13

Chapter

Fight against Corruption: Current Issues

INTRODUCTION

In the previous chapter, we discussed the nature of corruption and the existing government structures for dealing with it. Corruption has become a subject of intense public debate. TV channels and print media have been continuously highlighting many issues of corruption. Many expert bodies and higher judiciary have made many suggestions on how to curb corruption. Social activists have organized agitations on corruption related matters, notably the Jan Lokpal legislation. These have brought certain issues on corruption to the centrestage. We will now consider these issues on the basis of the SARC's report on Ethics in governance (fourth report).

These issues are (i) delays in departmental (or disciplinary) proceedings against corrupt officials; (ii) the need for prior government sanction for prosecuting corrupt officials; (iii) speeding up trials of corruption cases; (iv) making corrupt public servants liable for damages for their actions; (v) confiscation of properties acquired through corruption; (vi) prohibition of 'Benami' Transactions; (vii) protection to whistleblowers; and (viii) doing away with Article 311 of constitution which gives excessive job security to government servants.

ISSUES REGARDING CORRUPTION

Delays in Departmental Proceedings

It is useful to begin with delays in departmental inquiries or disciplinary proceedings against erring officials. Departmental proceedings are multi-stage quasi-judicial proceedings. CVC has fixed time lines, as in the following table, for the various stages of departmental inquiries. Students need not memorize the stages and timelines shown in the table. Its purpose is to show the numerous stages through which departmental proceedings against corrupt officials have to pass.

	Stage	Time (month)
1.	Examination of complaints received or lapses noticed to ascertain whether they involve a 'vigilance angle' or corruption (one month)	1
2.	Decision to refer complaints either to CBI or departmental agencies- to ascertain whether these have any substance (3 months)	3
3.	Submission of findings of investigations (3 months)	3
4.	Sending department/CBI report for 'First Stage Advice' to the CVC to decide whether an inquiry should be held against the officer (1 month after getting the report)	1
5.	Formulation of CVC's advice (1 month).	1
6.	Issue of charge-sheet, statement of imputations of misconduct, and list of witnesses and documents etc, if it is decided to hold a departmental inquiry (1 month from the receipt of CVC advice)	1
7.	Consideration of Defence Statement in which the accused employee gives his version (15 days)	0.5
8.	Issue of final orders in minor penalty cases in which no inquiry is necessary (2 months from receipt of Defence Statement)	2
9.	Appointment of the Inquiry Authority (IA) and Presenting Officer (PO) where the 'first stage advice' recommends major penalty which requires detailed inquiry- Immediately after receipt of Statement of Defence. PO leads, like a prosecutor, evidence against the accused officer; IA is like a neutral judge.	0
10.	Completion of inquiry – 6 months from the date of appointment of the Inquiry Officer and the Presenting Officer.	6
11.	Sending a copy of the inquiry report, (where the accused is held guilty or the disciplinary authority records reasons for disagreement with an inquiry report holding that charges are not proved), to the charged officer for his representation against the report (15 days from the receipt of representation)	0.5
12.	Considering the representation of the accused employee and forwarding the inquiry report for Second Stage Advice to the CVC (1 month from the date of receipt of the representation)	1
13.	Issue of orders on the inquiry report — 1 month from the receipt of CVC's 'second stage advice' (or 2 months from the date of inquiry report where such advice is not required).	2

Disciplinary Proceedings

The term "Disciplinary Proceedings" can be loosely defined as a structured process to determine whether an employee is guilty of misconduct, and if so, the quantum of punishment which the misconduct deserves. As shown above, these proceedings have to go through long processes. These processes are a part of historical legacy dating back to the Government of India Act, 1919 and even earlier. But the historical details are unnecessary for our purposes.

Disciplinary Rules envisage two kinds of penalties. Minor penalties consist of "Censure", "Withholding of promotion for a specified period", and "Withholding of increment and recovery from the salary of whole or part of pecuniary loss caused by the employee". Minor penalty can be imposed after calling for and considering the explanation of the accused employee.

Major Penalties comprise reduction in rank through reversion to a lower scale of pay, compulsory retirement, and removal or dismissal from service. Such penalties can be imposed only after a detailed inquiry. We have already noted the various stages of such inquiries. This detailed procedure can be dispensed with in certain situations mentioned in Article 311(2) of the constitution. These relate to an officer's conviction for a criminal offence, to grounds related to security of the state and where an inquiry is considered not practicable. With minor variations, this procedure also applies to group C and group D employees of central government, all state government employees and those working in central and state undertakings, in local self-government and cooperatives.

There is widespread dissatisfaction among all concerned about the way disciplinary proceedings are conducted. The time limits for various stages of departmental proceedings, which CVC prescribed, are rarely observed. Delays occur due to many reasons. The delinquent officers try to prolong the proceedings. They demand all sorts of documents both relevant and irrelevant. If the inquiring officer rules that any document is irrelevant, they challenge his order in a court. "Reasonable opportunity" clause opens the avenues to many opportunities to challenge the departmental proceedings. The proceedings often get bogged down in technical requirements. CATs and courts frequently intervene, even on interlocutory (interim) orders of the Inquiring officers. Lower courts have in many cases tied down the disciplinary authorities with technicalities by giving greater importance to procedure than to substance.

To get over these problems, many suggestions have been made. Some of these are:

- To rely more on minor than on major penalties
- To free inquiry officers of all other duties during the inquiry period
- Supplying the accused with documentary evidence against him along with the charge-sheet etc.

SARC has recommended the following steps to speed up departmental proceedings:

- Simplifying the procedure for completing proceedings quickly
- Relying mainly on documentary evidence to save time on calling and examining witnesses
- Creating an appellate mechanism within the department itself
- Imposing major penalties on the recommendation by a committee in order to ensure objectivity.

Sanction for Prosecution

Under the Prevention of Corruption Act, previous sanction of the competent authority is necessary before a court takes cognizance of the offences. Competent authority is one empowered to permit prosecution. This provision saves honest public servants from harassment they may face through malicious or vexatious complaints. The sanctioning authority, before according sanction, will see whether the available evidence shows that a *prima facie* case exists against the accused public servant. But opponents of this provision argue that it is often used by a sanctioning authority to shield dishonest officials. There are often inordinate delays in grant of such sanction. Further, unintentional defects in the grant of sanction have led to invalidation of the whole proceeding.

Many suggestions have been made to address these issues. One suggestion is that the requirement should be done away with in some cases. The provision of prior concurrence of the Central Government to prosecution applies to senior officers of the level of Joint Secretary and above and also to senior functionaries in CSPEs and other Central agencies. Some have argued that in the prevailing corruption ridden environment, there is danger of such a provision being misused to protect corrupt senior public servants, and if at all such a protection is to be given, the power should vest with an independent body like the CVC, which can take an objective stand.

The flip side of this view is that officers at the level of Joint Secretary and above operate at important decision-making levels in the government and that in taking decisions or giving advice they have to act without fear or favour. If they are exposed to frequent enquiries, they will be demoralized. They will 'play safe' and just push files around without taking decisions. The current phrase 'policy paralysis' reflects this problem. This approach will slow down important economic decisions.

The provision seeks to protect public servants in the exercise of their legitimate duties, and need not extend to circumstances which show obvious misconduct. Hence, SARC recommended that the following categories of offences should be excluded from the requirement of sanction:

(i) Demand or/and acceptance of bribes,
(ii) Obtaining valuable things without or with inadequate consideration, and
(iii) Cases of possession of assets disproportionate to the known source of income.

After the passing of the Lokpal and Lokayuktas Act, this position has changed. In Lokpal takes cognizance of a complaint against any government servant, they can take necessary action including prosecution on their own without seeking government sanction.

Validity of Sanctions

The second problem arises with regard to the validity of the sanction. Sanctioning authorities are often summoned after many years to adduce evidence on the sanction they had given. Many delinquents are discharged or acquitted on the grounds that the sanctioning authority had not applied its mind while giving the sanction. Moreover, this often happens after all the other evidences have been recorded.

The objective of Section 19 of the Prevention of Corruption Act was to prevent prosecution without sanction of the competent authority. Moreover, it has also been noted that sanctioning authorities are often not able to attend the court because of other official preoccupations and this also contributes to delay in concluding trial.

SARC therefore recommended that the Prevention of Corruption Act should be amended along the following lines:

- Sanctioning authorities should not be summoned as witnesses.
- If a trial court desires to summon the sanctioning authority, it should record the reasons for doing so.
- Such summons should be issued at the first stage even before framing of charges by the court.

MPs and MLAs

Another question is whether MPs and MLAs are public servants and which authority will sanction prosecution against them. The Prevention of Corruption Act is silent on whether MPs and MLAs are public servants. The matter is now settled since the Supreme Court ruled that Member of Parliament or of a Legislative Assembly is a public servant under the Prevention of Corruption Act.

The question of competent authority to sanction prosecution against a member arose with regard to an offence involving acceptance of a consideration for speaking or voting in a particular manner or for not voting in either House of Parliament. A Member of Parliament is not appointed by any authority. He is elected by his or her constituency or by the State Assembly and takes his or her seat on taking the oath prescribed by the Constitution. While functioning as a Member, he or she is subject to the disciplinary control of the presiding officer in respect of functions within the Parliament or in its Committees. Based on these considerations, SARC recommended that the sanctioning Authority, in case of Members of Parliament should be the Speaker or Chairman, as the case may be, and speaker of the concerned State legislature.

Delays in Giving Sanctions

Another criticism of the requirement of sanction for prosecuting government servants is that it has led to long delays. The competent authority to accord prosecution is one who can appoint the delinquent government servant. As there are often substantial delays in obtaining sanction for prosecution from government, the corrupt officials often escape. There is an urgent need to streamline sanction procedures to avoid delays.

SARC recommended that at the level of the Union Government, the sanction for prosecution should be processed by an Empowered Committee consisting of the Central Vigilance Commissioner and the Departmental Secretary to Government. In case of a difference of opinion between the two, it could be resolved by placing the subject before the full Central Vigilance Commission. In case, sanction is sought against a Secretary to Government, the Empowered Committee would comprise the Cabinet Secretary and the Central Vigilance Commissioner. In all cases, the order granting sanction for prosecution or otherwise shall be issued within two months. In case of refusal, the reasons for refusal should be placed before the respective legislature annually.

An Anomaly

Finally, on the subject of sanction for prosecution, we may note that an anomaly arose consequent upon a Supreme Court ruling. The Court interpreted that if the accused government servant retires before the court takes cognizance of his case, then no government sanction is necessary for his prosecution. This places the retired government officer at a disadvantage v*is a vis* a serving officer. The relevant issue, according to SARC, should be the legal status of the officer on the date of the alleged commission of the offence. Government has recently formulated a bill for change in law so that sanction will be necessary for retired officers also.

Speeding up Trials under the Prevention of Corruption Act

Speedy trials are essential for success of anti-corruption drives. For ensuring speedy trial of corruption cases, the Prevention of Corruption Act made the following provisions:

(a) All cases under the Act are to be tried only by a Special Judge.
(b) The proceedings of the court should be held on a day-to-day basis.
(c) No court shall stay the proceedings under the Act on the grounds of any error or irregularity in the sanction granted, unless in the opinion of the court it has led to failure of justice.

Unfortunately, despite these provisions, the experience with the trial of cases under the Act has been disappointing. The judges trying corruption cases have been declared as Special Judges; but they are loaded with many other non-corruption cases and are unable to complete trials quickly. The average time taken by trial courts for the disposal of cases has increased over the years.

Other important reasons for delay are the following:

- Tendency of the accused to obtain frequent adjournments on one plea or the other.
- Tendency of the accused to challenge almost every interim order passed even on miscellaneous applications by the trial court, in the High Court and in the Supreme Court and obtaining stay of the trial.

SARC has made the following recommendations to speed up trial proceedings of corruption cases.

(a) Time limits should be fixed for various stages of a trial by amending the code of criminal procedure (CRPC).
(b) Judges declared as Special Judges under the provisions of the Prevention of Corruption Act should not be loaded with other work. Only if there is inadequate work of corruption cases should the Special Judges be entrusted with other responsibilities.
(c) Proceedings of courts trying cases under the Prevention of Corruption Act should be held on a day-to-day basis without any exceptions.
(d) The Supreme Court and the High Courts may lay down guidelines to preclude unwarranted adjournments and avoidable delays.

Liability of Corrupt Public Servants to Pay Damages

For their corrupt acts, public servants are liable for punishment under the Prevention of Corruption Act (PC Act). But PC Act has no provision for civil liability of the wrong doer; nor does it have a provision for compensating the person/organization which has been wronged or has suffered damage because of the public servant's misconduct. The Constitutional Review Committee recommended

the enactment of a comprehensive law to provide for the creation of liability in cases where public servants cause loss to the State by malafide actions or omissions.

SARC recommended that in cases where public servants cause loss to the State or citizens by their corrupt acts, they should be made liable to make good the loss and to pay damages. The circumstances of cases where such damages would be payable, the principles of assessing the damages and the criteria for awarding the damages to the persons who have been wronged should be clearly spelt out. Adequate safeguards should be provided so that *bona fide* mistakes do not lead to award of damages. Otherwise public servants would avoid fair and speedy decisions.

Confiscation of Properties Illegally Acquired by Corrupt Means

Prosecutions and convictions of dishonest public servants are too few in relation to deep public dissatisfaction over corruption. Many corrupt officials have escaped because of the high standard of proof needed to establish corruption charges and the legal obstacles to speedy trials. The guilty officials have often been enjoying their ill-gotten wealth.

There is in fact a provision in the Prevention of Corruption Act for confiscation of assets of public servants in excess of their known sources of income. But this has had no impact for the following reasons.

- The property can be forfeited only after conviction. However, attachment and forfeiture of illegally acquired property of public servants can be made under the Criminal Law Amendment Ordinance. This leads to interim attachment of the property illegally acquired. Depending upon the outcome of the criminal case, the attached property is either forfeited or released.
- The procedure for attachment can start only after the court has taken cognizance of the offence. But by that time the accused can hide or otherwise dispose of the property.
- The State or the Union Government has to authorize the filing of a request seeking attachment. This often causes delay and allows time to the accused to sequester his wealth.

The Supreme Court has observed that: "A law providing for forfeiture of properties acquired by holders of public offices by indulging in corrupt and illegal acts and deals is a crying necessity in the present state of our society". The Law Commission in its 166th Report (1999) observed as follows: "The Prevention of Corruption Act has totally failed in checking corruption. In spite of the fact that India is rated as one of the most corrupt countries in the world, the number of prosecutions and more so the number of convictions are ridiculously low. A corrupt Minister or a corrupt top civil servant is hardly ever prosecuted under the Act, and in the rare event of his/her being prosecuted, the prosecution hardly reaches conclusion. At every stage there will be revisions and writs to stall the process."

In this Report, the Law Commission had proposed a law for forfeiture of property of corrupt public servants — 'The Corrupt Public Servants (Forfeiture of Property)' Bill. The main features of the draft Bill are the following:

- A public servant is prohibited from holding any 'illegally acquired property'.
- Such property shall be liable to be forfeited to the government.
- Powers of forfeiture would be exercised by the Competent Authority (CVC).

- Besides forfeiture, the guilty will face conviction for a minimum period of seven years, extendable upto fourteen years.
- The forfeiture applies not only to the public servant but also to his 'relative' or an 'associate' or the holder of any property which was at any time previously held by the public servant. To retain the property such a holder has to prove that he bought it in good faith for adequate consideration.
- The burden of proving that the property sought to be forfeited has not been acquired illegally is on the accused public servant.

SARC recommended that the Corrupt Public Servants (Forfeiture of Property) Bill as suggested by the Law Commission should be enacted immediately.

Prohibition of 'Benami' Transactions

Corrupt public servants try to hide their illegitimate wealth through 'Benami' transactions. In these transactions, the government servant holds property in someone else's name. The Law Commission recommended enactment of a legislation prohibiting Benami transactions and acquiring properties held Benami. A law entitled The Benami Transactions (Prohibition) Act was passed in 1988. The Act precludes the person who acquired the property in the name of another person from claiming it as his own. The Act prohibits Benami transactions and prohibits the acquirer from recovering the property from the Benamidar. The Act permits acquisition of property held Benami: "All properties held Benami shall be subject to acquisition by such authority, in such manner and after following such procedure as may be prescribed". It makes it clear that no amount shall be payable for the acquisition of any property under the Act.

Even after many years, Government has not prescribed rules under the Act. The government is, therefore, not in a position to confiscate properties acquired by the real owner in the name of his benamidars. The wealth amassed by corrupt public servants is often kept in 'Benami' accounts or invested in properties in others' names. Strict enforcement of the Benami Transactions (Prohibition) Act, 1988, could unearth such properties and make property accumulation difficult for corrupt officers and also work as a deterrent for others.

Government notified the necessary rules for the implementation of the Act prohibiting 'benami' transactions with effect from 1 November 2016. The Act is now being implemented. The IT department has given advertisements warning people against entering into Benami transactions.

Protection to Whistleblowers

The term 'whistleblowing' is a newly coined expression. It refers to an individual who makes public the illegal or dark secrets carefully hidden within an organization. Daniel Ellsberg 'blew the whistle' on the so called 'Pentagon papers'. Pentagon is the headquarters of the US military, and the papers are classified military documents. He went through prolonged legal trials and troubles. Thereafter, whistleblowing has not only been protected by law but is encouraged as a moral duty of the citizens. One should note that whistleblowing means exposing illegally suppressed or hidden information about illegal actions. Organizations and individuals hide such information to escape from law.

Subsequent to the exposure of Pentagon papers, United States also witnessed corporate frauds on a massive scale. Chartered accounts colluded in falsification of accounts to hide losses

and financial wrongdoing. As a result, two huge corporations, Enron and WorldCom, collapsed. The US Congress then passed laws giving sweeping protection to whistleblowers in publicly traded companies. Anyone retaliating against a corporate whistleblower can now be imprisoned for upto 10 years.

Whistleblowers help in providing information about corruption. Public servants in a department/agency know the antecedents and activities of their colleagues, subordinates and bosses. They are naturally afraid of sharing such information for fear of reprisal. They are often willing 'to spill the beans' if their identity is kept secret and if they are assured of protection. If adequate statutory protection is granted to whistle blowers, Government can access substantial information about corruption.

There is some difference between whistleblowers and informers. Informers usually do not belong to the set up or organization about which they give information. They come to know of the information either accidentally or by 'keeping their eyes and ears open' or by just snooping around for information which can fetch some reward or money from the police. Whistleblowers are part of an organization whose members are involved in wrongdoing. They get to know things as insiders. When they leak information, they become vulnerable in various ways.

The vulnerability of those who expose hidden goings on in an organization is best shown by tragic death of two bright young Indians. One was Manjunath Shanmugam working with Indian Oil Corporation; he was a graduate of the Indian Institute of Management, Lucknow. He refused bribes and ignored threats to his life in his fight against adulteration by the petrol pump owners. He paid the price. He was shot dead on 19th November, 2005 allegedly at the behest of corrupt petrol pump owners. The other was Satyendra Dubey, working with the National Highways Authority of India. He exposed the rampant corruption in construction of roads. He was killed on 27th November, 2003.

UK, USA, Australia and New Zealand have laws which protect whistleblowers. The UK Public Interest Disclosure Act, 1998, the Public Interest Disclosure Act, 1994 of Australia, the Protected Disclosure Act, 2000 of New Zealand, and the Whistleblowers Protection Act, 1984 of USA afford protection to whistleblowers. They contain provisions which maintain the anonymity of the whistleblower and safeguard him/her against victimization within the organization.

The Law Commission in its 179th Report has proposed a Public Interest Disclosure (Protection of Informers) Bill, which provides protection to whistleblowers. The main provisions of the Bill are:

- Whistleblowers exposing false claims, fraud or corruption should be protected by ensuring their confidentiality and anonymity, and by providing safeguards against victimization in the organization.
- The whistleblower should be allowed to seek transfer if he apprehends victimization in the current position.
- His career prospects should be protected.
- The legislation should cover corporate whistleblowers exposing fraud or wilful acts of omission or commission which cause serious damage to public interest.
- Acts of harassment or victimization of or retaliation against a whistleblower should be criminal offences with substantial penalty and sentence.

SARC recommended that legislation should be enacted immediately to provide protection to whistleblowers along the lines proposed by the Law Commission. Ministry of Personnel's Annual Report 2011-12 outlines the current situation in the matter.

The Government issued a resolution dated 21st April, 2004 authorizing the Central Vigilance Commission as the designated agency to receive written complaints from whistle- blowers. The resolution also, inter alia, provides for the protection to the whistleblowers from harassment, and keeping the identity of whistleblowers concealed. As it was felt that the persons who report corruption need statutory protection, a Bill titled "The Public Interest Disclosure and Protection to Persons making the Disclosures Bill, 2010" was introduced in Parliament. The Bill was referred to the Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice. It suggested several amendments in the Bill.

Government accepted most of the recommendations. The Bill was renamed as "The Whistleblowers Protection Bill, 2011". Government accepted the Standing Committee's recommendation to include ministers and regulatory authorities within the scope of the Bill. Government exempted Supreme Court and High Courts judges from the operation of the Bill. For whistleblowing, in relation to judges of the Supreme Court and High Courts, has already been considered in the Judicial Standards and Accountability Bill, 2010. The recommendation of the Standing Committee for inclusion of Armed Forces, Security and Intelligence Agencies, etc within the purview of the Bill was accepted.

Official amendments were moved for this purpose. The Bill, as amended, was passed by the Lok Sabha in 2011 and was included in the List of Business of the Rajya Sabha. It has not yet been considered by the Rajya Sabha.

Constitutional Protection to Civil Servants – Article 311

Part XIV of the Constitution deals with the regulation of service conditions of government servants. According to Article 309, Parliament can make laws dealing with the recruitment and conditions of service of its employees. State assemblies can pass similar laws for their State employees. Such laws have to be in line with the provisions of the Constitution. However, the provisions embodied in Article 311 confer extraordinary job security on government servants. Many writers argue that such excessive security emboldens government servants into various forms of misconduct.

We will now look at the service protection which government servants enjoy. Theoretically, Central Government employees hold office 'during the pleasure of the President'. State Government employees hold office 'during the pleasure of the Governor'. But the wording does not mean that government servants can be sacked at will. Far from it, the 'pleasure' is hemmed in by various conditions.

Article 311 of the Constitution enumerates these conditions. These conditions apply or 'kick in' when government wants to impose a major penalty on any government servant. Major penalty means dismissal, removal or reduction in rank of government servants. We briefly mention these conditions. First, no major punishment can be imposed on a government servant by an authority which is subordinate to an authority which appointed him. Secondly, no government servant can be awarded a major penalty unless an inquiry is held. These are the departmental or disciplinary proceedings we discussed earlier. In such an inquiry, he has to be informed of the charges ('the gravamen of the accusation' in the words of Jeeves in a

novel of P.G. Wodehouse) against him. Thirdly, he has to be given a reasonable opportunity of being heard in respect of those charges. This means that he should be given a chance to rebut the charges. Earlier, government servants had to be also given an opportunity to represent against the quantum of punishment proposed to be inflicted on them. This protection was removed under the Forty Second Amendment to the Constitution.

There are certain circumstances under which it is not necessary to hold a departmental inquiry before awarding a penalty. These circumstances are (1) if the government servant is convicted on a criminal charge; (2) if it is not reasonably practicable to hold an inquiry; and (3) if the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State, it is not expedient to hold such inquiry. These exceptions in practice apply to very few cases.

Article 311 gives job security to government servants. It provides procedural safeguards to them against arbitrary dismissal or removal or reduction to a lower rank. These provisions are enforceable in a court of law. Any order which a disciplinary authority passes in violation of Article 311 will be *ab initio void* or flawed or invalid from its very inception. The provisions of Articles 310 and 311 apply to all government servants.

Arguments in Favour of Retaining Article 311

Constitutional lawyers and political observers are divided on whether Article 311 of the Constitution should remain or should be deleted. The arguments in favour of retaining Article 311 are summarized below:

- Those who favour its retention say that the malaise lies elsewhere, and that its deletion will be of no avail. The problem lies in the maze of procedures and conflicting judicial pronouncements. The courts held that the safeguard of an opportunity of being heard (which an accused officer has) is a fundamental principle of natural justice. Therefore, even if Article 311 is deleted, the need for giving an opportunity to be heard will continue. It is this requirement which delays departmental proceedings.
- Article 310 mentions that government servants hold office during the pleasure of the President or the governor. If it is retained while repealing article 311, even then governments cannot jettison the rules governing disciplinary proceedings. They cannot dismiss civil servants without proving charges in departmental inquiries by merely invoking the withdrawal of the pleasure of the President or the Governor. Courts will not accept such procedures which disregard the principle of natural justice.
- The Supreme Court in many rulings held that Article 311 is not an obstacle to speedy conduct of departmental proceedings. Courts do not sit in appeal over findings of departmental inquiries. The role of the higher courts is restricted to ascertaining whether the inquiry was fairly or properly conducted; once that is proved, the court will not interfere with the ultimate finding. The court will interfere only in cases where there is no evidence whatsoever to support the finding of guilt.
- It is argued that it is the rules that govern disciplinary enquiries, and not Article 311 itself, that are responsible for the delays in enquiry and even in the removal of delinquent government servants. Most of the relevant procedures antedate the Constitution and little information

exists about their origin, or, in some cases, even about their *raison d'être*. It will be clear from the rulings cited above that the Supreme Court has adopted a judicious approach to Article 311. The Article does not give blanket protection to delinquent Government employees.

Arguments in Favour of Repealing Article 311

Notwithstanding some of the above arguments, critics argue that the Article 311 has great potential to protect dishonest officers through interpretations which go against its grain and which constitution makers never envisaged.

Deletion of Article 311, its critics feel, will reduce the job security of government servants. This in turn will make them more responsive, committed and efficient. As we saw earlier, disciplinary proceedings against government servants are often held up due to legal technicalities. It is felt that deletion of Article 311 will speed up departmental proceedings.

The National Commission to Review the Working of the Constitution expressed this point of view clearly: "Yet the services have remained largely immune from imposition of penalties due to the complicated procedures that have grown out of the constitutional guarantee against arbitrary and vindictive action (Article 311). The constitutional safeguards have in practice acted to shield the guilty against swift and certain punishment for abuse of public office for private gain. A major corollary has been erosion of accountability. It has accordingly become necessary to revisit the issue of constitutional safeguards under Article 311 to ensure that the honest and efficient officials are given the requisite protection but the dishonest are not allowed to prosper in office. A comprehensive examination of the entire corpus of jurisprudence has to be undertaken to rationalize and simplify the procedure of administrative and legal action and to bring the theory and practice of security and tenure in line with the experience of the last more than 50 years" In most countries (including UK), disciplinary proceedings against government servants permit hearing to delinquent, not as a matter of right, but at the discretion of the appropriate authority. India is among the few nations where a public servant, though an employee of the government, can invoke Constitutional rights against the government, his/her employer.

The Constitution created the safeguards in the aftermath of partition and post-colonial administrative upheavals when bureaucracy had to face grave, unprecedented challenges. These safeguards are unnecessary now. Growth of the economy has created diverse employment opportunities. Permanency in the civil services is itself in question with the proposed new approaches of providing outcome oriented contractual appointments for senior positions.

The safeguards have been given an interpretation which encourages government servants to rush to courts even against their transfers. Obviously, such could never have been the intention of the constitution makers. It is said that the present state of corruption and inefficiency in Government require major restorative 'surgery'. Some writers argue that Government should be a model employer. But even so, public interest should prevail over individual right, especially of the corrupt and inefficient public servant. Reasonable opportunity given to government servants to represent their side should not become excessive. It should not create a situation in which protracted and uncertain disciplinary proceedings encourage government servants to become lazy or dishonest.

The interpretations and requirements laid down by the highest courts have made disciplinary proceedings for major penalties very complicated, tedious and time consuming, involving a large number of sequential steps before a person can be found guilty of the charges and punished. The process unfortunately does not end there. Provisions exist for appeal, revision and review only after completion of which, the delinquent officer would begin to suffer the penalty.

The accused officer also has the right to challenge the legality of the action of disciplinary authority before the Administrative Tribunal, get an interim stay of the proceedings and relief thereafter, and to substantively appeal against the decision of the disciplinary authority or the government as the case may be in the Tribunal. This apart, he reserves his fundamental right to invoke the writ jurisdiction of the High Court and the Supreme Court protesting the violation of such rights in the conduct of the inquiry. Understandably, this has given rise to the demand for curtailing rights of the public servant in relation to his employment. But in view of the constitutional requirements and the judicial pronouncements, it would not be possible to radically simplify the procedure without amending the Constitution.

The view favouring the deletion of Article 311 argues ultimately that, over time, the provisions of Article 311 have given rise to a mass of judicial pronouncements which have led to much confusion and uncertainty in interpretation. If this Article is deleted, judicial pronouncements based on the Article would no longer be in force and binding.

SARC's reasons for repealing Article 311 of the Constitution

SARC recommended that Article 311 should be repealed for the following reasons:

1. No other Constitution provides such safeguards to civil servants.
2. Because of the writ jurisdiction of courts as provided in the Constitution, the protection available to Government employees is indeed formidable even outside Article 311.
3. Sardar Patel argued for protection of senior civil servants so that they can render impartial and frank advice to the political executive without fear of retribution. But the compulsions of equal treatment of all public servants and judicial pronouncements have made such a protection applicable to employees of PSUs, semi-government organizations and even body corporates like cooperatives. This has created a climate of excessive security without fear of penalty for incompetence or wrongdoing.
4. The rights of a civil servant under the Constitution should be subordinate to the overall requirement of public interest and the contractual right of the State. It cannot be an argument that a corrupt civil servant's rights are more important than the need to ensure an honest, efficient and corruption-free administration.
5. Even after removing Article 311, government will not remove public servants in an arbitrary manner or without a proper enquiry. Such arbitrary removal is not possible even in the private sector.

SARC's Final Recommendation

Taking into account these considerations and the common perception that Article 311 is over protective of government servants, SARC made the following recommendations:

(a) Article 311 and Article 310 of the Constitution should be repealed.

(b) Suitable legislation to provide for all necessary terms and conditions of services should be provided under Article 309, to protect the bona fide actions of public servants taken in public interest; this should be made applicable to the States.

(c) Necessary protection to public servants against arbitrary action should be provided through legislation under Article 309.

Summary

- The issues currently in focus in fight against corruption are (i) delays in departmental (or disciplinary) proceedings against corrupt officials; (ii) the need for prior government sanction for prosecuting corrupt officials; (iii) speeding up trials of corruption cases; (iv) making corrupt public servants liable for damages for their actions; (v) confiscation of properties acquired through corruption; (vi) prohibition of 'Benami' Transactions; (vii) protection to Whistleblowers; and (viii) doing away with Article 311 of constitution which gives excessive job security to government servants.
- Departmental inquiries against dishonest officers are multi-stage quasi-judicial proceedings. CVC identified 13 steps of the process and fixed time limits for each. But these are seldom observed in practice.
- Two kinds of penalties can be imposed on government servants. Minor penalties are censure, withholding of promotion for sometime, withholding of increment or recovering from an employee's salary the loss he caused to government. Minor penalty can be imposed after calling for and considering the explanation of the accused employee.
- Major penalties comprise reduction in rank, compulsory retirement, and removal or dismissal from service. They can be imposed only after a detailed inquiry.
- There is widespread dissatisfaction among all concerned about the way disciplinary proceedings are conducted. The delinquent officers invariably prolong the proceedings. The clause for giving 'reasonable opportunity' to accused officers to state their case creates many avenues for challenging the departmental proceedings. They get mired in legal technicalities.
- Procedures for departmental inquiries against dishonest officers should be simplified and speeded up.
- Under the Prevention of Corruption Act, previous sanction of the competent authority is necessary before a court takes cognizance of the offences.
- This provision saves honest public servants harassment they may face through malicious or vexatious complaints. The sanctioning authority, before according sanction, will see whether the available evidence shows that a *prima facie* case exists against the accused public servant.
- Opponents of this provision argue that sanctioning authorities often use it to shield dishonest officials. Secondly, sanctions get inordinately delayed. Thirdly, defects in sanction orders lead to invalidation of the proceedings.
- SARC recommended that the requirement of sanction should be deleted for cases involving: demand or acceptance of bribes; or obtaining valuable things without payment or inadequate payment; and possession of assets disproportionate to the known source of income.

- SARC recommended that the sanction for prosecution should be processed by an Empowered Committee, consisting of the CVC and the departmental secretary or cabinet secretary to Government.
- For securing speedy trials, the Prevention of Corruption Act provides for special Judges, day-to-day hearings, and restrictions on grant of stay on trials by other courts.
- Still the time taken for trials is long because special judges are loaded with other non-corruption cases; because the accused obtain frequent adjournments on one plea or the other; and because they challenge almost every interim order passed by the trial court in higher courts to get stay of the trial.
- Higher judiciary needs to set right these matters.
- The PC Act has no provision for civil liability of the wrong doer; nor does it have a provision for compensating the person/organization which has been wronged or has suffered damage because of the public servant's misconduct.
- The Constitutional Review Committee recommended the enactment of a comprehensive law to provide for the creation of liability in cases where public servants cause loss to the State by malafide actions or omissions.
- The guilty officials have often been enjoying their ill-gotten wealth.
- Though there is a provision in the PC Act for confiscation of assets of public servants in excess of their known sources of income, it has been ineffective for various reasons.
- The Law Commission proposed a law for forfeiture of property of corrupt public servants—'The Corrupt Public Servants (Forfeiture of Property)' Bill.
- It proposes forfeiting the ill-gotten wealth of corrupt officials to government.
- Powers of forfeiture would be exercised by the Competent Authority (CVC).
- SARC recommended that the Bill which the Law Commission suggested should be enacted immediately.
- Corrupt public servants try to hide their illegitimate wealth through 'Benami' transactions. In these transactions, they hold property in someone else's name.
- A law entitled The Benami Transactions (Prohibition) Act was passed in 1988.
- The Act precludes the person who acquired the property in the name of another person from claiming it as his own. The Act prohibits Benami transactions and prohibits the acquirer from recovering the property from the Benamidar. The Act permits acquisition of property held Benami.
- Even after many years, Government has not prescribed rules under the Act. The present government notified the rules and made the Act effective from 1st November 2016.
- Whistleblower is an individual who makes public the illegal or dark secrets carefully hidden within an organization. Whistleblowing means exposing illegally suppressed or hidden information about illegal actions. Organizations and individuals hide such information to escape from law.
- If adequate statutory protection is granted to whistleblowers, Government can access substantial information about corruption.

- There is some difference between whistleblowers and informers. Informers usually do not belong to the set up or organization about which they give information.
- The vulnerability of those who expose hidden goings on in an organization is shown by the tragic killing of two bright young Indians - Manjunath Shanmugam and Satyendra Dubey.
- The Law Commission has proposed a Public Interest Disclosure (Protection of Informers) Bill.
- Whistleblowers exposing false claims, fraud or corruption should be protected by ensuring their confidentiality and anonymity, and by providing safeguards against victimization in the organization.
- The legislation should cover corporate whistleblowers exposing frauds or wilful acts of omission or commission which cause serious damage to public interest.
- Acts of harassment or victimization of or retaliation against a whistleblower should be criminal offences with substantial penalty and sentence.
- Government formulated The Whistle Blowers Protection Bill, 2011.
- The Bill, as amended, was passed by the Lok Sabha in 2011. It has not yet been considered by the Rajya Sabha.
- Article 311 of the constitution confers extraordinary job security on government servants. Many writers argue that such excessive security emboldens government servants into various forms of misconduct.
- No government servant can be awarded a major penalty unless an inquiry is held.
- In such proceedings, government servants have to be given a reasonable opportunity of being heard in respect of those charges or chance to rebut the charges.
- Deletion of Article 311, its critics feel will reduce the job security of government servants. This in turn will make them more responsive, committed and efficient.
- The National Commission to Review the Working of the Constitution concurs with this view.
- Those who favour its retention say that the malaise lies elsewhere, and that its deletion will be of no avail.
- Even if Article 311 is deleted, the need for giving an opportunity to be heard - requirement which delays departmental proceedings - will continue.
- SARC recommended that Article 311 should be repealed because:
  - (i) No other Constitution provides such safeguards to civil servants.
  - (ii) The writ jurisdiction of courts is adequate to protect government employees without Article 311. Even after removing Article 311, government will not remove public servants in an arbitrary manner or without a proper enquiry.
  - (iii) Article 311 was meant for protection of senior civil servants so that they can render impartial and frank advice to the political executive without fear of retribution. But courts have made it applicable to all government, semi-government employees including those in cooperatives. This has created a climate of excessive security without fear of penalty for incompetence or wrongdoing.

(iv) The rights of a civil servant under the Constitution should be subordinate to the overall requirement of public interest and the contractual right of the State. The rights of corrupt civil servants cannot trump the need for an honest and efficient administration.

- SARC recommended that Article 311 and Article 310 should be repealed.
- Government servants can be protected by passing laws under Article 309.

PRACTICE QUESTIONS

1. "The requirement of government sanction for prosecuting dishonest officials is a protective shield for corruption." Do you agree?
2. Explain why action to punish erring officials gets delayed in government.
3. "Dishonest officials often escape because of their secret partnership with their political masters." Critically examine this popular perception.
4. "Dishonest officials should be summarily dismissed." Can we accept this view?
5. One of the demands of Anna Hazare in his agitation against corruption was that the provision in the PC Act for government sanction to prosecution of corrupt officials should be dropped. What are the disadvantages of such deletion? How will you approach the problem?
6. Explain briefly the reasons for delay in trials under the PC Act. How can the situation be remedied?
7. People feel that corrupt are sitting pretty on their ill gotten wealth. What can be done in this regard?
8. How can the Benami Transactions (Prohibition) Act help in the fight against corruption?
9. What is meant by whistleblowing?
10. Someone compared whistleblowing to ratting on one's colleagues. Can we support this iew? Give reasons.
11. What are the ways of protecting whistleblowers?
12. Seetharam wanted to do some whistleblowing about the shady goings on in his office. His wife Rukmini dissuades him saying that there is no law or organization now for protecting whistleblowers. Is she correct? If so, to what extent?
13. How are government servants protected by Article 311 of the Constitution?
14. State the arguments for and against deleting Article 311 from the Constitution.
15. "There will be no Durga Shaktis if Article 311 is deleted". Discuss.
16. Write short notes on:
    (a) Reasonable opportunity of being heard
    (b) Central Administrative Tribunals
    (c) Benami property
    (d) Departmental inquiry
    (e) Major punishment
    (f) Constitutional protection to government servants
    (g) Confiscation of unaccounted money of corrupt officials.