"[16]. The market restricting regulations by the state such as prohibition on certain cartels, excessive price-undercutting, red

[12] How to Bribe: A Typology of Bribe Paying and How to Stop It, Transparency International UK (2014), https://www.transparency.org.uk/publications/how-to-bribe-a-typology-of-bribe-paying-and-how-to-stop-it/#.WdY_smhSyUk (last visited Jan 19, 2020).

[13] Transparency International e.V., Global Corruption Report 2009: Corruption and the private sector TI Publication - Global Corruption Report 2009: Corruption and the private sector (2009), https://www.transparency.org/whatwedo/publication/global_corruption_report_2009 (last visited Jan 19, 2020).

[14] Picture courtesy : Private sector – Sectors, Curbing Corruption, https://curbingcorruption.com/sector/private-sector/#private-corruption (last visited Jan 19, 2020).

[15] Khan, Mushtaq , "*Corruption and Private Sector Development: Bangladesh Case Study*" (2014); Private sector – Sectors, Curbing Corruption, https://curbingcorruption.com/sector/private-sector/#private-corruption (last visited Jan 19, 2020).

[16] Ibid

tape and restrictions on entry and exist become a root cause for private to private corruption where commercial bribery, collusions, informal cartels are created to evade the policy regulations.

An extended dynamic of this system is seen where the employers in the value chain who negotiate with their suppliers, contractors, distributers , staff members and clients on behalf of the company indulge in bribery at different levels for personal or professional gains thereby impacting the wholistic equilibrium of the industry and in violation of his/her employer's contract[17]. The recent most American *case of Honda dealers*[18] involved several top brass managers of Honda to grant new automobile dealership contracts from late 1970-1992 only to those dealers who had the potential to pay bribes in the form of gift or cash instead of granting the contracts to those dealers who had the merit of performing for the company. Another example of private sector corruption especially in private services industry is the *Toronto Star case*[19] . In the said case, a senior account manager of Royal Bank Of Canada was bribed of 3,00,000 USD by a metal supply company in exchange of approving massive loans, preparing fraudulent financial statements .

While it is now settled that private sector corruption is rampant and ever growing in contrast to the heterodox attitude of limiting the ambit of corruption only to public officials, *the Bribe Payers' Index 2011* which represents the "supply side" of corruption from the private sectors ranks India 19 out of the 28 countries surveyed where the private economic organisations/ companies from these countries pay bribes to win business overseas[20] proving the increased private sector nexus which the current domestic laws fail to combat.

Perhaps in 2011 , while addressing the 18th Biennial Conference of CBI PM Manmohan Singh pressed upon increasing corporate liability in corruption matters, referring to prospective introduction of a Bill to amend PCA 1988 and introduce bribery of foreign official and bribery in Private sector as offences within the ambit of corruption[21]. However, the subsequent Amendment Act of 2018 partially serves the contention regarding private sector. The Act incorporates under S.9 offence of bribing a public servant by a commercial organisation or any person belonging to the commercial organisation in order to gain or obtain businesses or advantage in business for the

[17] Supra note 13, pg 20; also see A. Argandoña, '*Private-to-private Corruption*', Journal of Business Ethics, vol. 47, no. 3 (2003).

[18] United States v. Josleyn, 99 F.3d 1182, 1996. ; New York Times (US), 6 April 1995.

[19] Supra note 13, pg 21

[20] Transparency International e.V., Bribe Payers Index 2011 TI Publication - Bribe Payers Index 2011 (2011), https://www.transparency.org/whatwedo/publication/bpi_2011 (last visited Jan 19, 2020).

[21] ET Bureau, Private sector bribery may become criminal, says Manmohan Singh The Economic Times (2011), https://economictimes.indiatimes.com/news/politics-and-nation/private-sector-bribery-may-become-criminal-says-manmohan-singh/articleshow/10447652.cms (last visited Jan 19, 2020).

commercial organisation.[22] This amendment, as discussed earlier will only attempt to cater to the "Regulatory and Policy Capture" rung of the whole corruption gamete.

While PCA in itself doesn't provide something more concrete to tackle private sector corruption, it is interesting to note that the current Companies Act 2013 does provide a law for "Oppression and Mismanagement" . The Companies Act, 2013 under Section 241 provides the right to any member of the company to apply to Tribunal for relief in case of: -

"(i) Oppression - where the affairs of the company are being conducted in a manner prejudicial to the public interest or oppressive to member or prejudicial to the company's interests. [Section 241 (1A)];

(ii) Mismanagement - if it is established that the affairs of the company are being conducted in a manner prejudicial to the company or public interests or by reason of change of the control of the company [Section 241 (1B)]"[23]

While the shareholders of the company can move to the court where cases of fraud/ bribery "intra-corporation" and "inter- corporation" are suspected, a key drawback of purely relying on this law to answer the focal issue of private corruption is twofold , that is : i) the locus standi is only available for those who are either shareholders or a class of shareholders effected by the fraud , thereby excluding any outsider/ employees (not holding any shares) to file for any deficit that the company faces due to the fraudulent actions of the directors; ii) the provision is limited only to bring a company's BOD under perview and not partnership firms, Businesses etc.

SCOPE OF "COMPLETE JUSTICE" IN LIGHT OF PACTA SUNT SERVANDA

Since the earlier parts of this paper establish the existing legal lacunae to the very understanding of "corruption" and thereby troubles in accountability, it is important to now explore the possible solution that the Courts of Justice may offer. In exploring so, the power bestowed upon the Supreme Court of India by virtue of Article 142 of the Constitution is of instrumental concern. Art. 142 (1) states "*The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until*

[22] Prevention Of Corruption (Amendment) Act, s.4 (2018)

[23] S.S. Rana & Co, OPPRESSION AND MISMANAGEMENT - THE INDIAN SCENARIO - CORPORATE/COMMERCIAL LAW - INDIA ARTICLES ON ALL REGIONS INCLUDING LAW, ACCOUNTANCY, MANAGEMENT CONSULTANCY ISSUES (2018), https://www.mondaq.com/india/CorporateCommercial-Law/736320/Oppression-And-Mismanagement--The-Indian-Scenario (last visited Mar 22, 2020).

provision in that behalf is so made, in such manner as the President may by order prescribe[24]" . However in bestowing the power of "doing complete Justice", the law doesn't define the ambit of the term "complete Justice" and opens the room for multiple deliberations.

The Constrictive approach which evolved throughout 1963- 1989 primarily views the power of complete justice in purely procedural form and within reverence of statutory legislations[25]. The primary case of *Prem Chand Garg v. Excise Commr, U.P., Allahabad*[26] has been the threshold of reiteration and reliance for a plethora of cases decided by the Supreme Court[27] on the question of the nature of "complete Justice". The key assumptions that the old approach makes can be summarized to mean that Art.142(1) i) is used to overcome only procedural difficulites, ii) the exercise of which cannot override or supplant the Fundamental Rights as well as any substantive provisions of statutory law, iii) cannot ignore the provisions of existing laws dealing with the subject matter while building new edifice to deal with the same.

On the other hand, the Liberal approach of the Apex Court seemed to counter restrictive interpretations and bring forth the controversy of Constitutional Powers being superior to statutory ones[28]. The Supreme Court in the landmark cases of *Mohd. Anis v. Union Of India*[29] *and Delhi Judicial Service Assn. v. State Of Gurjarat*[30] introduced the open ended interpretation and application of "complete Justice".

What the Liberal approach summarily, in the succeeding cases post 1989 ascertained[31] is that the ambit of "complete Justice" (i) is an intrinsic part of the Basice Structure Doctrine and has a superior level of qualitative application, (ii) Any Prohibitions marked by statutory provision cannot ipso facto limit the ambit of Art. 142, (iii) Thus for the statutory prohibition to apply it shall prove to have underlying fundamental and general issues of Public Policy, (iv) The Court while exercising the power to complete justice shall act according to such prohibitions but is allowed to apply in a case to case basis.

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[24] INDIA CONST.1949, Art 142(1)

[25] R. Prakash, "*Complete Justice under Article 142*", J-14 , (2001) 7 SCC J-14

[26] AIR 1963 SC 996

[27] Naresh Shridhar Mirajkar v. State of Maharashtra 1966 SCR (3) 744; A.R. Antulay v. R.S. Nayak 1988 AIR 1531; Arjun Khiamal Makhijani v. Jamnadas C. Tuliani 1989 SCC (4) 612 ; V.C. Mishra, Re AIR 1995 SC 2348; M.S. Ahlawat v. State of Haryana AIR 2000 SC 168; M.C. Mehta v. Kamal Nath AIR 2000 SC 1997 ; E.S.P. Rajaram v. Union of India (1998) 4 SCC 409); State of Punjab v. Bakshish Singh 1967 AIR 752

[28] Harish B.N., Promita Pandey, " *Supreme Court, Complete Justice and Article 142: Scope For Unlimited Judicial Action*", 84, 7 Stud Adv (1995)82

[29] 1994 Supp. (1) SCC 145

[30] (1991) 4 SCC 406

[31] Union Carbide Corporation v. Union of India (1991) 4 SCC 584; Supreme court Bar Assn. v. UOI (1998) 4 SCC 409; Bonkya v. State of Maharashtra (1995) 6 SCC 447; Keshabha Malabhai v. state of Gujarat 1995 Supp (3) SCC 704; Mahendra Singh v. state of West Bengal (1974) 3 SCC 409

The nature of this unbridled power of the Apex Court today has been moulded to essentially provide justice by filling the existing legislative fallouts by the tool of equity. The interesting application of the power in several cases implies that the term "Complete Justice" rather than merely "Justice" causes the assumption of its power to travel beyond the idea of imparting Justice to just one side. Complete Justice is thus instrumental is correcting present inadequacies wherever the question of Public Interest is involved[32].

Therefore, it is not wrong to say that under the ambit of Complete Justice, a viable solution to our existing legislative inadequacies under PCA can be sought. Since it has been established in the initial parts of the paper that the Amendment in 2018 to the Legislation was done to bring the domestic laws in conformity with the International Convention of UNCAC[33], the powers under Art.142 can be utilised to fulfil the obligations under Pacta Sunt Servanda.

The Doctrine of Pacta Sunt Servanda finds its codified origins in the Vienna Convention on the Law of Treaties (VCLT) under articles 26 and 27[34]. As per the doctrine, the member states party to the treaty in force are obliged to perform their part in good faith and are bound by the terms therein[35].Consequentially, the failure to fully implement the obligation at the domestic level cannot be defended by invoking the provisions of a domestic law[36].

Thus, the enactment of PCA 2018 to be done in view of India's ratification of UNCAC in 2011[37] binds the Government to ensure a complete implementation of the Convention unless the terms stand contrary to the our domestic law. In the present scenario however, the UNCAC has only been partially implemented as the definition of corruption under PCA leaves out the obligations of the state under art. 12, 21 and 22 of the UNCAC to bring Private sector under the ambit of the domestic law. Hence it is this existing lacuna that summons the powers under Art. 142 to act as a lynch pin of equity.

Driving away from the constrictive interpretation, the Apex court has not hesitated to dwell into the question of "complete Justice" when ever Substantial provisions of law were involved. The

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[32] Dr. Justice B.S Chauhan, "*Courts and its Endeavour to do complete Justice*", pg 4, http://www.nja.nic.in/17%20Complete%20Justice.pdf

[33] Supra note 4

[34] Geetika Myers, Ira Chaddha Sridhar, " *T. RajKumar v. Union of India : A Case Analysis*", pg 100, 6.1 NLIU LR (2017) 95

[35] Ibid

[36] Ibid, pg 101, see also Ram Jethmalani v. Union of India (2011) 8 SCC 1

[37] India: Government ratifies two UN Conventions related to transnational organized crime and corruption, Unodc.org (2020), https://www.unodc.org/southasia/en/frontpage/2011/may/indian-govt-ratifies-two-un-conventions.html (last visited Jun 5, 2020).

compulsion of Public Interest attracted the court to forge new tools in dealing with the PIL on monetary compensation in *Nilabati Behera v. State of Orissa*[38]. A similar application was seen in extending the benefits of labour laws to a salesman and thereby widening the definition of the claimants of these benefits in the case of *T.P. Srivastava v. National Tobacca Co. Of India*[39].

The case of *Manohar Lal Sharma v. Principal Secy & Ors*[40] is a good prototype to understand the law-making powers of the Judiciary camouflaged in the virtue of complete justice. The Court herein went on to formulate guidelines for captive block bidding in light of "building confidence in the Rule of law"[41]. Moreover, the most exponential example of complete Justice in the sphere of International obligations is the classic *Vishakha and Ors. v State of Rajasthan*[42], where the Court gave effect to guidelines on Sexual harassment against women at Workplace in the absence of any relevant legislation on the subject matter. In doing so the court considered the International Obligation bestowed upon India under Article 10 of Convention on Elimination of All Forms of Discrimination Against Women (CEDAW)[43] and widened the definition of "Human rights" u/s 2(d) of The Protection Of Human Rights Act 1993 to incorporate the right to safe workplace for women[44].

Therefore, the tentative solution to our present problem of an incomplete definition of Corruption can be solved by reading the power of Complete Justice in harmony with the Doctrine of Pacta Sunt Servanda as (a) India by enacting PCA indicated its intent to model the law on the basis of its Global ratification, (b) the existing PCA 1988 is devoid of a wholistic definition of corruption thereby enacting the Doctrine of Pacta sunt Servanda partially only, (c) the repercussions of this legislative inconsistency has had a far reaching impact in the realm of Public interest, (d) the court in exercising its powers u/a 142 to widen the interpretation of corruption under PCA 1988 doesn't not violate a public policy prohibition.

[38] (1993) 2 SCC 746
[39] (1992) 1 SCC 286
[40] (2014) 2 SCC 532
[41] Ibid
[42] AIR 1997 SC 3011
[43] Ibid
[44] Ibid, pg 252, para 17

CONCLUSION

Having understood that a sheer legislative vacuum exists in the matter on bribery private sector, and that the present legal options fall inadequate to actually get into the meat of the problem of intra-corporate and inter-corporate corruption, India should have ideally modified the amendments in the PCA 2018 by now. The absence of such attitude, however has strengthened the legitimacy of The Supreme Court's judicial activism by the virtue of art. 142 (1).

The process of law-making in the realm of domestic adaptation of International Conventions has by the example of PCA 1988, come under attack as "public Interest" has over time become the underlining necessity of laws. It is this evolved outlook of interest which has complicated and convinced the Courts of Justice to question the ambit of their powers time to time. Additionally, public interest has necessitated to reanalyse domestic laws in contemplation of International conventions creating the higher grounds. One can only hope for a futuristic litigation on PCA highlighting the necessary fronts for Judicial cognizance.