

## **Foundation for Democratic Reforms – LOK SATTA**

### **Suggested Amendments to Lokpal Bill, 2011**

*August, 2011*

There is a broad agreement in the country that our services are stunted, resources are squandered and economic growth is stymied by corruption at various levels in public life. The public opinion and broad consensus across the political spectrum today favor a strong, independent, accountable, effective anti-corruption institutional framework at all levels - national, state and local.

Clearly, strong and effective punitive measures are not the sole measures required to curb corruption. Increasing competition and choice brought down corruption in many services, notably in the case of telephones. Technology and transparency have both improved the quality of services and reduced corruption. Computerization of railway reservations is a good illustration. Nonpartisan, effective and accountable enforcement of law disregarding wealth, position, rank or influence will ensure swift and sure punishment to the corrupt, and reduce corruption by increasing risks of corrupt behavior. Empowering local governments with adequate accountability would enable citizen participation in fighting corruption by making them understand the stakes involved in a much more transparent and proximate way. Citizens can be empowered in the fight against corruption by creating incentives and opportunities, as in case of False Claims Act in the United States and citizens' charters with penalties. Ultimately there is no substitute to improving the nature of politics and making political parties and elections effective platforms for the best and the brightest to assume positions of leadership and responsibility.

Clearly there is no single silver bullet that will address all the challenges in the fight against corruption. Each of the strategies required is necessary, but not sufficient to curb corruption. Nevertheless, a strong and independent Ombudsman institution with the requisite resources at its command and wide-ranging powers can make a significant impact on the all-round fight against corruption. Clearly such a measure should be accompanied by strengthening the anti-corruption law, creating an independent and accountable investigative force, strong and effective prosecution, adequate number of special courts to facilitate speedy trials and speedier and simpler procedures for concluding disciplinary actions against erring officials. The suggestions made in this submission take into account the Bill introduced by the government in the Parliament which is now under the consideration of the Department Related Standing Committee on Personnel, Public Grievances, Law & Justice.

Four civil society organizations – Foundation for Democratic Reforms, Lok Satta, Transparency International (India) and Center for Media Studies – organized a National Round Table on Lokpal on April 24<sup>th</sup> 2011 in New Delhi. Many eminent and distinguished citizens with rich and varied experience in judiciary, administration, investigative agencies, constitutional authorities, governance reform and advocacy movements, the legal profession and the media have participated. Some of the prominent participants include Justice M N Venkatachaliah, Justice J S Verma, Justice Santosh Hedge, Justice Rajindar Sachar, Sri N Gopalaswami, Sri T S Krishnamurthy, Sri Pratyush Sinha, Shri Kuldip Nayar, Sri Shanti Bhushan, Sri Soli Sorabjee, Admiral RH Tahiliani, Sri PS Ramamohana Rao and Sri C Anjaneya Reddy. Civil Society activists who participated includes Ms Kiran Bedi, Shri Prashant Bhushan, Sri Arvind Kejriwal, Sri Swami Agnivesh, Sri Nikhil Dey, Ms Maja Daruwala and Sri Venkatesh Nayak. Several other prominent citizens who could not attend

the round-table personally like Sri P Shankar, Sri T S R Subramanian, Sri Ram Jethmalani, Sri Fali S Nariman, Sri JF Rebeiro, Sri Satish Sahwney and others have either sent their submissions to the Round Table or endorsed the initiative. The list of eminent citizens who participated is enclosed. The summary of the views of the Round Table, as approved by two eminent jurists, former Chief Justice MN Venkatachaliah and former Chief Justice J S Verma who co-chaired are enclosed. These views summarize the consensus of the Round-table.

**This submission to the Standing Committee is informed by the following approaches:**

1. The consensus views of a broad cross-section of highly distinguished and experienced citizens with deep insights into the Constitution and the working of the government.
2. The recognition that the basic structure of the Constitution and the institutional checks and balances, which are inherent in our parliamentary democracy should not be undermined.
3. There must be a fair reconciliation of the potentially conflicting objectives of strong and effective action against the corrupt, the principles of natural justice and the liberties of citizens on the one hand; and the imperatives of creating a strong Ombudsman institution with the necessity to preserve the dignity, integrity and effectiveness of the organs of the state, namely the executive, the legislature and the judiciary on the other hand.
4. The recognition that government and institutions are a continuum and we have to strengthen the existing institutions, even as new institutions are created and there should be effective mechanisms for coordination between various authorities and agencies in the common objective of fighting corruption.
5. While there are several desirable goals in combating corruption and improving the quality of governance, no single law is adequate to create institutions and mechanisms to address all issues; and no single authority, however powerful, can be overburdened with

jurisdiction over too many people or with responsibilities in too many areas.

In this submission, in line with the broad approaches outlined above, three major issues have been primarily addressed along with several other attendant issues. The first is the need to enact a law of Parliament applicable to the union government, the state governments and the local governments. No single authority can be burdened with fighting corruption at all levels. But the legal framework should be similar at all levels. With the ratification of the United Nations Convention Against Corruption (UNCAC), the Parliament has the power and the responsibility to make laws related to institutional mechanisms to fight corruption applicable at all levels – union and the state.

Second, the independence and accountability of the investigative agencies dealing with corruption, Central Bureau of Investigation at the central level and the Anti-Corruption Bureau at the state level should be integral to any viable and effective mechanism to fight corruption. By law or organizational culture or strong tradition by decades of practice, many established democracies have insulated crime investigation, in particular investigation and prosecution of matters related to corruption, abuse of office and obstruction of justice from the vagaries of partisan politics or undue political and administrative control.

Three, the Central Vigilance Commission functioning under the Act of Parliament made in 2003, but pre-existing since 1964 has an important role to play in preventive vigilance, departmental enquiries, investigation of offences related to corruption, advising government and superintendence of the Central Bureau of Investigation. Prudence and wisdom require that such an institution should be effectively and seamlessly linked to the new institution being created. Its experience and institutional strength should be fully utilized

and duplication of work be avoided. In states, a vigilance commission exists since mid 1960s, but merely by executive orders without any statutory backing. Therefore, in states the vigilance commissions could be merged with the new institutions, which are sought to be created.

## **1 SELECTION PANEL OF THE LOKPAL**

Regarding the qualifications for choosing the members of Lokpal and the process of selection, there could be infinite number of models. However, what is important is a mechanism that satisfies three criteria:

1. Eminence, credibility and integrity
2. Experience, record of service and insights in fight against corruption
3. Impartiality and nonpartisan selection

Examined by these criteria, the composition and the selection procedure contemplated by section 4 of the Bill seem to be reasonable. However, it is desirable that the two nominees under section 4 (1)(h) and section 4(1)(i) – one eminent jurist, and one person of eminence in public life – are chosen by the other seven members collectively, and not by the central government.

## **2 INTEGRATION OF CVC**

The Central Vigilance Commission (CVC) is a three-member body functioning under CVC Act, 2003. Its functions include exercising superintendence over the CBI in the investigation of offences under Prevention of Corruption Act (PCA) 1988, Code of Criminal Procedure (CrPC) 1973 and relevant provisions, review of sanction of prosecution under Prevention of Corruption Act by the competent authorities, advice to central government and its agencies, and superintendence over vigilance administration of central government and its agencies. The CVC and Vigilance Commissioners also play a crucial role in recommending

officers for appointment namely Directorate of Enforcement in the Ministry of Finance, Director of Central Bureau of Investigation (the Delhi Special Police Establishment). These are all functions of great importance in the fight against corruption and therefore cannot be insulated from the future Lokpal.

It is necessary to seamlessly integrate the functions of Lokpal as contemplated under the Bill and the functions of the Central Vigilance Commission, as per the provisions of the CVC Act, 2003. Abolition of the CVC and transferring of the functions to Lokpal would not be wise, since the Lokpal institution will have to start the process of institution building *ab-initio*. It would be more appropriate to ensure full autonomy to the Central Vigilance Commission and make the members, ex-officio members of Lokpal. Such a linkage should ensure that eventually the members of the Vigilance Commission are appointed in the same manner as that of the Lokpal. The members of the CVC should be endowed with the same powers and protection of the Lokpal. The existing institutional arrangements of CVC should be further strengthened. The three members of CVC would be a part of Lokpal, and will simultaneously exercise the functions under the CVC Act, with certain changes. All the allegations of corruption against *Class I* officers will be referred to the Lokpal for action. The members of the CVC will be part of decision-making process in all these cases in Lokpal. In respect of corruption allegations against officials of lower rank, the CVC will have exclusive jurisdiction without over-burdening the Lokpal institution.

All other advisory functions and superintendence of CBI, appointments of directors of CBI and Enforcement Directorate will continue to be vested in CVC, as per the provisions of section 25 and section 26 of the CVC Act. The members of CVC appointed before the enactment of Lokpal will continue until the expiry of their term under the CVC Act.

However, future members will be appointed by the same selection committee as that of Lokpal and in the same manner. In effect, section 4 of the CVC Act will be substituted by section 4 of the Lokpal Act. However, the criteria for selection of CVC members, who will be ex-officio members of Lokpal will be as per section 3 of CVC Act, and these members even after enactment of Lokpal Act will be appointed as members of the Central Vigilance Commission and ex-officio members of Lokpal. The Lokpal Bill 2011 should therefore make the following provisions:

1. Section 3(2)(c) should be inserted – *“The central vigilance commissioner and two vigilance commissioners will function as ex-officio members of Lokpal”*.
2. Section 3(3)(c) should be inserted – *“as central vigilance commissioner and vigilance commissioners eligible to be appointed as per the provisions of the sections 3(3) of the CVC Act”*.
3. Through the Lokpal Act, section 3(4) of the CVC Act should be amended to provide for appointment of the secretary to the CVC by the CVC itself. Therefore section 3(4) of the CVC Act, as amended should read as follows:

*The Central Vigilance Commission shall appoint a secretary to the Commission on such terms and conditions as it deems fit to exercise such powers and discharge such duties as the Commission may by regulations specify in this behalf.*

The CBI should be splitted to two organizations – one dealing exclusively with corruption offences, and other dealing with other crimes. Anti-Corruption CBI should be fully under CVC supervision and guidance.

These arrangements in respect of CVC will achieve the following goals:

- Seamless integration of CVC and Lokpal



- Retaining the institutional strength and expertise of CVC
- Independence with accountability of CBI and Enforcement Directorate
- Effective handling of corruption against lower bureaucracy within the ambit of the broader policy of Lokpal, but without over burdening the Lokpal institution, diluting its authority or delaying justice.

### **3 JURISDICTION OF LOKPAL**

Under section 17(1)(a), Lokpal will have jurisdiction into matters involved in any allegation of corruption against a Prime Minister, after he has demitted the office of the Prime Minister. The Fourth Report of the Second Administrative Reforms Commission (SARC) as well as the National Commission to Review of the Working of the Constitution (NCRWC) recommended the exclusion of Prime Minister from the jurisdiction of Lokpal. The broad argument of the two august bodies is that the Prime Minister in the Westminster system occupies a pivotal position, and his / her accountability should be only to the Lok Sabha; and not any appointed authority. Any destabilization of the office of the Prime Minister could seriously undermine the stability of government and paralyze all administration. Even if the Lokpal exonerates the Prime Minister fully after an enquiry, the damage done to the country would be considerable and irreversible. However, sections of people strongly feel that the Prime Minister must be within the ambit of the Lokpal. They felt that the public confidence in our political process has been eroded significantly, and it may be necessary to bring the Prime Minister within the purview of the Lokpal in order to restore public trust.

In this vital matter, there is need to reconcile the imperatives of national security and political stability particularly in the absence of a provision of President's rule at the Union

level in the Constitution on the one hand; and strong public opinion and the principle of democratic accountability on the other hand. There are two possible ways of addressing this. The first is retaining the provisions related to the Prime Minister as they are in the present bill before the Parliament. The Prime Minister is in any case is subject to the jurisdiction of Lokpal for his/her actions while out of office. In addition in a parliamentary democracy, the Parliament is entrusted with the responsibility of exercising oversight functions over the Prime Minister. If indeed there are credible allegations of corruption directly leveled against the Prime Minister and if *prima facie* evidence does exist, it is reasonable to expect in a robust and fiercely competitive political system like ours that the Lok Sabha will act decisively to hold the Prime Minister to account and force his resignation. While the Prime Minister's party/coalition might command a majority in Lok Sabha, the party/parties forming government will act with their best political interests in mind at all times and will not ordinarily allow a government headed by a corrupt Prime Minister to survive in office.

The second way to resolve this issue would be to bring a serving Prime Minister under the jurisdiction of Lokpal with specific caveats. There could be two safeguards that could be incorporated as provisos under section 17(1)(a). These provisos could ensure that Lokpal may enquire into allegations against a serving Prime Minister, if two-thirds of the members of Lokpal make a reference on the basis of material before them to a Parliamentary Committee comprising Vice President, Speaker and the Leader of Opposition of the Lok Sabha; and if such a Committee sanctions an enquiry into the conduct of the Prime Minister. Then Lokpal will proceed to enquire into the allegations against the Prime Minister. In such a case, the second safeguard should be that no allegation against the Prime Minister on a matter relating to the sovereignty and integrity of India, the security of the state, friendly relations with foreign states and public order be entertained by the Lokpal or the parliamentary

committee. Therefore, under the proviso 17(1)(a) shall be inserted as follows:

*Provided that specific allegations backed by prima facie evidence against the serving Prime Minister may be enquired into by the Lokpal, if on a reference by Lokpal with a majority of not less than two-thirds of total membership of Lokpal refers the matter to a sanctioning committee comprising the Vice President, the Speaker of Lok Sabha and the Leader of Opposition of Lok Sabha and if that sanctioning committee on the basis of material available sanctions the enquiry of the Lokpal.*

*Provided further that no such sanction of enquiry be sought or given against the serving Prime Minister in respect of allegations on matters relating to the sovereignty and integrity of India, the security of the State, friendly relations with Foreign States and public order.*

#### **4 ACCOUNTABILITY IN JUDICIARY**

Regarding Judiciary there is a broad consensus in the country that the accountability and probity of higher judiciary should be ensured through a separate and powerful mechanism of National Judicial Commission along with the accountability framework as provided by the Judicial Accountability and Standards Bill, 2010. The Judicial Standards and Accountability Bill, 2010 now before Parliament gives legal status to the code of conduct of judges, provides for a permanent body to investigate complaints against serving judges of higher courts, imposition of minor penalties, and recommendation of proceedings for removal

of judges, if the findings of enquiry warrant it.

A panel of three eminent jurist – Justice Venkatachaliah, Justice J S Verma and Justice Krishna Iyer – has prepared a viable model of National Judicial Commission (NJC) after detailed examination of issues and extensive deliberation. The National Judicial Commission should be the body of functionaries of great eminence headed by the Vice President, which should make the final binding recommendation to the President on the appointment of judges of higher courts and the removal of judges after an enquiry finds them guilty of proved misbehavior or incapacity. We understand that the government is processing the proposal to constitute a seven member National Judicial Commission with the Vice President, the Prime Minister, the Speaker of Lok Sabha, the Law Minister, the Leaders of Opposition in Lok Sabha and Rajya Sabha and the Chief Justice of the Supreme Court. In case of high court judges, the Commission would include the chief minister and the chief justice of the concerned state. Such a National Judicial Commission would require amendment of article 124(2) and 124(5) of the Constitution. Given these circumstances it would be best to leave the judiciary out of the Lokpal's jurisdiction for the following reasons:

1. It is important to protect their dignity, institutional prestige and credibility of the higher judiciary
2. The higher judiciary is the most trusted institution in the country today. Bringing it under the fledging institution of Lokpal would be inappropriate.
3. The Lokpal bill in the Parliament envisages removal of Lokpal members by the President on the grounds of misbehavior after the Supreme Court has on an enquiry held, reported that the Lokpal Chairperson or member ought to be removed. In such a case, it would be inappropriate for the same Supreme Court judges to come under the jurisdiction of

Lokpal.

4. If the enquiry into the conduct of judges in the Supreme Court and High Courts is brought under the purview of Lokpal, there is a realistic probability that the Supreme Court will hold it as violative of the basic features of Constitution. Such a course of events will create a clash between the Parliament and the Supreme Court, which is wholly avoidable.

The arguments and advice of highly respected and eminent jurists, Justice Venkatachaliah, Justice J S Verma and Justice Krishna Iyer are invaluable in creating a National Judicial Commission in a harmonious manner.

## **5 INCLUSION OF CHIEF MINISTERS UNDER LOKPAL**

We are of the opinion that the chief ministers of the states should be brought under the jurisdiction of Lokpal. The Lokpal Round Table on April 24<sup>th</sup> 2011 New Delhi is of the unanimous view that the chief minister should be brought under the jurisdiction of Lokpal at the national level. It is necessary to bring the Chief Ministers under Lokpal on the following grounds:

1. On May 1<sup>st</sup> 2011, the government ratified UNCAC and therefore, under Article 253 read with items 13 and 14 of List I of Seventh Schedule of the Constitution, the Parliament is vested with the power to make any law for the whole or part of India for implementing UNCAC. This article 253 read with Article 51(c) of the directive principles of state policy gives the Parliament the power to make laws on any subject covered by an international treaty or convention, even if it is covered under List II of Seventh Schedule of the

Constitution. Therefore, the Chief Minister should be under the jurisdiction of the Lokpal under the national level.

2. The arguments that can be advanced against the Prime Minister are not applicable in the case of Chief Minister. First, there is much less risk of a government getting paralyzed in the Chief Minister is investigated. Second, if there is a crisis situation and the governance in the state cannot be carried with the provisions of Constitution, Article 356 could be invoked. Therefore, the balance of convenience lies in bringing the Chief Ministers within the purview of an independent anti-corruption authority, but at the national level.

## 6 LOKAYUKTAS IN STATES

For the same reasons (ratification of UNCAC and Article 253) outlined above, it is imperative that the Lokpal legislation by the Parliament should incorporate a separate chapter on Lokayukta in each state and local ombudsman in each city/district under the Lokayukta. Over the past twenty years, much of the economic power and discretionary authority have shifted from the centre to the states. Land allotments, mining leases, new ports, exclusive coastal zones, SEZs and any other decisions giving scope for massive abusive of power and corruption are increasingly in state's control. Therefore, we strongly feel a separate chapter should be incorporated in the Bill providing for Lokayukta and local Ombudsman.

For reasons of convenience, in section 2 of the Lokpal Bill 2011, under definitions, all references to Lokpal may include Lokpal or Lokayukta. References to central government may be substituted by the *appropriate government, central or state depending on the*

*situation.*

**The separate chapter on Lokayukta may provide for the following:**

1. Number of members: the law may provide for a Lokayukta in each state for a chairman and two members and a maximum of four members, of whom half shall be judicial members.
2. The selection committee of Lokayukta will be comprised of the Chief Minister, the Speaker of Legislative Assembly, the Leader of Opposition in Legislative Assembly and the Chief Justice of the High Court.
3. The law may provide for every state having Anti-Corruption Bureau, designated as a Police Station.
4. The law may provide for ACB to be under the supervision and guidance of Lokayukta. A committee comprising the chairperson and members of Lokayukta and the Chief Secretary of the state shall appoint the Director and officers of ACB. This committee in consultation with the Director of the ACB shall appoint the officers of ACB. ACB shall function under the direct supervision of the Lokayukta. But the Lokayukta will not interfere in the day-to-day investigation.
5. Lokayukta will have direct jurisdiction over Chief Minister (if not brought under the Lokpal), the ministers at the state level, the members of the state legislative assembly and council, all the chairpersons and members of the state public sector undertakings and other bodies and all officials including officials of all-India Services and all other officers of the rank of group A officer and above.
6. Lokayukta will be the appointing authority of the heads of all the vigilance authorities in the state and have supervision over all the vigilance agencies in the state.
7. These functions will include preventive vigilance, supervision of vigilance and

supervision of anti-corruption functions.

8. The law should provide for appointment of local ombudsman for each district and for each municipal corporation by the Lokayukta and functioning under the supervision of Lokayukta and with the same functions as the Lokayukta with respect to local governments.
9. The title of the Bill may be appropriately amended as the **Lokpal and Lokayukta Bill, 2011**.

## 7 AMENDMENT TO DEFINITION OF CORRUPTION

Amendments to Prevention of Corruption Act, 1988, and other related laws. The following laws should be amended:

1. The definition of the corruption should be enlarged as per the recommendations of the Fourth Report of the Second ARC and should include
  - (a) Abuse of office and authority (even if no direct pecuniary gain to the public official)
  - (b) Obstruction of justice
  - (c) Squandering public money/ wasteful public expenditure
  - (d) Gross perversion of Constitution/democratic institutions
  - (e) 'Collusive Bribery' causing loss to state, public or public interest to be made a special offence
2. The increase in punishment for such offences, including collusive bribery, should be on the lines of the recommendations of the 4<sup>th</sup> Report of 2<sup>nd</sup> ARC. In addition, the penalty in criminal class, the Prevention of Corruption Act, 1988, should be amended to ensure civil liability of public servants (liability for loss and damages, both).



3. Confiscation of properties, illegally acquired, should be achieved by enacting The Corrupt Public Servants (Forfeiture of Property) Bill, suggested by Law Commission.
4. Section 19 of the Prevention of Corruption Act should be amended, and the power of sanction of prosecution of officials should be in the hands of Lokpal/CVC in the case of central governments and Lokayuktas in case of state government. However the government should be given an opportunity to state objections, if any, and in writing, within a fixed time period (say 30 days). The Lokpal / Lokayukta would take into consideration these written objections submitted by the government, and the Lokpal Institution may provide a mechanism for reexamination of its decision in the light of the special points made by the government, wherever necessary. Lokpal / Lokayukta's final orders regarding prosecution will be made in the form of a speaking order, given in writing, citing the circumstances and reasons for the decision.
5. Section 6A of the Delhi Special Police Establishment Act, 1946, which prohibits CBI from any inquiry or investigation into allegations against senior officials should be repealed under the Lokpal / Lokayukta Act. In respect of allegation of offences directly investigated by Lokpal, section 27 of the Lokpal Bill provides that no sanction for enquiry or investigation or prosecution shall be needed. The anti-corruption investigation wing of CBI and ACB in states are to be autonomous and function under the superintendence of the Lokpal/Lokayukta. Then there is no place for section 6A of the Delhi Special Police Establishment Act, 1946.
6. Similarly section 197 (1) of the CrPC should be amended as follows:

*If a public servant is to be prosecuted, the previous sanction is to be that of the CVC in case of Central Government and the Lokayukta in case of the state Govt.*
7. In respect of appointment of prosecutors in anti-corruption special cases, the power to appoint all such prosecutors should vest with the Lokpal in case of Union Government

and the Lokayukta in case of State Government. Already under section 15 of Lokpal Bill, 2011, the Lokpal is empowered to appoint Prosecutors for cases pending before it. All prosecutors with respect to anti-corruption cases will be under the Lokpal / Lokayukta.

## **8 REMOVAL OF PUBLIC SERVANTS**

The Lokpal Round Table on 24<sup>th</sup> April evolved a consensus in which the members were of the opinion that if Lokpal / Lokayukta holds a public servant guilty of corruption, a further departmental enquiry and a further procedure for removing that public servant and/or imposing a penalty is unnecessary. It is for the Lokpal institution to ensure that the principles of natural justice are followed before awarding punishments; such a punishment should be implemented without delay.

There was also a broad consensus that all cases warranting a major punishment (including removal) based on the findings of Lokpal / Lokayukta should be included under Article 311(2)(b) or (c) of the Constitution. Further enquiry should not be made a requirement. Therefore a provision must be added in the Lokpal/Lokayukta bill as follows:

*Where Lokpal/Lokayukta, after enquiry into allegations of a public servant, is of the opinion that public servant is guilty of the allegations and public interest demands imposition of the punishment or dismissal or removal or reduction in rank, then the Lokpal/Lokayukta shall make such a report to the appropriate government. Such recommendation after due enquiry is binding on the government and the government shall there after impose such a punishment on the public servant without further enquiry.*

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